

CASE NO. 16-2189 (consolidated with 16-2202)
ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Defendants-Appellants, and

DEFENDERS OF WILDLIFE, et al.,
Intervenor-Defendants-Appellants.

Appeal from the United States District Court
For the District of New Mexico
The Honorable William P. Johnson
District Court Case No. 1:16cv-00462-WJ-KBM

**RESPONSE BRIEF FOR PLAINTIFF-APPELLEE
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GLOSSARY

10(j) Rule	Final rule issued on January 16, 2015 revising the Mexican gray wolf 10(j) rule
APA	Administrative Procedure Act
Arizona	Arizona Game and Fish Department
Commission	New Mexico State Game Commission
Director	Director of the New Mexico Department of Game and Fish
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
Foundation	Foundation to Protect New Mexico Wildlife
Interior	U.S. Department of the Interior
MWEPA	Mexican Wolf Experimental Population Area
NEPA	National Environmental Policy Act
NM	New Mexico
NMAC	New Mexico Administrative Code
State	State of New Mexico

STATEMENT OF RELATED CASES

This appeal is a consolidation of two appeals arising from the same district court order granting the New Mexico Department of Game and Fish’s motion for preliminary injunction. Case No. 16-2202 is an appeal by Defendant-Appellants U.S. Department of the Interior, Sally Jewell, in her official capacity as Secretary of the U.S. Department of Interior, U.S. Fish and Wildlife Service, Daniel M. Ashe, in his official capacity as Director of the U.S. Fish and Wildlife Service, and Dr. Benjamin N. Tuggle, in his official capacity as Southwest Regional Director of the U.S. Fish and Wildlife Service (“Federal Appellants”). Case No. 16-2189 is an appeal by Intervenor-Defendants-Appellants Defenders of Wildlife, Center for Biological Diversity, WildEarth Guardians, and New Mexico Wilderness Alliance (“Intervenors”).

While 10th Cir. Rule 28.2(c)(1) states that “each party must list all prior or related appeals, with appropriate citations, or a statement that there are no prior or related appeals[,]” both Federal Appellants and Intervenors have asserted in their respective briefs that in addition to the two consolidated appeals identified above, this case is related to various district court actions pending before the U.S. District Court for the District of Arizona. The inclusion of such argument in the Rule 28.2(c)(1) statement is improper.

INTRODUCTION

The Endangered Species Act (“ESA”) requires the U.S. Fish and Wildlife Service (“Service”) to “cooperate to the maximum extent practicable with the States.” 16 U.S.C. § 1535(a). Consistent with this requirement and the concept of cooperative federalism, the Service has promulgated regulations stating that, when carrying out programs involving the reintroduction of fish and wildlife, the Service shall “comply with State permit requirements ... except in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibilities.” 43 C.F.R. §24.4(i)(5)(i). In acknowledgment of these obligations, the Service included a condition in the federal permit authorizing the take, disposal, transplant, or release of Mexican wolves within the State of New Mexico (“State”) that requires the Service, and all individuals operating under the Service’s authority, to obtain state permits. Intervenor’s Opening Br. (“Int. Br.”), Addendum at 112 (stating the permit is “functional only when used in combination with a valid state permit”).

Nonetheless, three days after the New Mexico Department of Game and Fish (“New Mexico”) sent a notice of intent alerting the Service that it was contemplating filing a lawsuit based on the Service’s failure to comply with state and federal law and requesting that in the alternative the parties engage in dispute resolution, the Service hurriedly imported and released two Mexican wolves into

the wild in the State without the requisite permits. In doing so, the Service disregarded the State's interest in managing wildlife within its borders, and intruded on the State's ability to protect and promote the well-being of its citizens.

In recent years, the Service has become increasingly unwilling to cooperate with stakeholder agencies. The Service's abandonment of the collaborative process has caused the Service to violate its own regulations, in furtherance of the short-sighted goal of increasing a nonessential experimental population of Mexican wolves, no matter the cost. This singular focus is unlawful, which the district court recognized when it issued a narrowly-tailored preliminary injunction preventing the Service from releasing additional wolves during the pendency of this litigation without a permit.

The district court, after allowing all parties to fully brief the issues and after hearing oral argument, reasonably concluded based on the evidence presented that unlawful releases of Mexican wolves—an apex predator—in the State were likely to cause irreparable harm in the absence of an injunction. The district court further concluded that, based on the evidence before it, the balance of the harms favored an injunction, and that an injunction was in the public interest, because the Service was perfectly capable of re-applying for and obtaining the requisite permits, and proceeding with additional *lawful* releases. Lastly, the district court found that, given the Service's disregard for its own regulations, New Mexico was likely to

prevail on the merits. The district court's decision was thorough, well-reasoned, and supported by the evidence. As set forth in further detail below, Federal Appellants' arguments, as well as the arguments by Intervenor and amicus curiae Foundation to Protect New Mexico Wildlife ("Foundation"), lack merit and should be rejected. Moreover, because a number of these arguments were not raised in the district court, they are simply not appropriate and should be rejected for purposes of this appeal from a preliminary order. New Mexico therefore requests that the Court hold that the district court did not abuse its discretion, and affirm the district court's issuance of a preliminary injunction.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over New Mexico's federal claims under 28 U.S.C. § 1331 and 5 U.S.C. § 703, and over New Mexico's state claims under 5 U.S.C. § 703 and 28 U.S.C. § 1367. The court granted New Mexico's preliminary injunction motion on June 10, 2016. Federal Appellants and Intervenor filed timely notices of appeal on August 8 and July 28, respectively. Fed. R. App. P. 4(a)(1)(B), 4(a)(3). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

Did the district court abuse its discretion by determining that (1) New Mexico was likely to suffer irreparable harm in the absence of preliminary relief, (2) the balance of harms tips in New Mexico's favor, (3) an injunction is in the

public interest, and (4) New Mexico is likely to prevail on the merits.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. The Reservation of State's Rights under the Federal System

The Constitution created a federal government of limited powers. U.S. Const., amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). As James Madison stated in Federalist No. 45: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” Federalist No. 45 at 292-293 (James Madison) (C. Rossiter ed. 1961). While the authority of the federal government is paramount in certain respects, “[t]he States ... retain substantial sovereign authority under our constitutional system.... This federalist structure of joint sovereigns preserves to the people numerous advantages.... Perhaps the principal benefit of the federalist system is a check on abuses of government power.” *Gregory v. Ashcroft*, 501 U.S. 452, 457-458 (1991). With respect to the resources within its borders, as Justice Holmes explained, in its “capacity of quasi-sovereign ... the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.” *State of Ga. v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). This federal structure is reflected in the Department of the Interior (“Interior”)

regulations at issue in this case. 43 C.F.R. pt. 24.

B. Wildlife Management under New Mexico Law

The New Mexico Department of Game and Fish was established in 1903 to manage the fish and wildlife within the State's borders. Appellants' Appendix ("Aplts. App.") at 31. Pursuant to statutes enacted by the legislature and rules adopted by the New Mexico State Game Commission ("Commission"), New Mexico administers programs for the conservation of fish and wildlife, including a variety of permit programs that allow New Mexico to manage fish and wildlife populations. *Id.* The New Mexico Administrative Code ("NMAC") prohibits the release of non-domesticated animals in the State without a permit. N.M. Code R. § 19.31.10.11 (It shall be unlawful for any person or persons to release, intentionally or otherwise, or cause to be released in this state any mammal ... except domestic mammals ... without first obtaining a permit from the department of game and fish.). The State's laws also make it "unlawful for any person receiving any permit or license ... to violate ... any provision listed on the permit or license." N.M. Code R. § 19.31.10.10.C. In addition, the NMAC prohibits the importation of non-domesticated animals into the State without a permit. N.M. Code R. § 19.35.7.8. These laws allow New Mexico to appropriately manage and monitor the release and importation of animals within the State, such that wildlife populations are protected and preserved for the State's citizens.

C. The Endangered Species Act and Nonessential Experimental Populations

“Congress enacted the [ESA] in 1973 to ‘provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction.’” *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000) (quoting S. Rep. No. 93-307, at 1 (1973)). The ESA provides various levels of protection depending upon how a species is classified. The three ESA classifications are: (1) endangered, (2) threatened, and (3) experimental populations. *See* 16 U.S.C. §§ 1538(a), 1539(j). While both endangered and threatened species are entitled to protection under the ESA, the Service has more “regulatory leeway concerning the crafting and implementation of protections for threatened species.” *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 698 (10th Cir. 2010). Experimental populations, which are established under section 10(j) of the ESA, are treated similarly to threatened species, with some defined exceptions. 16 U.S.C. § 1539(j)(2)(C); *see also* 50 C.F.R. § 17.82.

“Congress added section 10(j) to the [ESA] in 1982 to address the [Service’s] and other affected agencies’ frustration over political opposition to reintroduction efforts perceived to conflict with human activity.” *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d at 1231. Congress “hoped [to] mitigate industry’s fears [that] experimental populations would halt development projects, with the clarification of the legal responsibilities incumbent with the experimental

populations.” *Id.* at 1232. Congress thus vested the Secretary of the Interior (“Secretary”) with authority to “identify experimental populations, determine whether such populations are essential or nonessential, and, consistent with that determination, provide control mechanisms (*i.e.*, controlled takings) where the [ESA] would not otherwise permit the exercise of such control measures against listed species.” *Id.* at 1233. When Congress added section 10(j) to the ESA, it determined that “[t]he involvement of State Fish and Wildlife Agencies in the experimental population regulatory process is crucial.” S. Rep. No. 97-418, at 9 (1982). Interior explained that “it is essential to have the cooperation of the State,” but “States ... fear that [sic] stringent provision in the present Act will alter or eliminate wildlife and land management options available in the introduction area and are reluctant to give their approval.” *Id.* at 31-32. Interior went on to state that, by authorizing the Secretary to issue special regulations for experimental populations, the new section 10(j) would provide the flexibility necessary to fashion rules that would garner state cooperation. *Id.*

Once the Service identifies an experimental population, it must determine whether the population is an “essential” experimental population. 16 U.S.C. § 1539(j)(2)(B). The term “essential experimental population” is defined as: “[A]n experimental population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild. All other experimental

populations are to be classified as *nonessential*.” 50 C.F.R. § 17.80 (emphasis in original); *see also* S. Rep. No. 97-418, at 9 (1982) (“In making the determination of whether an experimental population is essential to the survival of the species, the Secretary shall consider whether the loss of the experimental population would be likely to appreciably reduce the likelihood of survival of that species in the wild as listed. If the Secretary determines that it would, the population should be considered essential to the survival of the species.”). Thus, loss of any nonessential experimental population, by definition, will not reduce the likelihood of the survival of the species in the wild. *Aplts. App.* at 33.

The Secretary has flexibility under ESA section 10(j) to promulgate regulations that he or she deems advisable to ensure survival of an experimental population, without confining him or her to the strict prohibitions in ESA section 9. *E.g., Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d at 1233. Thus, management and conservation related to experimental populations, including promulgation and enforcement of regulations, are left to the Secretary’s discretion. *Id.* at 1234. The Secretary has utilized this flexibility and discretion to promulgate a distinct and tailored set of rules for each experimental population. 50 C.F.R. §§ 17.84–17.85.

D. Intergovernmental Cooperation

Section 6(a) of the ESA requires the Service, in carrying out programs authorized by the ESA, to “cooperate to the maximum extent practicable with the

States.” 16 U.S.C. § 1535(a). Consistent with this requirement, Interior’s regulations include provisions relating to intergovernmental cooperation with respect to the management of fish and wildlife.¹ In pertinent part, these regulations provide that “[f]ederal authority exists for specified purposes while State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law.” 43 C.F.R. § 24.1(a). Consistent with the foregoing, the regulations state that “Federal agencies of the [Interior] *shall* ... [c]onsult with the States and *comply with State permit requirements* ... except in instances where the [Secretary] determines that such compliance would prevent him from carrying out his statutory responsibilities ... [i]n carrying out research programs involving the taking or possession of fish and

¹ Federal Appellants assert that these regulations are non-binding policy guidance. Federal Appellants’ Opening Br. (“FWS Br.”) at 6 n.3. This argument is unpersuasive for the following reasons: (1) the regulations affect the rights of states to enforce their permitting requirements, *see Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 417 (1942) (holding that an agency’s characterization of a regulation as policy is not determinative, rather the court’s look to its substance, namely, whether it affects or determines rights); *see also Lewis-Mota v. Sec’y of Labor*, 469 F.2d 478 (2d Cir. 1972) (examining whether agency conduct amounted to a policy or rule); *Pickus v. U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974) (same); (2) they were published in proposed and final form in the Federal Register and are codified in the Code of Federal Regulations; and (3) they do not contain the type of disclaimer language that Interior and other federal agencies routinely include in policy statements intended to be non-binding, such as Interior’s Policy on Consultation with Indian Tribes, which includes a section entitled “Disclaimer,” explaining the policy “is not intended to create any right, benefit, or trust responsibility ... enforceable at law.”

wildlife or programs involving reintroduction of fish and wildlife.” *Id.*

§ 24.4(i)(5)(i) (emphasis added). These regulations are consistent with Congressional intent regarding section 10(j) which, as described above, considered the state wildlife agencies to be “crucial” to the experimental population regulatory process. S. Rep. No. 97-418, at 9 (1982).

II. FACTUAL BACKGROUND

A. Status of the Mexican Gray Wolf

The Mexican gray wolf subspecies (*Canis lupus baileyi*) was listed under the ESA as endangered on April 28, 1976. 41 Fed. Reg. 17736 (Apr. 28, 1976). The entire gray wolf species (*Canis lupus*) in North America south of Canada, except in Minnesota, was listed as endangered under the ESA on March 9, 1978. 43 Fed. Reg. 9607 (Mar. 9, 1978). This listing subsumed the separate listing for the Mexican gray wolf subspecies. In the late 1970s, the United States and Mexico captured the last remaining Mexican wolves in the wild, and established a binational captive-breeding program. The captive breeding program originated with seven founding wolves, Aplt. App. at 28, and has grown to approximately 248 wolves in 55 facilities in the United States and Mexico, *id.* at 14.

1. Recovery Plan Efforts

The Mexican Wolf Recovery Plan was adopted in 1982. The plan’s “prime objective” is “[t]o conserve and ensure the survival of *Canis lupus baileyi* by maintaining a captive breeding program and reestablishing a viable, self-sustaining

population of at least 100 Mexican wolves in ... a 5,000-square-mile area within the Mexican wolf's historic range.” Aplt. App. at 53.

The Service initiated efforts to revise the recovery plan in the 1990s and reported its intent to release a draft plan in 1998. Supplemental Appendix (“Supp. App.”) at 2. The draft revised recovery plan was never finalized. *Id.* The Service again initiated efforts to revise the recovery plan in 2003 and 2010. *Id.* As before, the Service abandoned the efforts midstream. Thereafter, various parties sued the Service seeking to compel the agency to update the recovery plan. As a result, the Service agreed to “to complete a final recovery plan for the Mexican wolf and submit for publication in the Federal Register a notice of availability of the recovery plan by November 30, 2017.” Aplt. App. at 30. The Service expects to publish a draft recovery plan for public and peer review early in 2017. Mexican Wolf Recovery Program: Progress Report #18 (“Progress Report”), NM Addendum at 107.² Nothing precludes the Service from completing the plan prior

² Federal Appellants and Intervenor (“Appellants”) request that the Court take judicial notice of certain documents that are not part of the record on appeal. FWS Br. at 9 n.5; Int. Br. at 27 n.8. Although not framed as requests for judicial notice, the Foundation also requests that the Court consider evidence that was not before the district court. *E.g.*, Found. Br. at 30 n.4. Generally, appellate review is limited to the factual record established in the district court. *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) (“This court will not consider material outside the record before the district court.”); *see also* Fed. R. App. P. 10. Furthermore, the requests for judicial notice extend only to the existence of the documents, and not to the truth of the matters asserted therein. *Tal v. Hogan*, 453 F.3d 1244, 1265

to the court-ordered deadline.

2. The 10(j) Rule for the Mexican Gray Wolf

The Service promulgated the initial 10(j) rule relating to the experimental population of the Mexican gray wolf in 1998, designating the population as “nonessential” under the ESA. Aplt. App. at 28 (citing 63 Fed. Reg. 1752 (Jan. 12, 1998)). The rule established two recovery areas, within which reintroduction of wolves into the wild could occur, and a larger Mexican Wolf Experimental Population Area (“MWEPA”). *Id.* The Service explained in the rule its intention “that this reintroduction will achieve the *recovery goal* of at least 100 wolves occupying 5,000 square miles.” 63 Fed. Reg. at 1754.

In June 2013, the Service proposed to delist the gray wolf and to list the Mexican gray wolf as a subspecies. Aplt. App. at 28. At the same time, the Service proposed revising the 10(j) rule regulating the experimental population of

n.24 (10th Cir. 2006). In many instances, however, Appellants urge the Court to take statements within the documents as fact. If the Court elects to consider these materials for the truth of the matters asserted, New Mexico respectfully requests that the Court consider the documents provided by New Mexico that are subject to judicial notice and that rebut or call into question the *post hoc* factual claims made by Appellants. To that end, the Court may take judicial notice of the Progress Report because it is available on the Service’s public website. *See* Fed. R. Evid. 201; *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1213 (10th Cir. 2012) (taking judicial notice of administrative agency’s publicly available documents). For reference, a copy of the report is attached hereto in the Addendum. *See* NM Addendum at 102-161; *see also* https://www.fws.gov/southwest/es/mexicanwolf/pdf/2015_MW_Progress_Report.pdf.

Mexican gray wolves. *Id.* On August 5, 2013, the Service published a notice of intent to prepare an environmental impact statement (“EIS”) for the proposed revisions. 78 Fed. Reg. 47268 (Aug. 5, 2013). The final EIS (“FEIS”) was issued in November 2014. FWS Br. at 9.

In September 2014, New Mexico submitted comments relating to the proposed 10(j) rule, expressing its frustration with the Service’s indifference towards the State’s desire for a science-based, range-wide recovery goal. Letter from A. Sandoval dated Sept. 19, 2014, NM Addendum at 163 (stating “it has been made clear to us that the Service has, and will continue, to disregard our fundamental concerns and suggestions about the need for an updated recovery plan before any significant revisions to the 10(j) rule are warranted”). Several months later, New Mexico submitted comments regarding the FEIS, expressing its concern over the Service’s refusal to provide New Mexico with information regarding proposed population objectives. New Mexico stated:

The Department believes the Service’s decision to include a population objective in the Final EIS, while refusing to discuss population numbers while developing the Draft EIS is outside the intent of [the National Environmental Policy Act (“NEPA”)]. During the EIS development and rule revision process the Department continually asked the Services for a population objective/goal and was told on every occasion that this number would not be presented until a new recovery plan is finalized.

Letter from A. Sandoval dated Jan. 6, 2015, NM Addendum at 168.³

The Service issued the final rules listing the Mexican gray wolf as a subspecies and revising the Mexican gray wolf 10(j) rule (“10(j) Rule”) on January 16, 2015. Aplt. App. at 28. The 10(j) Rule established a new, interim population objective of 300 to 325 Mexican wolves within the MWEPA throughout both Arizona and New Mexico. *Id.* at 28-29. This population objective is triple the objective included in the current recovery plan. Furthermore, the Service indicated its intent “to pursue additional recovery efforts for the Mexican wolf outside the MWEPA in the future.” 80 Fed. Reg. 2512, 2516 (Jan. 16, 2015).⁴

The 10(j) Rule resulted in a fourfold increase in habitat that Mexican wolves can occupy, and a tenfold increase in areas that Mexican wolves can be released and/or translocated. Progress Report at 10. The Service did not prepare a revised recovery plan prior to issuing the 10(j) Rule.

Following issuance of the 10(j) Rule and pursuant to 16 U.S.C. § 1539(a)(1)(A), the Service issued itself a permit on May 6, 2015 regarding the

³ The Court may take judicial notice of the September 2014 and January 2015 letters because they were part of the record for the proposed 10(j) rule and are available on the federal government’s public website. *See* www.regulations.gov, docket no. FWS–R2–ES–2013–0056; *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d at 1213. For reference, copies of the letters are attached hereto in the Addendum. *See* N.M. Addendum at 162-171.

⁴ At the hearing on the preliminary injunction, the Service conceded that the 300 to 325 number in the 10(j) Rule could be exceeded if the Service determined that the “right level of genetic fitness” was not achieved. Supp. App. at 16.

nonessential experimental population of Mexican wolves. Int. Br., Addendum at 112. Interpreting applicable regulations, including 43 C.F.R. § 24.4(i)(5)(i), the Service included a permit condition requiring the Service, and all individuals operating under the Service's authority, to obtain state permits when taking, disposing, transplanting, or releasing Mexican wolves within the State. *Id.* (stating persons covered by the permit must have a valid state permit).

B. Permitting Activities

1. Prior Permitting Efforts

Since the initial release of Mexican wolves in 1998, it has been the Service's practice to first obtain approval from New Mexico. Aplt. App. at 29. For example, the Service applied for and New Mexico issued an importation permit for two Mexican wolves on January 21, 2015. Supp. App. at 9. This permit included certain conditions prohibiting the Service from releasing the wolves or their offspring without prior written permission from New Mexico. *Id.* Agreeing to be bound by these conditions, the Service signed the permit on January 23, 2015. *Id.*

2. Recent Permit Applications

On April 1, 2015, New Mexico received the Service's application to release up to ten Mexican wolves in the State, along with a request that New Mexico waive a condition of previously-issued permits prohibiting the release of offspring from certain imported Mexican wolves. Aplt. App. at 59. On May 6, 2015, New Mexico received an additional application from the Service to release two

additional Mexican wolves. *Id.* On June 2, 2015, New Mexico’s Director (“Director”) denied both the April 1 and May 6 release applications and declined to waive the condition prohibiting the release of offspring. On June 22, 2015, the Service timely appealed the Director’s decision. *Id.* On August 27, 2015, the Commission heard argument on the Service’s appeal, and requested that the Service provide additional data and evidence regarding Mexican wolf recovery efforts, recovery plans, historical range, habituation, and nuisance issues. *Id.* at 60. The Service submitted its response to this request on September 23, 2015, and supplemented its response on September 25, 2015. *Id.* On September 29, 2015, by unanimous vote of 7-0, the Commission denied the Service’s appeal. *Id.* at 56.

In denying the appeal, the Commission upheld the Director’s determination that, pursuant to NMAC sections 19.35.7.19(A)(3) and 19.35.7.19(C), she was unable to determine whether the releases proposed by the Service would conflict with current conservation management because of the lack of a federal species management plan. *Id.* at 63-64. NMAC section 19.35.7.19(A)(3) requires that an applicant “demonstrate that the intended release is provided for in state or federal resource or species management plans or strategies.” *Id.* at 65. The Service alleged that the 10(j) Rule constituted a federal species management plan sufficient to satisfy section 19.35.7.19(A)(3). *Id.* at 66. The Director disagreed, concluding the 10(j) Rule was not a species management plan within the meaning of the code

because it needed to “contain more than interim and placeholder management objectives in order to facilitate a meaningful review of the applicant’s proposed releases when the proposed releases are part of a much larger recovery/release effort.” *Id.* The fact that the 10(j) Rule is interim in nature is clear from the preamble to the final rule. *Id.* (citing 80 Fed. Reg. at 2516 (“We expect to pursue additional recovery efforts for the Mexican wolf outside of the MWEPA in the future.”)); *see also id.* at 67. The Commission upheld the Director’s determination, finding it “entirely acceptable that the Director ensure that a documented styled ‘management plan’ actually contain real as opposed to placeholder and interim management objectives, thus making it a meaningful ‘management plan’ and facilitating a meaningful assessment of potential conflicts.” *Id.* at 66. The Commission further concluded: “Faced with the knowledge that the Service intends to introduce additional Mexican wolves in additional locations in New Mexico, it is entirely reasonable for the Director to require the Service to share the details of its plan concerning Mexican wolf population and location objectives, thus facilitating an informed decision as to whether the releases, as part of a larger Mexican wolf recovery effort, will conflict with current conservation management.” *Id.* at 67.

Finally, the Commission upheld the Director’s decision to deny the Service’s request to waive the condition in previously-issued permits prohibiting the release

of imported wolves and their associated offspring on the grounds that Mexican wolves are not domestic mammals. *Id.* at 70-74.

3. The Service's Reaction to New Mexico's Permit Denial

In a letter dated October 14, 2015, the Service responded to the Commission's decision by stating that it did not intend to comply with the State's permitting requirements, and that it intended to move forward with the reintroduction of Mexican wolves in the State, notwithstanding that it did not have the requisite permits to do so. *Aplts. App.* at 30. Specifically, the Service informed New Mexico as follows: "The Service has concluded that it has independent legal authority, pursuant to Federal statutes and regulations, to engage in all activities regarding the reintroduction of the Mexican wolf in New Mexico. Exercising this authority will allow the Service to import, export, hold and transfer Mexican wolves in the State of New Mexico; and to release Mexican wolves on federal lands in New Mexico without a State permit." *Id.* at 79.

The Service thereafter issued its Initial Release and Translocation Plan for 2016. *Aplts. App.* at 30. This document, issued after completion of the New Mexico permit application and appeal process, identifies four concrete activities that the Service intends to undertake in 2016: "the actions within MWEPA are: (1) to initial release a pack (male and female with pups) within New Mexico, (2) to cross-foster pups into a maximum of five packs ..., (3) to translocate a single wolf

(M1336) in Arizona or New Mexico, and (4) to translocate wolves that may be moved for management purposes during 2016” Aplt. App. at 80. On or about April 23, 2016, despite not having the requisite State permits, the Service imported and released two wolves in the State. *Id.* at 30. To date, the Service has not submitted any new or revised permit application to New Mexico.

C. Reintroduction of the Mexican Gray Wolf

The Service began reintroducing Mexican wolves into the wild in 1998. Aplt. App. at 28. As explained by the Service: “Initial release candidates are considered genetically surplus to the captive breeding program.” Progress Report at 12. The Service performed one initial release and one translocation in 2015, *id.* at 32, and two initial releases in 2016, Aplt. App. at 30.

The Service estimates that at the end of 2015, the wild population totaled a minimum of 97 wolves, and 21 packs. Progress Report at 10. This is a conservative estimate, based on visual observations and radio telemetry monitoring of wolves equipped with radio-collars. *Id.* at 12. Nine natural pairings of breeding-age wolves in the MWEPA population occurred in 2015. *Id.* at 19. These natural pairings resulted in the designation of four new packs. *Id.* Breeding animals were also naturally replaced in three other packs. *Id.* In 2015, 14 packs exhibited denning behavior, and all but two were confirmed to have produced wild-born litters. *Id.* The Service documented over 40 pups born, with a minimum

of 23 surviving in the wild until year-end. *Id.* As explained by the Director of the Service, these pups were all born in the wild to wild parents, which demonstrates that “the population continues to self-perpetuate and is not demographically reliant on releases from captivity.” *See* Written Responses from D. Ashe to House Comm. on Nat. Res. Dated Apr. 19, 2016, NM Addendum at 190.⁵ The Service reports on its Mexican Wolf Recovery Program website that in 2016 a minimum of 42 pups in nine packs were documented in the wild. 2016 Denning Packs and Wolf Pups, NM Addendum at 194.⁶

According to the Service, a single Mexican wolf may impact ungulate populations equivalent to killing over 20 elk and deer per year. Progress Report at 21. In 2015, wolf depredation was estimated to impact 102 domesticated animals, including cattle, horses, and pet dogs. *Id.* at 22. The 2015 confirmed cattle mortality rate is the highest recorded since reintroductions began, and according to the Service “is cause for concern.” *Id.* at 27. The Service also investigated 16

⁵ The Court may take judicial notice of the written responses because they are government records that are not reasonably subject to dispute. Fed. R. Evid. 201; *Pueblo of Sandia v. United States*, 50 F.3d 856, 861 n. 6 (10th Cir. 1995) (taking judicial notice of government reports and documents not contained in record below). For reference, a copy of the responses is attached hereto in the Addendum. *See* NM Addendum at 172-192.

⁶ The Court may take judicial notice of the 2016 wolf pup information because it is available on the Service’s public website. *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d at 1213; *see also* <https://www.fws.gov/southwest/es/mexicanwolf/>. For reference, a copy of the website cover page is attached hereto in the Addendum. *See* NM Addendum at 193-194.

reported instances of wolf nuisance behavior, including wolves near houses or in proximity to people. *Id* at 23.

D. Inbreeding Effects on Litter Sizes

In spring of 2016, the Service released data to New Mexico and the Arizona Game and Fish Department (“Arizona”) that allowed for an assessment of whether inbreeding (that is, breeding that occurs between related individuals) is resulting in reduced litter sizes in the wild. A previous analysis by Fredrickson et al. (2007) provided support for the hypothesis that inbreeding depresses litter size. But that analysis was based on a limited sample because releases to the wild were only initiated in 1998. With an additional eight years of data from wild-born pups available (1998-2014), New Mexico and Arizona (1) investigated whether levels of inbreeding had increased in the wild population since recovery efforts began in 1998, and (2) analyzed the relationship between the level of inbreeding and the maximum number of pups counted in each litter of wild Mexican wolves. In a report issued on June 22, 2016 that was provided to the Service, New Mexico and Arizona found that (1) there was no significant change in the level of inbreeding over time, and (2) there was no significant relationship between inbreeding and the maximum number of pups counted in each litter over the entire study period (1998-2014). Analysis of Inbreeding Effects on Maximum Pup Count and Recruitment in

Wild Mexican Wolves (“Inbreeding Report”), NM Addendum at 195.⁷ In other words, the facts simply do not support the conclusion that the wild experimental population is exhibiting depressed litter sizes, which is the Service’s principal basis for current reintroduction efforts. *E.g.*, FWS Br. at 8-10.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court’s decision to issue a preliminary injunction in light of the evidence before that court and the limited standard of review of this Court with respect to decisions to issue preliminary relief.

Appellants seek to conduct a *de novo* proceeding in this Court, introducing both new evidence and new legal theories. When properly limited to the record and arguments before the district court, it is clear that New Mexico made a *prima facie* showing in support of interim relief, and the Court fashioned a narrowly tailored injunction – that does not affect Mexican wolf releases outside the State and allows releases in the State that comply with federal and state law – pending a decision on the merits. Even if this Court were to consider the additional evidence and legal theories advanced by the parties, New Mexico has plainly established irreparable harm, that the balance of harms and public interest favor a temporary injunction, and that New Mexico is likely to succeed on the merits.

⁷ The Court may take judicial notice of the Inbreeding Report because it is a government record that is not reasonably subject to dispute. Fed. R. Evid. 201; *Pueblo of Sandia v. United States*, 50 F.3d at 861 n.6. For reference, a copy of the report is attached hereto in the Addendum. *See* NM Addendum at 195-203.

Appellants seek to overcome the district court's findings with respect to irreparable harm by introducing evidence not before the district court, attempting to mislead the Court regarding the potential extent of harm to New Mexico, and denying that New Mexico has a legitimate interest in effectuating its laws.

Appellants likewise seek to overcome the court's findings with respect to the balance of harms and public interest by raising the specter of extinction of Mexican wolves in the context of efforts to supplement an experimental population that the Service itself designated as *nonessential*. To support their position, Appellants rely on evidence not before the district court and make the unfounded assertion that there are no circumstances under which New Mexico would issue a permit to the Service to release captive-bred wolves in the state. Appellants' tactics and claims fall far short of providing this Court with a basis to find that the district court abused its discretion.

Finally, Appellants' claim that the district court erred in finding that New Mexico has demonstrated a likelihood of success on the merits is a strawman. Both Interior regulations and the Service's permit for Mexican wolf releases in New Mexico require the Service to comply with state permitting requirements, and those requirements unquestionably require the Service to obtain permits to import and release wolves. The Service has a history of complying with state permit requirements, both within New Mexico with respect to Mexican wolves and in

other states where the agency is engaged in reintroduction of experimental populations of other species. The Service's interpretation of the regulation in a manner that assures that the agency will never have to comply with state permitting requirements despite the plain language of the regulation is inconsistent with its past conduct, *post hoc*, and self-serving. In contrast, the plain language interpretation advanced by New Mexico and embraced by the district court is based on a logical distinction between those actions the Secretary is legally ***responsible*** to take and those that fall within her discretion. The fact that New Mexico is likely to succeed on its state law claims provides alternate grounds to affirm the district court's decision.

STANDARD OF REVIEW

To obtain a preliminary injunction, the moving party must demonstrate four factors: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of harms tips in the movant's favor; and (4) that the injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Where the latter three requirements weigh in favor of the movant, the test is modified, and the moving party may meet the requirement for showing success on the merits by showing "that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and

deserving of more deliberate investigation.” *Davis v. Mineta*, 302 F.3d 1104, 1110–11 (10th Cir. 2002); *see also N. Nat. Gas Co. v. L.D. Drilling, Inc.*, 697 F.3d 1259, 1266 (10th Cir. 2012) (recognizing and referring to the modified or relaxed injunctive relief standard post-*Winter*); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 n.3 (10th Cir. 2009) (same).

This Court reviews a district court’s grant or denial of a preliminary injunction for an abuse of discretion. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1243 (10th Cir. 2001). A district court abuses its discretion where it “‘commits an error of law, or is clearly erroneous in its preliminary factual findings.’” *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999) (quoting *Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1487 (10th Cir.1993)). In the context of a preliminary injunction, the Court’s “task is to determine whether the district court abused its discretion when it found, based on the evidence and arguments presented, that [movants] had demonstrated a likelihood of success on the merits.” *Verlo v. Martinez*, 820 F.3d 1113, 1130 (10th Cir. 2016) (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981) (“It is only necessary that plaintiffs establish a reasonable probability of success, and not an ‘overwhelming’ likelihood of success, in order for a preliminary injunction to issue.”)). The district court’s factual findings are reviewed for clear error, and its legal determinations are reviewed de novo. *Davis*

v. Mineta, 302 F.3d at 1110–11.

An issue not raised in the district court is not properly before this Court on appeal. *E.g.*, *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993) (review of issues not raised below would undermine the need for finality in litigation and conservation of judicial resources, and would result in decisions where everything accomplished below was for naught); *Tele–Commc ’ns, Inc. v. Comm ’r of Internal Revenue*, 104 F.3d 1229, 1232–33 (10th Cir. 1997) (“*Tele–Commc ’ns*”) (“Propounding new arguments on appeal in an attempt to prompt us to reverse the trial court undermines important judicial values.”). As previously explained by this Court, “to preserve the integrity of the appellate structure, we should not be considered a ‘second shot’ forum ... where secondary, back-up theories may be mounted for the first time.” *Tele–Commc ’ns*, 104 F.3d at 1233.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT NEW MEXICO WAS LIKELY TO SUFFER IRREPARABLE INJURY

A. The Release of Mexican Wolves Will Harm New Mexico’s Ability to Manage Ungulate Herds During the Litigation

The district court concluded that New Mexico had sufficiently shown “a significant risk that the release of an apex predator, without [New Mexico’s] knowledge of the time, location, or number of releases, presents a serious enough risk of harm to the State’s comprehensive wildlife management effort to satisfy the

irreparable injury requirement.” Aplt’s App. at 20. These conclusions are factual findings that are reviewed for clear error. *Davis v. Mineta*, 302 F.3d at 1110–11. In light of the evidence before the district court, and the standard of review on appeal, the district court’s determination was not an abuse of discretion.

The Service asserts that the district court’s determination constitutes clear error because it was not supported by the record before the court, particularly with respect to impacts on ungulate populations during the pendency of this litigation. *Id.* at 24-27. In an effort to tarnish the district court’s decision, the Service wrongly attempts to introduce evidence at this juncture that it did not provide to the district court. Specifically, the Service now cites extensively to the FEIS, *inter alia*, for the proposition that a wolf population of 300 will not result in a significant impact on ungulate herds. FWS Br. at 9, 10, 12, 25. But, because the FEIS was not before the district court, it cannot be the basis for a claim of clear error. And, while the Service’s argument that the district court erred cannot prevail when that argument is based on evidence not provided to the district court, the Service’s argument is deficient for a number of additional reasons.

First, the Service requests that the Court take judicial notice of the FEIS. FWS Br. at 9 n.5. But, as noted, the FEIS is not part of the record on appeal and, therefore, is not properly before this Court. Furthermore, even if the request were granted, this request extends only to the existence of the document, and not to truth

of the statements contained therein. *Tal v. Hogan*, 453 F.3d at 1265 n.24.

Therefore, statements in the FEIS cannot provide the basis for a finding of clear error by the district court.

Second, the record before the district court supports the court's conclusion that the release of an unknown number of Mexican wolves, at undisclosed locations, and at undisclosed times, would harm the State's wildlife management efforts. Apls. App. at 20. The Service's arguments to the contrary are flawed because, while the Service implies releases will be limited in number before final judgment, the Service fails to provide New Mexico or the Court with any assurance whatsoever regarding the total number of wolves it intends to release during that period. FWS Br. at 25. In addition, the Service improperly suggests that if irreparable harm occurs then New Mexico can, at that point, request removal of wolves causing such harm. *Id.* As explained by New Mexico's Director, New Mexico must manage predator and prey species "together rather than in isolation from one another." Apls. App. at 44. New Mexico "establishes population management objectives for species in the State, including elk, deer, bighorn sheep, antelope, and other protected wildlife." *Id.* These objectives take into account habitat, threats to existing populations, distribution of existing populations, and hunter interest and success rates. *Id.* Through its permitting and licensing programs for hunters, as well as other wildlife programs, New Mexico controls and

manages the ungulate population whereby it achieves a balance between predator and prey species. *Id.* at 43-44. The release of apex predators in unknown numbers and unknown locations obviously threatens to disrupt this balance. *Id.* Thus, the court did not commit clear error when it concluded that the release of Mexican wolves in the State, without New Mexico knowing where, when, or how many, would harm New Mexico's ability to manage its ungulate populations.

Third, even if the Court were to consider the statements in the FEIS for the truth of the matter asserted, those statements are undermined by the Service's own facts and conclusions regarding the impacts of Mexican wolves on ungulate populations in 2015. Progress Report at 21. As described above, a single Mexican wolf may kill over 20 elk and deer per year. *Id.* As a consequence, the Service's near-term plans to introduce dozens of captive wolves in order to get to an interim population of 300-325 wolves can be expected to reduce ungulate populations by hundreds or thousands.

Similarly, the Service's argument that ungulate populations will not be impacted "before final judgment" ignores the facts and is not persuasive. FWS Br. at 26. This litigation began over five months ago, and this appeal alone will extend through at least the beginning of 2017, during which time the district court proceedings have been stayed. Aplt's App. at 4, 9. Assuming that the stay is lifted in the spring of 2017, the parties will still have to undertake discovery and brief the

merits. Indeed, this case could easily extend into 2018, if not later. The Service “planned to release a maximum of three adult wolves in summer 2016, along with less than a dozen pups.” FWS Br. at 25. If the Service planned to release approximately 10-14 wolves in 2016, and higher numbers of wolves in 2017 and 2018, the nonessential, experimental wild population could be expected to swell to 200 or more wolves during the pendency of this litigation.

Given the impact that one single wolf may have on ungulates, the Service’s bald assertion that the planned releases will not alter the status quo, FWS Br. at 25, is wholly insufficient grounds for this Court to conclude that the district court abused its discretion in making the factual finding that there is “a serious enough risk of harm to the State’s comprehensive wildlife management effort to satisfy the irreparable injury requirement.” Apls. App. at 20.

In sum, the district court’s conclusion that an unknown number of Mexican wolves released into the wild could irreparably harm New Mexico was supported by the evidence, does not constitute clear error, and was not an abuse of discretion.

B. The Release of Mexican Wolves Will Harm the Sovereign Interests of the State

The Service next asserts that New Mexico cannot show injury to its sovereignty because the Service’s actions to conserve federally protected species are not subject to state control. FWS Br. at 27. Contrary to the Service’s assertion, it is well established that interference with a State’s sovereign or quasi-sovereign

authority is sufficient to establish irreparable injury.

In *Maryland v. Alonzo Jay King, Jr.*, 133 S. Ct. 1 (2012), Chief Justice Roberts issued a stay pending disposition of Maryland's petition for writ of certiorari. The court of appeals had found that a Maryland statute requiring law enforcement officials to collect DNA samples from individuals charged with but not yet convicted of certain crimes violated the Fourth Amendment. The Chief Justice stated in his stay order: "[T]he decision below subjects Maryland to ongoing irreparable harm. '[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Id.* at 3 (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

In *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015), the United States appealed a ruling temporarily enjoining implementation of a permanent resident program and the United States moved for a stay pending appeal. The court of appeals found that for purposes of standing, Texas was entitled to "special solicitude" given its substantial interest in the litigation. *Id.* at 752 (citing *Mass. v. E.P.A.*, 549 U.S. 497, 520 (2007)). The court explained that "Texas's interest in not being pressured to change its law is more directly related to its sovereignty than was Massachusetts's interest in preventing the erosion of its shoreline." *Id.* (referencing *Mass. v. E.P.A.*, 549 U.S. at 520). Accordingly, the court denied the

United States’ motion to stay the district court’s injunction pending appeal. *Id.*; see also *State of New Mexico ex rel. Bill Richardson v. BLM*, 565 F.3d 683, 697 (10th Cir. 2009) (concluding that New Mexico had standing “because of the threat of environmental damage to lands within its boundaries,” and because “states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders.”).

As applied here, New Mexico faces significant interference with its core government functions to establish and enforce laws within its borders. As in *Maryland v. Alonzo Jay King, Jr.*, without an injunction, New Mexico is unable to “effectuate statutes enacted by representatives of its people.” 133 S. Ct. at 3. As in *Texas v. United States*, New Mexico is being pressured to change its laws to bend to the demands of the Service. 787 F.3d at 752. These threats to New Mexico as a sovereign are sufficient to establish irreparable injury.⁸

⁸ Federal Appellants do not contest New Mexico’s standing on appeal, but assert that, to the extent that the district court held that *parens patriae* provided grounds for standing, its decision was improper. FWS Br. at 18 n.7. In doing so, the Federal Appellants conveniently ignore *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the Supreme Court noted “the long development of cases permitting States to litigate as *parens patriae* to protect quasi-sovereign interests.” 549 U.S. 497, 520, n.17 (2007) (quotation marks and citation omitted). In any event, it is unnecessary to reach the *parens patriae* argument here because New Mexico asserted, and the district court found, that the agency had standing based on at least two other grounds—injury to the State’s ability to manage its wildlife and injury to its sovereign interests. Aplt. App. at 148-150. Impairment of a state’s quasi-sovereign interests can be a basis for injury, wholly independent of

In sum, the district court’s determination that New Mexico established a threat of irreparable injury was not an abuse of discretion.

II. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THE BALANCE OF HARMS FAVORS AN INJUNCTION

The Service argues that, in weighing the balance of the harms, the district court erred by “discount[ing]” the potential harm to the nonessential experimental population, and “assum[ing]” that a preliminary injunction would not necessarily prevent continued releases of Mexican wolves. FWS Br. at 28. The district court’s conclusions with respect to both of these issues are factual findings that are reviewed for clear error. *Davis v. Mineta*, 302 F.3d at 1110–11. The Service’s assertions are baseless because the district court’s conclusions are supported by the evidence that was before the court and do not constitute clear error.

A. The Service Overstates the Alleged Harm to the Nonessential, Experimental Population of Mexican Wolves and Understates the Harm to New Mexico

The Service asserts that, without releasing Mexican wolves into the wild during the pendency of this litigation, the species will decline into an “extinction vortex.” FWS Br. at 20. These allegations are unsupported and wrongly color this matter with a sense of urgency that is simply not corroborated by the facts.

Certainly, were the circumstances as urgent as the Service now alleges, just last

the interests of its citizens. *Massachusetts v. EPA*, 549 U.S. at 518-19; *see also Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237 (1907).

year it might have reconsidered its “nonessential” designation of the experimental population and no doubt its only declarant would have used much more dire and conclusive language in support of its position in the district court. FWS Br. at 20. As described above, however, the Service considers “[i]nitial release candidates [to be] genetically surplus to the captive breeding program.” Progress Report at 12. This means they are unnecessary to the success of the captive breeding program, and therefore to the ultimate survival of the species. Indeed, the fact that Mexican wolves in the wild are considered “nonessential” means that by definition the loss of the entire population will not reduce the likelihood of the survival of the species in the wild. Aplt. App. at 33; *see also* 63 Fed. Reg. at 1756 (the loss of the nonessential experimental population “would not jeopardize the continued survival of the [Mexican wolf] subspecies.”). Moreover, as a conservative estimate, there were at least 97 wolves in the wild in spring 2016 and an additional 42 pups in the wild in summer 2016, which exceeds the population goal set forth in the only recovery plan that has been prepared for the species. *See* Aplt. App. at 26.

Furthermore, with respect to concerns regarding the genetic diversity of the nonessential experimental population, the Service overstates the evidence associating genetic diversity with depressed litter sizes. In fact, the Service’s sole declarant, Sheryl L. Barrett, could only conclude that “[t]he genetic diversity of the Mexican wolves in the MWEPA *has the potential* to be biologically problematic.”

Aplts. App. at 129 (emphasis added). Ms. Barrett further stated that, absent the Service's releases in 2016, "the genetic health of the Mexican wolf population in the wild will stagnate and *possibly decline*." *Id.* at 127 (emphasis added); *see also* FWS Br. at 9 (describing the *potential* for inbreeding). These statements are hardly supportive of the Service's argument to this Court that absent releases the Mexican wolf species will decline into an "extinction vortex." FWS Br. at 20. Yet, Ms. Barrett's declaration was the only evidence before the district court, and therefore is the only evidence the Court should consider on appeal. *United States v. Kennedy*, 225 F.3d at 1191. Accordingly, the district court did not commit clear error when it determined as a factual matter that the potential harm to the nonessential population of Mexican wolves in the wild was limited.

The Service next relies on evidence that was not before the district court to assert that the genetic diversity of the Mexican wolf population will be harmed during the pendency of this litigation. Citing the FEIS, the Service alleges that "[d]ecreased genetic diversity ... compromises the health of the population *by causing* smaller litter sizes, lower birth weights, and greater mortality in infant pups." FWS Br. at 9. But the Service's allegations go far beyond the qualified language in the FEIS, which states that when genetic diversity is low, "reproduction *may* be increasingly compromised by, *among other factors*, lower birth weights, smaller litter sizes, and greater neonatal mortality." Int. Br.,

Addendum at 92. Other portions of the FEIS contain similarly qualified language, stating that “[i]nbreeding depression *may be partially* responsible for small litter sizes.” *Id.* at 108 (emphasis added).

Furthermore, the FEIS relies on Fredrickson et al (2007) and his predecessors which, as described above, relied on a limited sample size. Int. Br., Addendum at 90, 92, 108. New Mexico and Arizona, however, performed the same analyses based on recent data and larger sample sizes. Inbreeding Report at 1. Their results demonstrate there is no significant relationship between the level of inbreeding and the maximum number of pups counted in each litter. *Id.* As pointed out above, these documents were not part of the record below; therefore, they should not be considered by this Court. Even if the Court were to consider these documents, they only confirm that the district court did not commit clear error in making the factual determination that the potential harm to the nonessential, experimental population of Mexican wolves is such that it would not reduce the likelihood of survival of the species in the wild.

Additionally, as described above, the threat of irreparable injury to New Mexico is significant. Despite the Service’s assertions to the contrary, introducing an indeterminate number of wolves into the wild without informing New Mexico of the location, time, or number of releases can easily disrupt the State’s ability to manage its ungulate populations, with potentially significant consequences to the

predator-prey balance within the State. Equally if not more important, interference with the ability of New Mexico to effectuate laws it has duly enacted constitutes a form of irreparable injury. The district court considered the facts in the record, and did not commit clear error in determining that the risk of injury to the nonessential experimental population of Mexican wolves was outweighed by the threat of injury to New Mexico.

B. The Service Could Obtain the Requisite Permits

The district court's determination regarding the Service's ability to obtain permits from New Mexico, Aplt. App. at 21, is fully supported by the evidence that was before the district court and therefore does not constitute clear error. The Service asserts that New Mexico "has been adamant that further release permits will not issue until a new recovery plan is finalized." FWS Br. at 29. This false assertion is belied by the Commission's decision, which simply requires "a documented styled 'management plan' [that] actually contain[s] real as opposed to placeholder and interim management objectives, thus making it a meaningful 'management plan' and facilitating a meaningful assessment of potential conflicts." Aplt. App. at 66; *see also* N.M. Code R. § 19.35.7.19(A)(3) (requiring an applicant to "demonstrate that the intended release is provided for in state or federal resource or species management plans or strategies."). While the Commission and the Director referenced a recovery plan in their respective

decisions, these references do not suggest that *only* a recovery plan promulgated in the federal register would suffice for purposes of obtaining the requisite permits.⁹

The record clearly shows that the Service could re-apply for a new permit. The Service has committed to preparing a draft recovery plan by early 2017, with a final plan to be completed by November 2017. *Id.* at 30. While the agency's track record of repeatedly initiating recovery plan development efforts and then abandoning those efforts does not instill a sense of confidence in its ability to cross the finish line, the agency has the resources to complete a plan before the November 2017 deadline it has set for itself. Furthermore, it is likely that the Service has begun to prepare the new recovery plan, and has materials and information that it could share with New Mexico as part of a management plan that could be submitted in support of a new permit application. But the Service never

⁹ Federal Appellants cite *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010), to assert that the Service "need not promulgate or revise recovery criteria before taking action to conserve a species under other sections of the ESA." FWS Br. at 5; *see also id.* at 39. In that case, the Ninth Circuit held that the Service could designate critical habitat without establishing recovery criteria. Nothing about the case suggests that the Service may release members of a nonessential experimental population on an *ad hoc* basis without an up-to-date recovery plan. Next, Federal Appellants cite *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012), to assert that "when managing listed species, [the Service] is not bound by the contents of a recovery plan." FWS Br. at 5; *see also id.* at 39. But the D.C. Circuit in that case held only that, when making a delisting decision, the Service is not bound by its recovery plan. Because the Service is not making any listing or delisting decisions, the case is easily distinguished from the situation here.

applied for a new permit. Instead, the Service moved forward with its planned releases without any regard for its own regulations, its own permitting requirements, or the State's permitting requirements.

In sum, the evidence before the district court supported its conclusion that the issuance of a preliminary injunction would “not necessarily prevent continued releases” of Mexican wolves. *Aplts. App.* at 165. This determination does not constitute clear error and therefore should be upheld.

III. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT ISSUANCE OF AN INJUNCTION IS IN THE PUBLIC INTEREST

The Service asserts that the district court committed clear error by making the factual finding that the issuance of an injunction would not necessarily preclude any further wolf releases. *FWS Br.* at 29; *see also* *Foundation Amicus Curiae Br.* (“*Found. Br.*”) at 15. This assertion can be easily rejected. As explained above, the court reasonably concluded, based on the evidence before it, that the Service could re-apply for a permit at a later date with additional information regarding wolf releases (e.g., the 2016 translocation and release plan, a draft recovery plan, etc.) that would likely enable New Mexico to grant the requisite permits.¹⁰ *Aplts. App.* at 166. Indeed, as the district court recognized,

¹⁰ In other instances where New Mexico has denied import permit applications, the applicants have re-applied at a later date with the additional information, and the permit applications have been granted. The notion of having a permit denied and having to re-apply is a common feature of permit programs administered by

the Service had previously obtained release permits, and could do so again in the future. *Id.* (“By seeking and receiving a State permit for releases, ***which Respondents previously have done***, Respondents will comply with federal regulations governing the reintroduction of wildlife, and, upon State approval, continue to release wolves.” (emphasis added)). In the history of the reintroduction effort, the 2015 permit denial is the only instance in which the State issued a denial. The mere fact that the Service elected not to re-apply for a new permit does not make the court’s conclusion erroneous.

The Service also asserts that the district court discounted “the public’s interest in protecting the wild populations of Mexican wolves.” FWS Br. at 29. But the Court did no such thing. The injunction issued by the district court does not in any way alter the federal and state protections afforded to the extant, wild population. For example, it does not affect any of the take prohibitions codified at 50 C.F.R. § 17.84(k)(5). Moreover, the Service has determined that the wild population of Mexican wolves is ***nonessential*** to the continued existence of the species. *See* 50 C.F.R. § 17.80. As such, as a matter of law it has already been determined that the loss of the entire population would not appreciably reduce the likelihood of the survival of the species in the wild. Aplt’s App. at 33.

The Service next alleges that, by enacting the ESA, Congress decided “to

government agencies at the federal, state, and local levels across the nation.

place the highest priority on conservation,” and the district court erred by ignoring the judgment of Congress when assessing the public interest. FWS Br. at 30. The district court’s decision, however, is fully consistent with the intent of Congress. The ESA is a comprehensive statutory scheme governing a wide variety of species-related activities. One such activity is the designation of nonessential experimental populations pursuant to ESA section 10(j). Congress has spoken with respect to these populations, deeming them experimental, and furthermore allowing the Service to designate them as nonessential, as is the case here. The balance that was struck by Congress places a lower priority on these populations; the Service’s overbroad assertions to the contrary should be rejected.

Furthermore, the Service takes a myopic view of what activities may be considered to be in the public interest. FWS Br. at 29-30. Increasing the population of Mexican wolves in the wild is not in the public interest if it undermines and seriously jeopardizes the State’s wildlife management program. Aplt. App. at 43-45. Indeed, from the perspective of New Mexico’s citizens, and their interests in managing a landscape of diverse wildlife resources, and protecting livestock, pets, and communities through the enactment and administration of state laws governing the import and release of wild animals, the public interest is best served by preventing the unlawful release of Mexican wolves.

In sum, given the evidence before the district court, issuance of an injunction

was strongly in the public interest.

IV. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT NEW MEXICO IS LIKELY TO SUCCEED ON THE MERITS

Although “[t]he courts use a bewildering variety of formulations of the need for showing some likelihood of success, ... [a]ll courts agree that plaintiff must present a *prima facie* case but need not show a certainty of winning.” *Planned Parenthood Ass’n of Utah v. Herbert*, 828 F.3d 1245, 1252 (10th Cir. 2016) (brackets in original, citations omitted). A preliminary injunction is appropriate if the moving party can establish a likelihood of success on one claim; the moving party need not establish a likelihood of success on all claims. *See id.*

A. Federal Law Claims

1. The Service Does Not Have a Statutory Responsibility to Release Mexican Wolves

The Service’s own regulations require the Service, “[i]n carrying out research programs involving the taking or possession of fish and wildlife or programs involving reintroduction of fish and wildlife,” to “consult with the States and comply with State permit requirements ..., except in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibilities.” 43 C.F.R. § 24.4(i)(5).¹¹ Federal

¹¹ Notably, the Service routinely seeks and obtains state permits to import animals that are to be released into experimental populations. For example, the Service has obtained several permits in Wyoming to import black-footed ferrets. The Court

Appellants assert that the ESA “confers on [the Service] a ‘responsibility’ to manage the Mexican wolf population in a way that promotes the species’ conservation.” FWS Br. at 32; *see also* Int. Br. at 16-19 (asserting that the ESA requires the Service to recover Mexican wolves); Found. Br. at 27-30 (same). According to Federal Appellants, any action that the Service takes under the ESA is a “statutory responsibility” because the Service is required under the ESA to conserve and recover imperiled species. But this interpretation is inconsistent with relevant caselaw, would render the regulation meaningless by violating basic canons of construction, ignores applicable precedent showing the discretionary nature of programs implemented pursuant to section 10(j), and runs counter to the very conditions imposed by the Service on itself when it required compliance with state permits whenever the Service, or anyone under the Service’s authority takes, transfers, or releases Mexican wolves.

a) Relevant Caselaw

Section 10(j) of the ESA states that “[t]he Secretary *may* authorize the release (and related transportation) of any population ... of an endangered species or a threatened species ... if the Secretary determines that such release will further

may take judicial notice of these permits because they are government records that are not reasonably subject to dispute. *Pueblo of Sandia v. United States*, 50 F.3d at 861 n. 6. For reference, copies of these permits are attached hereto in the Addendum. *See* NM Addendum at 204-227.

the conservation of such species.” 16 U.S.C. § 1539(j)(2)(A) (emphasis added).

After examining this language, the district court concluded that there “is a significant difference between a statutory grant of authority, such as stating that the Secretary *may* take an action, and a specific statutory directive requiring the Secretary to take an action.” Aplt. App. at 161 (emphasis in original). Thus, the court concluded that “the permissive language contained in the statute does not constitute a statutory responsibility of the Secretary.” *Id.*

The district court’s interpretation is consistent with relevant caselaw and should be upheld. In *Lawrence v. City of Philadelphia*, 527 F.3d 299 (3d Cir. 2008), the court of appeals analyzed whether individuals fell within an exemption to the Fair Labor Standards Act for overtime wages. The issue hinged on whether the employees had the “legal authority and *responsibility*” to undertake fire suppression activities as part of their employment. *Id.* at 303 (emphasis added). The court found, after looking at various dictionary definitions, that in order for the employee to be “responsible” for fire suppression the “person must be required to do it or be subject to penalty.” *Id.* at 316-17; *see also id.* at 317 (“In other words, a responsibility is something that is mandatory and expected to be completed as part of someone’s role or job.”). Thus, the court found that because the employee was not required to undertake fire suppression activities, the exemption did not apply.

In *American Family Mutual Insurance Company v. Williams*, — F.3d —,

No. 15-3400, 2016 WL 4177216, at *2 (7th Cir. Aug. 8, 2016), the court of appeals analyzed the meaning of the term “legally responsible” in the context of a homeowner’s insurance policy. The court explained:

Black’s Law Dictionary defines “responsibility” as the “quality, state, or condition of being answerable or accountable; LIABILITY.” BLACK’S LAW DICTIONARY 1506 (10th ed. 2014). “Liability,” in turn, means “legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.” *Id.* at 1053. To the same effect, Merriam-Webster defines “responsible” as “liable or subject to legal review or in case of fault to penalties.” MERRIAM-WEBSTER’S THIRD NEW INT’L DICTIONARY 1935 (1986). ***When used in the legal sense, “responsible” means roughly “subject to some kind of liability.”***

Id. (emphasis added).

As applied here, the Secretary’s ability to authorize the release of an experimental population of Mexican wolves is not a statutory responsibility. As in *Lawrence v. City of Philadelphia*, the Service is not required to undertake such release activities, and is not subject to penalty if it fails to do so. 527 F.3d at 316-317. As in *American Family Mutual Insurance Company v. Williams*, the Service is not “subject to some kind of liability” if it declines to release Mexican wolves pending development of a management plan. 2016 WL 4177216 at *2. As such, the Service’s ability to authorize the release of nonessential experimental populations does not amount to a statutory responsibility. *Id.*¹²

¹² Compare *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1267 (11th Cir. 2007) (characterizing an action that the Service is required to

In addition, the case cited by Federal Appellants can be easily distinguished from the situation here. In *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477 (10th Cir. 1990), plaintiffs argued that federal defendants failed to comply with an Executive Order stating: “Each agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for ... (3) conducting Federal activities and programs affecting land use....” *Id.* at 1485. The court held that the Executive Order did not apply because “federal defendants were not ‘responsible’ for the land use planning” at issue because “they did not have any ability to exercise control over the project.” *Id.* However, concluding an action is *not* a responsibility involves a different inquiry than concluding an action *is* a responsibility. In *Village of Los Ranchos de Albuquerque v. Barnhart*, the Court concluded that, at a minimum, a “responsibility” requires “an ability to exercise control.” Since federal defendants did not have that ability, the Court’s inquiry ended. *Id.* The Court did not address whether something further is required (e.g., a mandate, directive, etc.).

As applied here, New Mexico does not dispute that “an ability to exercise

undertake under the ESA as a “statutory responsibility”); *Friends of Animals v. Ashe*, 51 F. Supp. 3d 77, 79 (D.D.C. 2014) (same); *Pennaco Energy, Inc. v. U.S. Dept. of Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004) (characterizing action that the Service is required to undertake under the NEPA as a “statutory responsibility”).

control” is a necessary condition to something being a “responsibility.” But while it is necessary, it is not sufficient. The case cited by Federal Appellants does not suggest otherwise.

b) Federal Appellants’ Interpretation Renders 43 C.F.R. § 24.4(i)(5) Meaningless

Federal Appellants assert that the term “responsibility” refers to “something within one’s power or control.” FWS Br. at 32. But this overbroad interpretation renders the exception that the Service comply with the State’s permitting requirements, “*except* in instances where the [Secretary] determines that such compliance would prevent him from carrying out his statutory responsibilities,” meaningless. 43 C.F.R. § 24.4(i)(5) (emphasis added). As explained by the district court at the hearing on the preliminary injunction:

[T]his language -- is this so broad that every time that there is to be a release of a wolf that a state doesn’t approve of, then the Secretary gets to do it anyway, because otherwise that would prevent him from carrying out his statutory responsibilities? But if that’s the law, then this whole notion about the Department of the Interior consulting with the states and complying with state permit requirements, that, in effect, becomes a paper tiger, because then any time a state and the Fish and Wildlife Service disagree, what the state has to say about it is of no consequence because then the Secretary can say, well, he has to carry out his statutory responsibilities.

Supp. App. at 20. The fact that the ESA requires the Service to recover and conserve species does not mean that each and every action that the Service takes is a statutory responsibility. Indeed, the regulation would lose all meaning if this was

the case—every time the Service met with opposition regarding a proposed action, it would simply deem the proposed action a statutory responsibility and proceed, notwithstanding local, regional, or statewide concerns. This is contrary to the express language of the regulation and basic canons of construction, and it runs afoul of the collaborative system intended by Congress with respect to nonessential experimental populations. *E.g., Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d at 1231-1232; *see also United States v. Menasche*, 348 U.S. 528, 538 (1955) (“The cardinal principle of statutory construction is to save and not to destroy.... It is our duty ‘to give effect, if possible, to every clause and word of a statute ... rather than to emasculate an entire section, as the Government’s interpretation requires.’”) (quotation marks and citations omitted).¹³

Intervenors assert that under the district court’s interpretation, the Service “could not invoke the exception in 43 C.F.R. § 24.4(i)(5) in connection” with any activity. Int. Br. at 23. This assertion can be easily dismissed, as there are instances in which the Secretary is required to take action in connection with an activity that falls within the purview of 43 C.F.R. § 24.4(i)(5). For example, 16 U.S.C. § 1333(b)(2) states:

¹³ Canons of statutory interpretation apply equally to interpretation of regulations. *Time Warner Ent. Co., L.P. v. Everest Midwest Licensee, L.L.C.*, 381 F.3d 1039, 1050 (10th Cir. 2004) (“As with statutory construction, in interpreting regulations, we strive to construe the text so that all of its provisions are given effect and no part is rendered superfluous.”)

Where the Secretary determines ... that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he ***shall*** immediately remove excess animals from the range so as to achieve appropriate management levels.

(emphasis added). Accordingly, if a state's permitting requirement prevented the Secretary from carrying out this statutory responsibility, the Secretary would arguably not have to comply with those permitting requirements. Here, however, due to the discretionary nature of the section 10(j) program, the Secretary is required to comply with state permitting requirements.

c) Relevant Precedent Shows the Discretionary Nature of the Section 10(j) Program

Since section 10(j) was adopted in 1982, the Service has promulgated many regulations relating to the introduction of experimental populations in the wild. 50 C.F.R. §§ 17.84–17.85. Each rule is tailored to the species at issue, taking into account not only the specific needs of the species, but also the potential impacts to the region in which the proposed releases may take place. *Id.* Most recently, the Service's actions with respect to the red wolf (*Canis rufus*) illustrate the latitude afforded the Service under the section 10(j) program.

The red wolf was declared an endangered species in 1973. Of the 17 remaining wolves in captivity, 14 became founders of a successful captive breeding program. By 1987, enough red wolves were bred in captivity to begin the release of captive wolves into the wild as a nonessential experimental population

pursuant to a 10(j) rule. 50 C.F.R. § 17.84(c). The Service estimates that there are currently 50-75 wolves in the wild as a result of these efforts.

Notably, on September 12, 2016, the Service announced that it intends to capture all red wolves currently in the wild. Press Release dated Sept. 12, 2016, NM Addendum at 229.¹⁴ The Service has determined, based on the best and latest scientific information gathered over the past 21 months, that the capture of the wild wolves is in the best interest of the viability of the species.

The fact that the Service has the latitude to both release into the wild and capture from the wild individuals in a nonessential experimental population affirms that the agency is not “responsible” for taking any particular action under section 10(j) of the ESA. That provision is discretionary, not obligatory. 16 U.S.C. § 1539(j)(2)(A). The contention that each and every decision taken by the Service pursuant to any 10(j) program is a statutory directive that the Secretary is required to undertake is nonsensical. Such a contention, among other things, is contrary to the express intent of Congress in adopting section 10(j). *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d at 1231-1232. Indeed, the permit that the Service issued itself

¹⁴ The Court may take judicial notice of the press release because it is available on the Service’s public website. *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d at 1213. For reference, a copy of the press release is attached hereto in the Addendum. See NM Addendum at 228-231; *see also* https://www.fws.gov/news/ShowNews.cfm?ref=science-leads-fish-and-wildlife-service-to-significant-changes-for-red-&_ID=35794.

to authorize the translocation and release of Mexican wolves includes a condition requiring the Service to comply with state permitting requirements. This clearly illustrates that the Service does not consider compliance with state permitting requirements to be inconsistent with any statutory responsibility. Int. Br., Addendum at 112.

In sum, the district court did not err in interpreting the language in 43 C.F.R. § 24.4(i)(5) relating to “statutory responsibilities” as referring to specific statutory directives. The Service is not mandated to release Mexican wolves into the wild. Thus, the Service’s release of such wolves into the wild without the requisite state permits is unlawful.

2. The Service’s Interpretation is Not Entitled to *Auer* Deference

Federal Appellants assert that the Service’s interpretation of 43 C.F.R. § 24.4(i)(5) is entitled to *Auer* deference because it “was neither ‘plainly erroneous’ nor ‘inconsistent with’ the text of” the regulation. FWS Br. at 33 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).¹⁵ However, as the Supreme Court has explained, *Auer* deference is “unwarranted when there is reason to suspect that the agency’s interpretation ‘does not reflect the agency’s fair and

¹⁵ Intervenors appear to assert that the Service’s interpretation is subject to *Chevron* deference. Int. Br. at 18 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984)). This assertion can be easily rejected, as *Chevron* deference only applies to an agency’s interpretation of a statute, and not a regulation, as is at issue here.

considered judgment on the matter in question.”” *Christopher v. SmithKline Beecham Corp.*, — U.S. —, 132 S. Ct. 2156, 2166 (2012) (citing *Auer*, 519 U.S. at 462); *see also Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J. concurring) (laying out numerous arguments against the continued application of *Auer* deference). Furthermore, there is reason to suspect that an interpretation does not reflect an agency’s fair and considered judgment on a matter if the agency’s interpretation conflicts with a prior interpretation, is nothing more than a convenient litigating position, or is a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. at 2166-67; *see also Mitchell v. C.I.R.*, 775 F.3d 1243, 1249–50 (10th Cir. 2015). Thus, when the Court applied *Auer* deference in reviewing EPA’s interpretation of regulations it promulgated under the Clean Water Act, it stated “there is no indication that [EPA’s] current view is a change from prior practice or a post hoc justification adopted in response to litigation.” *Decker v. Northwest Env’tl. Law Center*, 133 S. Ct. 1326, 1329-30 (2013) (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. at 2166-67).

As applied here, the agency has in many instances interpreted 43 C.F.R. § 24.4(i)(5) as requiring compliance with state permitting requirements. *See* Section IV.A.1 n.9 (describing that the Service seeks permits from the State of Wyoming to release black-footed ferrets); 52 Fed. Reg. 29784, 29789 (Aug. 11,

1987) (describing how, pursuant to 43 C.F.R. § 24.4(i)(5)(i), the Service applied for a research permit from the California Fish and Game Commission). But the Service’s interpretation became inconvenient when New Mexico (after granting permits on numerous occasions) for the first time in the history of the reintroduction program denied a permit application. The Service thereafter changed its interpretation to accommodate its own agenda. Such an interpretation does not reflect the agency’s “fair and considered judgment,” and is an improper *post hoc* rationalization. *Decker v. Northwest Env’tl. Law Center*, 133 S. Ct. at 1329-30. The Service’s interpretation therefore is not entitled to any deference.

Furthermore, as the U.S. Supreme Court has explained: “It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance” *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. at 2168-2169. Here, the Service’s interpretation prior to its October 14, 2015 letter, Aplt’s. App. at 78-79, was that compliance with New Mexico’s permitting requirements did not prevent it from carrying out its statutory responsibilities. Nothing suggested to New Mexico that, upon permit denial, the Service would take the opposite position. Indeed, the Service’s position conflicts with the Service’s own permit, which requires compliance with state law. Int. Br., Addendum at 112. The position is also inconsistent with the Service’s conduct in

executing prior State permits, stating “[b]y exercising the rights of this permit, he/she acknowledges that the animals brought into New Mexico under its provisions, and all their subsequent progeny, will be subject to State laws and rules,” and including the certification “I have read and understand the restrictions and conditions of this permit and agree to abide by them.” Supp. App. at 9. The Service’s *post hoc* approach, which was expressed only after previously complying with the State’s permitting requirements and is directly at odds with its own permit condition, is entirely self-serving and not entitled to deference.

3. The District Court’s Ruling is Consistent with ESA Section 6(a)

Intervenors assert that the district court’s ruling “cannot be reconciled with ESA section 6(a),” which requires the Service, in carrying out the programs authorized by the ESA, to “cooperate to the maximum extent practicable with the States.” Int. Br. at 19. This argument fails for two reasons.

First, this issue was not raised in the district court, and therefore is not properly before this Court on appeal. *Tele-Commc’ns*, 104 F.3d at 1232–33 (“an issue must be presented to, considered and decided by the trial court before it can be raised on appeal”) (internal quotations and brackets omitted). As an appellate body, this Court’s function is not to take up new legal theories that were not presented in the district court. *Verlo v. Martinez*, 820 F.3d at 1132. As such, Intervenors’ section 6(a) argument is not a “legitimate ground on which to reverse

[a] preliminary injunction order.” *Id.* at 1133.

Second, even if the Court considers Intervenor’s argument, the district court’s ruling is fully consistent with ESA section 6(a). The district court concluded that compliance with 43 C.F.R. § 24.4(i)(5) would not prevent the Service from carrying out its statutory responsibilities. *Aplts. App.* at 161-162. This conclusion was based in part on the fact that the Service has previously obtained New Mexico permits prior to releasing Mexican wolves within the State. *Id.* at 166. Thus, based on the Service’s own actions, the district court reasonably concluded it was feasible for the Service obtain additional permits in the future. *Id.* The district court did not create “an exception to ESA section 6(a).” *Int. Br.* at 20. Rather, the court assumed the Service would “cooperate to the maximum extent practicable” in the same manner that it had in the past. This is consistent with section 6(a), and Intervenor’s assertions to the contrary should be rejected.

4. The District Court’s Ruling Is Consistent with 50 C.F.R. § 17.81(d)

50 C.F.R. § 17.81(d) requires every 10(j) rule “to the maximum extent practicable” to represent an agreement between the Service, state and federal agencies, and private landowners. Intervenor appears to assert that, because New Mexico participated as a “cooperating agency” in developing the EIS for the 10(j) Rule, they are precluded by 50 C.F.R. § 17.81(d) from challenging the implementation of the 10(j) Rule. *Int. Br.* at 22. This assertion lacks merit.

As an initial matter, as with the section 6(a) argument described above, this argument should not be considered by this Court on appeal because it was not raised in the district court. *Tele-Comm's*, 104 F.3d at 1232-1233. A court of appeals is not a “second shot” forum where secondary, back-up theories may be mounted for the first time. *Id.* at 1233; *see also Tooele Cty. v. United States*, 820 F.3d 1183, 1191 (10th Cir. 2016) (declining to consider new arguments on appeal). Indeed, the district court cannot have abused its discretion with respect to a legal argument that was not presented to it.

Furthermore, as evidenced by the comment letters submitted by New Mexico during the 10(j) Rule public comment period, the Service repeatedly ignored New Mexico’s concerns regarding the 10(j) Rule. *See* N.M. Addendum at 162-171. Indeed, the fact that the Service ignored New Mexico’s concerns in developing the 10(j) Rule does not mean that it is entitled to do so when implementing the rule, particularly when the Service’s regulations and permit expressly require it to comply with the State’s permitting requirements. *See* Int. Br. at 22. Nor do Intervenor’s cite any authority for this illogical proposition. *Id.*

Contrary to Intervenor’s assertions, the district court’s decision does not provide New Mexico with “veto power over the implementation of a 10(j) Rule,” Int. Br. at 22, or with “veto authority over [the Service’s] implementation of the ESA,” Int. Br. at 20. Rather, the district court’s decision relates only to the

Service's ability to import and release certain Mexican wolves into a nonessential, experimental population in violation of Federal and State law. As explained above, nothing has prevented the Service from applying for another permit. New Mexico does not have "veto power" any more so than it did when it approved the permits, and Intervenors' assertions to the contrary should be rejected.

B. State Law Claims

1. New Mexico's State Claims are Not Barred by Sovereign Immunity

Federal Appellants assert that New Mexico's state law claims are barred by sovereign immunity. FWS Br. at 36; *see also* Int. Br. at 24-25. As Federal Appellants recognize, however, the Administrative Procedure Act ("APA") contains a waiver of sovereign immunity that the Third Circuit has held extends to state law claims. *E.g., Treasurer of the State of New Jersey v. U.S. Dep't of the Treasury*, 684 F.3d 382, 400 n.19 (3d Cir. 2012). As explained by the Third Circuit when it directly addressed this issue:

The Government contends that the waiver of sovereign immunity should be limited to actions brought under federal law rather than state law as the States have done here to the extent that they seek relief under their unclaimed property acts. Though in view of the circumstance that most cases against the Government are under federal law so that Congress probably was focused on that law when it adopted the 1976 amendments to the APA, we see no support for the distinction that the Government makes between federal and state law in either the text or the history of section 702.

Id. (citing 5 U.S.C. § 702).¹⁶

Furthermore, the Service—through a combination of actions—has submitted to State law. First, the Service’s regulations require it to “comply with State permit requirements.” 43 C.F.R. § 24.4(i)(5)(i). Second, as detailed further below, Permit TE 091551, which authorizes the Service to import Mexican wolves from specified captive wolf facilities from around the United States to New Mexico, expressly states: “Please note that this permit is ... functional only when used in combination with a valid state permit.” Int. Br., Addendum at 112. Third, the Service applied for and was granted permits on multiple occasions. Supp. App. at 9. And fourth, a Service official signed prior permits stating that the Service as permittee binds itself to faithful observance of the regulations of the Commission. *Id.* Therefore, the Service’s claims of immunity ring hollow and should be rejected. The Service participated in the State’s permitting process only so long as the permits were granted; this type of selective cooperation cannot stand.

2. New Mexico’s State Claims are Not Barred by Intergovernmental Immunity

Citing *Hancock v. Train*, 426 U.S. 167 (1976), Federal Appellants next assert that “the doctrine of intergovernmental immunity guarantees that [New

¹⁶ Notably, the cases cited by Federal Appellants do not expressly address the issue of whether the APA’s waiver of sovereign immunity extends to state claims. FWS Br. at 36 n.8. The Third Circuit’s decision is the only case directly addressing this issue, and therefore should be afforded the greatest weight.

Mexico’s state law claims] will fail.” FWS Br. at 36; *see also* Int. Br. at 21 n.6.

However, *Hancock v. Train*, and its companion, *EPA v. State Water Resources Control Board*, 426 U.S. 200 (1976), stand for the proposition that “Federal *installations* are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous.” *Id.* at 211. The holding in these cases derives from the Court’s interpretation of the Supremacy Clause in tandem with the Plenary Powers Clause, which delegates to Congress the power to exercise exclusive legislative jurisdiction “over all places purchased by the consent of the ... state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.” U.S. Const., Art. I, s 8, cl. 17.¹⁷

In each instance, the Court was faced with the question of whether Congress subjected existing federal installations to state permitting requirements. As the Supreme Court explained in *Hancock v. Train*, 426 at 179, the Supremacy and Plenary Powers clauses “do not bar all state regulation which may touch upon the activities of the Federal Government.” But the Court went on to explain that the permitting requirement in question would prohibit operation of federal installations

¹⁷ Notably, the Service has not identified any installations within the State purchased by the United States over which the State has ceded legislative jurisdiction to the United States. Where a state has not ceded such authority, the United States has a proprietorial interest only. *Paul v. United States*, 371 U.S. 245, 264 (1963) (opining that where a state does not cede jurisdiction, the United States’ possession of the property is “simply that of an ordinary proprietor”).

absent a permit. *Id.* at 180.

In contrast, the permitting requirements set out in the NMAC and applicable in this case regulate the import and release of wild animals. N.M. Code R. § 19.35.7.8 (prohibiting import of non-domesticated animals without a permit); N.M. Code R. § 19.31.10.11 (prohibiting release of non-domesticated animals without a permit). They do not apply to federal installations. And they do not have the potential to prohibit operation of federal installations. As a consequence, as the district court explained, the holding in *Hancock* is limited and readily distinguishable because it applies to requirements that would subject federal installations to State control. Aplt's App. at 162-163.

Even assuming *arguendo* that the intergovernmental immunity doctrine applies not just to federal installations but to all real property owned by the federal government (which it does not), it cannot be wielded as a defense here because the State law provisions in question do not regulate or otherwise affect real property. Rather, the State's import permit requirement applies to all wild animals, including wolves. It is triggered by the movement of such animals from outside the boundaries of the State into the State. Likewise, the State's release permit requirement does not regulate or otherwise affect real property; it bars the unpermitted release of wild animals, including wolves.

Federal Appellants have not argued or otherwise attempted to establish that,

at the points of importation and release, the wolves that are bred in private facilities are the personal property of the United States. Thus, the district court was not asked to – and did not – make its decision in consideration of the ownership status of the pertinent wolves. The only evidence before this Court that arguably bears on this issue is Permit TE 091551, which was issued by the Service to itself. Int. Br., Addendum at 110-120.¹⁸ But the permit does not clearly establish ownership, stating only that wolves and their offspring are the property of the United States and/or Mexican government. *Id.* at 115. In light of the foregoing, New Mexico’s state law claims are not barred by the doctrine of intergovernmental immunity.

3. New Mexico’s State Law Claims are Not Preempted

a) Express Preemption

Intervenors assert that “ESA section 6(f) expressly preempts state laws that prohibit importation of endangered species when there is a federal regulation or permit allowing those very same imports.” Intervenors Br. at 26. The errors in Intervenors’ argument are threefold.

First, this argument was not briefed in the district court, and therefore should not be considered by this Court. *Tele-Comm’s*, 104 F.3d at 1232-1233.

Intervenors assert that it is appropriate for the Court to consider their “express”

¹⁸ The permit was not part of the record below and is, therefore, not properly part of the record on appeal. In addition, it is well established that documents subject to judicial notice cannot be cited for the truth of the claims they contain. *Tal v. Hogan*, 453 F.3d at n.24 (10th Cir. 2006).

preemption argument because “conflict” preemption was raised below.

Intervenors Br. at 26 n.7. This assertion fails, however, because courts “have consistently rejected the argument that raising a related theory below is sufficient to preserve an issue on appeal.” *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1314 n.4 (10th Cir. 1998) (citing *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721–22 (10th Cir.1993); *see also Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1141–42 (10th Cir. 2007) (“This Court will not consider a new theory advanced for the first time as an appellate issue, even a theory that is related to one that was presented to the district court.”)).

Second, even if the Court considers Intervenors’ express preemption argument, it fails as a matter of law. The ESA provides: “Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, *endangered species or threatened species* is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter....” 16 U.S.C. § 1535(f) (emphasis added). Here, the nonessential experimental population of Mexican wolves that New Mexico seeks to regulate *is not* an endangered or threatened species. Rather, the wolves comprise a third category of species regulated pursuant to the ESA. *See*

16 U.S.C. §§ 1538(a), 1539(j) (The three ESA classifications are: (1) endangered, (2) threatened, and (3) experimental populations.). Thus, by expressly limiting the preemption provision of the ESA to only endangered and threatened species, it is clear that Congress did not intend for state regulation of nonessential experimental populations to be preempted by the ESA. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758, 759–60 (9th Cir. 1983) (“Since the Secretary has not listed either the Indonesian python or the Wallaby kangaroo as “endangered” or “threatened” species, section 6(f) of the Act has no application to state regulations restricting or prohibiting trade in those species); *Humane Soc’y of the United States v. Jewell*, 76 F. Supp. 3d 69, 120 (D.D.C. 2014) (explaining that the “narrow focus on the threatened or endangered populations presumably better targets federal resources where needed and avoids unnecessary federal preemption of state regulatory authority.”).

Third, Intervenor’s assert that New Mexico’s permitting import requirements are preempted “to the extent that New Mexico’s application of that [requirement] blocks importation of wolves pursuant” to Permit TE 09155. Int. Br. at 27. This

argument lacks merit because, as described above, Permit TE 09155 expressly states: “Please note that this permit is ... functional only when used in combination with a valid state permit.” Int. Br., Addendum at 112. There cannot be express preemption when the permit at issue requires compliance with state permitting requirements.

For these reasons, Intervenor’s arguments with respect to express preemption should be rejected.

b) Conflict Preemption

Federal Appellants assert that “the doctrine of [conflict] preemption prevents New Mexico from using state law to block [the Service’s] implementation of the ESA.” FWS Br. at 37; *see also* Int. Br. at 28-29. This assertion fails because the Service can comply with both State and federal law; the State’s permitting requirements therefore do not prevent the Service from accomplishing its ESA conservation goals. *Mount Olivet Cemetery Ass’n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998).

In *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, 1191 (9th Cir. 2007), plaintiffs operated a commercial parasailing business in Hawaii pursuant to U.S. Coast Guard-issued licenses. During certain months of the year, Hawaiian law prohibited parasailing activities in areas inhabited by humpback whales. Plaintiffs brought an action alleging that its U.S. Coast Guard license preempted

Hawaii's ban on parasailing because the license granted plaintiffs a federal right of maritime passage that conflicted with the Hawaiian seasonal ban. *Id.* at 1192. The court rejected this argument, holding there was no conflict preemption. The court explained that states may impose reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power. *Id.* at 1192-93. Thus, because the Hawaiian ban was only in place for five months of the year, there was no actual conflict with federal law. *Id.* at 1193-94; *see also Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1131 (9th Cir. 1998) (state law is not preempted "if the state law could be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below Friant dam.").

In *Black Dog Outfitters, Inc. v. Idaho Outfitters & Guides Licensing Bd.*, 790 F. Supp. 2d 1248, 1252 (D. Idaho 2011), plaintiffs provided outfitting services for hunting and fishing excursions in Idaho. Among other things, plaintiffs argued that the State of Idaho's permitting and license regulations pertaining to outfitters were preempted by the Wild and Scenic River Act and the Multiple Use and Sustained Yield Act. *Id.* at 1261-62. Plaintiffs argued that Idaho's regulations were "completely inconsistent" with the federal statutes, thereby frustrating the objectives and purposes of the statutes. *Id.* at 1262-63. The court rejected this argument, explaining there was no actual conflict because (1) neither federal statute prevented the State of Idaho from regulating the issuance of outfitter

licenses, and (2) the federal agencies' own regulations required compliance with state laws. *Id.* at 1263. Thus, the court held that there was no conflict preemption.

The Service's own actions illustrate that it is possible to comply with both state and federal law, as the Service has complied with New Mexico's permit requirements in the past, and attempted to do so in this instance. Indeed, the Service's own permit requires compliance with state permitting requirements. *Int. Br., Addendum* at 112. Furthermore, New Mexico has not imposed a complete ban on releasing wolves. Rather, as in *UFO Chuting of Hawaii, Inc. v. Smith*, it has imposed reasonable, nondiscriminatory conservation and environmental protection measures to enable it to effectively manage wildlife within its borders. Thus, there is no actual conflict between the state permitting requirements and the ESA. Moreover, as in *Black Dog Outfitters, Inc. v. Idaho Outfitters & Guides Licensing Bd.*, the ESA does not prevent New Mexico from regulating the release of nonessential experimental populations, and the Service's own regulation requires compliance with State laws. In sum, the New Mexico's permitting requirements are not preempted by the ESA.

Based on the foregoing, the district court reasonably concluded that New Mexico was likely to succeed on at least one of its claims for relief. Accordingly, its decision to issue a preliminary injunction was not an abuse of discretion.

V. THE FOUNDATION’S ARGUMENTS ARE IRRELEVANT AND UNPERSUASIVE

The Foundation presents a number of political arguments that are irrelevant to the Court’s determination here. Found. Br. at 3-16. The function of the Judiciary is to “say what the law is” and to apply that law to the cases and controversies before it. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). While legislative (i.e. political) bodies maintain authority to write the law, the interpretation and application of the laws and the ultimate resolution of cases and controversies are solely within the province of the Judiciary. *Id.* For this reason, the manner in which the NMAC was revised, and the reasons for the revisions, are immaterial to the Court’s consideration of whether the district court erred in granting a preliminary injunction to New Mexico. Found. Br. at 4-16.¹⁹

Even if the Court considers the arguments presented by the Foundation, they ignore that New Mexico is, and always has been, committed to conserving and increasing the population of Mexican wolves in the wild. Prior to withdrawing from the recovery program in 2011, New Mexico was heavily involved in assisting the Service with implementation of the wolf reintroduction program, including

¹⁹ To the extent that the Foundation attempts to challenge the Commission’s decision directly, such attempts are barred by administrative res judicata. *See* Found. Br. at 7. Under fundamental exhaustion principles, if the Service wanted to challenge the Commission’s decision, it was required to file a timely action in court. The Service has not done so, and the Foundation cannot now step into the Service’s shoes and assert arguments that are precluded as a matter of law.

monitoring, response, and community outreach. However, as the Commission explained: “For years the Service has moved forward with introduction efforts in New Mexico without the aid of a current, comprehensive, science-based recovery plan to frame and inform that effort.... New Mexico withdrew from the recovery program because it grew weary of being an accomplice to an undefined and objectiveless effort.” Aplt. App. at 75. New Mexico is not opposed to releasing additional wolves into the wild in the State. It simply seeks to do so pursuant to a science-based management plan with objective recovery goals.

Setting aside the political contentions made by the Foundation, little substance remains. The Foundation cites a district court decision, *Coalition of Arizona/New Mexico Counties v. USFWS*, No. Civ. 03-508, for the proposition that the 10(j) Rule includes mitigation measures that will mitigate any harm to New Mexico. Found. Br. at 16-17; *see also id.* at 23-25 (describing the compensation programs relied upon by the district court in *Coalition of Arizona/New Mexico Counties v. USFWS*). That case is easily distinguishable from the situation here. As explained by the district court, “[t]he key factor is whether imminent injury will not be able to be compensated after the fact by monetary damages.” Aplt. App. at 164. In *Coalition of Arizona/New Mexico Counties v. USFWS*, the plaintiffs were primarily members of the livestock industry, who would have been made whole by the payment of money damages. Found. Br., Addendum at 53. To the contrary,

here, as the district court explained: “[T]he release of wolves in violation of the State permitting process, which has already occurred, cannot be compensated after the fact by monetary damages. Similarly, disruption to the State’s comprehensive wildlife management effort cannot be remedied through monetary compensation.” Apts. App. at 164. Thus, the Foundation’s arguments can be easily dismissed.

The Foundation next asserts that New Mexico has failed to establish irreparable harm because it “did have and could have knowledge of the [Mexican wolf] releases’ time, location, and number.” Found. Br. at 17-18. The Foundation cites to the Initial Release and Translocation Plan for 2016 to support this assertion. *Id.* The Foundation’s argument ignores that the 2016 release plan was issued *after* the permitting process was completed. The Service could have re-applied for a State permit once it had the information in the 2016 plan, but it failed to do so. Instead, the Service disregarded the State’s permitting requirements and proceeded with wolf releases in violation of State and federal law.

In addition, the Foundation asserts that the management provisions in the 10(j) Rule “refute the [district court’s] finding” regarding irreparable harm. Found. Br. at 19-22. The Foundation’s assertion entirely misses the point. The provisions in the 10(j) Rule relate to, among other things, opportunistic harassment and targeted removal of problem wolves. These hardly allow New Mexico to accomplish the comprehensive wildlife management scheme that it is required to

do, and has done, for the last 100 years in the State. Moreover, the management provisions cited by the Foundation, including 50 C.F.R. § 17.84(k)(7)(vi), are after-the-fact remedies that involve removal of wolves *after* they have harmed livestock or ungulate populations. Found. Br. at 19-22. The Foundation ignores that the purpose of a preliminary injunction is to protect plaintiffs from *future* irreparable harm. *E.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. at 20.

The Foundation lastly asserts that New Mexico’s “main concern was its own power.” These types of allegations, unsupported by the record, can be easily dismissed. The record reflects the systematic narrowing of the Service’s focus on increasing the Mexican wolf population, no matter what the cost, and regardless of the State’s permitting requirements. New Mexico is committed to increasing the population of Mexican wolves in the wild, but desires to do so in a manner that is based on the best available science and guided by objective, science-based recovery criteria.

CONCLUSION

For the foregoing reasons, New Mexico respectfully requests that the Court affirm the district court’s decision and uphold the issuance of a preliminary injunction.

Respectfully submitted,

DATE: October 28, 2016

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STATEMENT REGARDING ORAL ARGUMENT

New Mexico respectfully requests oral argument. In light of the posture of the case and the important federalism concerns raised by Appellants' positions, New Mexico believes that oral argument will assist the Court in resolving the issues on appeal.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the page limitation set by the Court's August 24, 2016 Order because it contains 70 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

DATE: October 28, 2016

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made pursuant to 10th Cir. R. 25.5;
2. That all hard copies filed are exact copies of ECF submissions;
3. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, Antimalware Client Version 4.7.214.0, updated October 27, 2016, and according to the program the brief is free of viruses.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 28, 2016, I filed the foregoing using CM/ECF which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 702

§ 702. Right of review

Currentness

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

CREDIT(S)

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

5 U.S.C.A. § 702, 5 USCA § 702

Current through P.L. 114-229.

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United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 703

§ 703. Form and venue of proceeding

Currentness

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

CREDIT(S)

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

5 U.S.C.A. § 703, 5 USCA § 703

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United States Code Annotated

Title 16. Conservation

Chapter 30. Wild Horses and Burros: Protection, Management and Control (Refs & Annos)

16 U.S.C.A. § 1333

§ 1333. Powers and duties of Secretary

Effective: December 8, 2004

[Currentness](#)

(a) Jurisdiction; management; ranges; ecological balance objectives; scientific recommendations; forage allocation adjustments

All wild free-roaming horses and burros are hereby declared to be under the jurisdiction of the Secretary for the purpose of management and protection in accordance with the provisions of this chapter. The Secretary is authorized and directed to protect and manage wild free-roaming horses and burros as components of the public lands, and he may designate and maintain specific ranges on public lands as sanctuaries for their protection and preservation, where the Secretary after consultation with the wildlife agency of the State wherein any such range is proposed and with the Advisory Board established in [section 1337](#) of this title deems such action desirable. The Secretary shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands. He shall consider the recommendations of qualified scientists in the field of biology and ecology, some of whom shall be independent of both Federal and State agencies and may include members of the Advisory Board established in [section 1337](#) of this title. All management activities shall be at the minimal feasible level and shall be carried out in consultation with the wildlife agency of the State wherein such lands are located in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species. Any adjustments in forage allocations on any such lands shall take into consideration the needs of other wildlife species which inhabit such lands.

(b) Inventory and determinations; consultation; overpopulation; research study; submittal to Congress

(1) The Secretary shall maintain a current inventory of wild free-roaming horses and burros on given areas of the public lands. The purpose of such inventory shall be to: make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals; determine appropriate management levels of wild free-roaming horses and burros on these areas of the public lands; and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels). In making such determinations the Secretary shall consult with the United States Fish and Wildlife Service, wildlife agencies of the State or States wherein wild free-roaming horses and burros are located, such individuals independent of Federal and State government as have been recommended by the National Academy of Sciences, and such other individuals whom he determines have scientific expertise and special knowledge of wild horse and burro protection, wildlife management and animal husbandry as related to rangeland management.

(2) Where the Secretary determines on the basis of (i) the current inventory of lands within his jurisdiction; (ii) information contained in any land use planning completed pursuant to [section 1712 of Title 43](#); (iii) information contained in court ordered environmental impact statements as defined in [section 1902 of Title 43](#); and (iv) such additional information as becomes available to him from time to time, including that information developed in the research study mandated by this section, or in the absence of the information contained in (i-iv) above on the basis of all information currently

available to him, that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels. Such action shall be taken, in the following order and priority, until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation:

(A) The Secretary shall order old, sick, or lame animals to be destroyed in the most humane manner possible;

(B) The Secretary shall cause such number of additional excess wild free-roaming horses and burros to be humanely captured and removed for private maintenance and care for which he determines an adoption demand exists by qualified individuals, and for which he determines he can assure humane treatment and care (including proper transportation, feeding, and handling): *Provided*, That, not more than four animals may be adopted per year by any individual unless the Secretary determines in writing that such individual is capable of humanely caring for more than four animals, including the transportation of such animals by the adopting party; and

(C) The Secretary shall cause additional excess wild free-roaming horses and burros for which an adoption demand by qualified individuals does not exist to be destroyed in the most humane and cost efficient manner possible.

(3) For the purpose of furthering knowledge of wild horse and burro population dynamics and their interrelationship with wildlife, forage and water resources, and assisting him in making his determination as to what constitutes excess animals, the Secretary shall contract for a research study of such animals with such individuals independent of Federal and State government as may be recommended by the National Academy of Sciences for having scientific expertise and special knowledge of wild horse and burro protection, wildlife management and animal husbandry as related to rangeland management. The terms and outline of such research study shall be determined by a research design panel to be appointed by the President of the National Academy of Sciences. Such study shall be completed and submitted by the Secretary to the Senate and House of Representatives on or before January 1, 1983.

(c) Title of transferee to limited number of excess animals adopted for requisite period

Where excess animals have been transferred to a qualified individual for adoption and private maintenance pursuant to this chapter and the Secretary determines that such individual has provided humane conditions, treatment and care for such animal or animals for a period of one year, the Secretary is authorized upon application by the transferee to grant title to not more than four animals to the transferee at the end of the one-year period.

(d) Loss of status as wild free-roaming horses and burros; exclusion from coverage

Wild free-roaming horses and burros or their remains shall lose their status as wild free-roaming horses or burros and shall no longer be considered as falling within the purview of this chapter--

(1) upon passage of title pursuant to subsection (c) of this section except for the limitation of subsection (c)(1)¹ of this section; or

(2) if they have been transferred for private maintenance or adoption pursuant to this chapter and die of natural causes before passage of title; or

(3) upon destruction by the Secretary or his designee pursuant to subsection (b) of this section; or

(4) if they die of natural causes on the public lands or on private lands where maintained thereon pursuant to [section 1334](#) of this title and disposal is authorized by the Secretary or his designee; or

(5) upon destruction or death for purposes of or incident to the program authorized in this section.

(e) Sale of excess animals

(1) In general

Any excess animal or the remains of an excess animal shall be sold if--

(A) the excess animal is more than 10 years of age; or

(B) the excess animal has been offered unsuccessfully for adoption at least 3 times.

(2) Method of sale

An excess animal that meets either of the criteria in paragraph (1) shall be made available for sale without limitation, including through auction to the highest bidder, at local sale yards or other convenient livestock selling facilities, until such time as--

(A) all excess animals offered for sale are sold; or

(B) the appropriate management level, as determined by the Secretary, is attained in all areas occupied by wild free-roaming horses and burros.

(3) Disposition of funds

Funds generated from the sale of excess animals under this subsection shall be--

(A) credited as an offsetting collection to the Management of Lands and Resources appropriation for the Bureau of Land Management; and

(B) used for the costs relating to the adoption of wild free-roaming horses and burros, including the costs of marketing such adoption.

(4) Effect of sale

Any excess animal sold under this provision shall no longer be considered to be a wild free-roaming horse or burro for purposes of this chapter.

CREDIT(S)

(Pub.L. 92-195, § 3, Dec. 15, 1971, 85 Stat. 649; [Pub.L. 95-514](#), § 14(a), Oct. 25, 1978, 92 Stat. 1808; [Pub.L. 108-447](#), Div. E, Title I, § 142(a), Dec. 8, 2004, 118 Stat. 3070.)

Footnotes

¹ So in original. Probably should be “subsection (c)”.

16 U.S.C.A. § 1333, 16 USCA § 1333

Current through P.L. 114-229.

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

[United States Code Annotated](#)

[Title 16. Conservation](#)

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

16 U.S.C.A. § 1535

§ 1535. Cooperation with States

[Currentness](#)

(a) Generally

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

(b) Management agreements

The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of [section 715s](#) of this title.

(c) Cooperative agreements

(1) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program--

(A) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened; or

that under the State program--

(i) the requirements set forth in subparagraphs (C), (D), and (E) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to [section 1533\(d\)](#) of this title or [section 1538\(a\)\(1\)](#) of this title with respect to the taking of any resident endangered or threatened species.

(2) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program--

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or

that under the State program--

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to [section 1533\(d\)](#) or [section 1538\(a\) \(1\)](#) of this title with respect to the taking of any resident endangered or threatened species.

(d) Allocation of funds

(1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered and threatened species or to assist in monitoring the status of candidate species pursuant to [subparagraph \(C\) of section 1533\(b\)\(3\)](#) of this title and recovered species pursuant to [section 1533\(g\)](#) of this title. The Secretary shall allocate each annual appropriation made in accordance with the provisions of subsection (i) of this section to such States based on consideration of--

(A) the international commitments of the United States to protect endangered species or threatened species;

(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this chapter;

(C) the number of endangered species and threatened species within a State;

(D) the potential for restoring endangered species and threatened species within a State;

(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species;

(F) the importance of monitoring the status of candidate species within a State to prevent a significant risk to the well being of any such species; and

(G) the importance of monitoring the status of recovered species within a State to assure that such species do not return to the point at which the measures provided pursuant to this chapter are again necessary.

So much of the annual appropriation made in accordance with provisions of subsection (i) of this section allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available

to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.

(2) Such cooperative agreements shall provide for (A) the actions to be taken by the Secretary and the States; (B) the benefits that are expected to be derived in connection with the conservation of endangered or threatened species; (C) the estimated cost of these actions; and (D) the share of such costs to be borne by the Federal Government and by the States; except that--

(i) the Federal share of such program costs shall not exceed 75 percent of the estimated program cost stated in the agreement; and

(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such States, enter jointly into an agreement with the Secretary.

The Secretary may, in his discretion, and under such rules and regulations as he may prescribe, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement. For the purposes of this section, the non-Federal share may, in the discretion of the Secretary, be in the form of money or real property, the value of which will be determined by the Secretary, whose decision shall be final.

(e) Review of State programs

Any action taken by the Secretary under this section shall be subject to his periodic review at no greater than annual intervals.

(f) Conflicts between Federal and State laws

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

(g) Transition

(1) For purposes of this subsection, the term "establishment period" means, with respect to any State, the period beginning on December 28, 1973, and ending on whichever of the following dates first occurs: (A) the date of the close of the 120-day period following the adjournment of the first regular session of the legislature of such State which commences after December 28, 1973, or (B) the date of the close of the 15-month period following December 28, 1973.

(2) The prohibitions set forth in or authorized pursuant to [sections 1533\(d\)](#) and [1538\(a\)\(1\)\(B\)](#) of this title shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law) within any State--

(A) which is then a party to a cooperative agreement with the Secretary pursuant to subsection (c) of this section (except to the extent that the taking of any such species is contrary to the law of such State); or

(B) except for any time within the establishment period when--

(i) the Secretary applies such prohibition to such species at the request of the State, or

(ii) the Secretary applies such prohibition after he finds, and publishes his finding, that an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hearing or comment provisions of [section 553 of Title 5](#) or any other provision of this chapter; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

(h) Regulations

The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

(i) Appropriations

(1) To carry out the provisions of this section for fiscal years after September 30, 1988, there shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an amount equal to 5 percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under [section 669b](#) of this title, and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

CREDIT(S)

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

16 U.S.C.A. § 1535, 16 USCA § 1535
Current through P.L. 114-229.

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Proposed Legislation

[United States Code Annotated](#)

[Title 16. Conservation](#)

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

16 U.S.C.A. § 1536

§ 1536. Interagency cooperation

[Currentness](#)

(a) Federal agency actions and consultations

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

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

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

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

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a) (2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)--

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth--

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a) (3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a) (2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a) (3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a) (2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that--

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to [section 1371\(a\)\(5\)](#) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with [section 1371\(a\)\(5\)](#) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a) (2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 ([42 U.S.C. 4332](#)).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a) (2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a) (2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the “Committee”).

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a) (2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g) (2) (B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under [section 5703 of Title 5](#).

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [[5 U.S.C.A. § 552a](#)], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3) (G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to--

- (1) a description of the consultation process carried out pursuant to subsection (a) (2) of this section between the head of the Federal agency and the Secretary; and
- (2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a) (2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a) (2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a) (2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary--

(A) determine that the Federal agency concerned and the exemption applicant have--

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a) (2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A) (i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of Title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3) (A) (i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with [sections 554, 555, and 556](#) (other than subsection (b) (1) and (2) thereof) of Title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing--

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with [sections 554, 555, and 556](#) (other than [subsection \(b\) \(3\) of section 556](#)) of Title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g) (5) of this section. The Committee shall grant an exemption from the requirements of subsection (a) (2) of this section for an agency action if, by a vote of not less than five of its members voting in person--

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g) (4) of this section and on such other testimony or evidence as it may receive, that--

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action--

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless--

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a) (2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by

the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of [section 1540\(g\)](#) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a) (2) of this section.

(n) Judicial review

Any person, as defined by [section 1532\(13\)](#) of this title, may obtain judicial review, under chapter 7 of Title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in [section 2112 of Title 28](#). Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding [sections 1533\(d\)](#) and [1538\(a\)\(1\)\(B\) and \(C\)](#) of this title, [sections 1371](#) and [1372](#) of this title, or any regulation promulgated to implement any such section--

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. §§ 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

CREDIT(S)

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

16 U.S.C.A. § 1536, 16 USCA § 1536
Current through P.L. 114-229.

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KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Limitation Recognized by *Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers*, 11th Cir.(Fla.), Sep. 15, 2010



KeyCite Yellow Flag - Negative Treatment Proposed Legislation

[United States Code Annotated](#)

[Title 16. Conservation](#)

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

16 U.S.C.A. § 1538

§ 1538. Prohibited acts

[Currentness](#)

(a) Generally

(1) Except as provided in [sections 1535\(g\)\(2\)](#) and [1539](#) of this title, with respect to any endangered species of fish or wildlife listed pursuant to [section 1533](#) of this title it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or 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 by this chapter.

(2) Except as provided in [sections 1535\(g\)\(2\)](#) and [1539](#) of this title, with respect to any endangered species of plants listed pursuant to [section 1533](#) of this title, it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to [section 1533](#) of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(b) Species held in captivity or controlled environment

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to [subsection \(c\) of section 1533](#) of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to [subsection \(c\) of section 1533](#) of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsection (a) (1) of this section shall not apply to--

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i);

until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) Violation of Convention

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if--

(A) such fish or wildlife is not an endangered species listed pursuant to [section 1533](#) of this title but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter.

(d) Imports and exports

(1) In general

It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business--

(A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to [section 1533](#) of this title as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or

(B) as an importer or exporter of any amount of raw or worked African elephant ivory.

(2) Requirements

Any person required to obtain permission under paragraph (1) of this subsection shall--

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by him and the subsequent disposition made by him with respect to such fish, wildlife, plants, or ivory;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

(3) Regulations

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(4) Restriction on consideration of value or amount of African elephant ivory imported or exported

In granting permission under this subsection for importation or exportation of African elephant ivory, the Secretary shall not vary the requirements for obtaining such permission on the basis of the value or amount of ivory imported or exported under such permission.

(e) Reports

It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to [section 1533](#) of this title as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this chapter or to meet the obligations of the Convention.

(f) Designation of ports

(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to [section 1533](#) of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary of the Interior. For the purpose of facilitating enforcement of this chapter and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 668cc-4(d) of this title, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) Violations

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

CREDIT(S)

([Pub.L. 93-205](#), § 9, Dec. 28, 1973, 87 Stat. 893; [Pub.L. 95-632](#), § 4, Nov. 10, 1978, 92 Stat. 3760; [Pub.L. 97-304](#), § 9(b), Oct. 13, 1982, 96 Stat. 1426; [Pub.L. 100-478, Title I, § 1006, Title II, § 2301](#), Oct. 7, 1988, 102 Stat. 2308, 2321; [Pub.L. 100-653, Title IX, § 905](#), Nov. 14, 1988, 102 Stat. 3835.)

16 U.S.C.A. § 1538, 16 USCA § 1538
Current through P.L. 114-229.

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KeyCite Yellow Flag - Negative Treatment Proposed Legislation

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[Title 16. Conservation](#)

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

16 U.S.C.A. § 1539

§ 1539. Exceptions

[Currentness](#)

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe--

(A) any act otherwise prohibited by [section 1538](#) of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by [section 1538\(a\)\(1\)\(B\)](#) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies--

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that--

- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

(b) Hardship exemptions

(1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to [section 1533](#) of this title will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of [section 1538\(a\)](#) of this title to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to December 28, 1973, shall expire in accordance with the terms of section 668cc-3 of this title; and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

(2) As used in this subsection, the term “undue economic hardship” shall include, but not be limited to:

(A) substantial economic loss resulting from inability caused by this chapter to perform contracts with respect to species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species;

(B) substantial economic loss to persons who, for the year prior to the notice of consideration of such species as an endangered species, derived a substantial portion of their income from the lawful taking of any listed species, which taking would be made unlawful under this chapter; or

(C) curtailment of subsistence taking made unlawful under this chapter by persons (i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes.

(3) The Secretary may make further requirements for a showing of undue economic hardship as he deems fit. Exceptions granted under this section may be limited by the Secretary in his discretion as to time, area, or other factor of applicability.

(c) Notice and review

The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application; except that such thirty-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

(d) Permit and exemption policy

The Secretary may grant exceptions under subsections (a)(1)(A) and (b) of this section only if he finds and publishes his finding in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in [section 1531](#) of this title.

(e) Alaska natives

(1) Except as provided in paragraph (4) of this subsection the provisions of this chapter shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by--

(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or

(B) any non-native permanent resident of an Alaskan native village;

if such taking is primarily for subsistence purposes. Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the

Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

(2) Any taking under this subsection may not be accomplished in a wasteful manner.

(3) As used in this subsection--

(i) The term “subsistence” includes selling any edible portion of fish or wildlife in native villages and towns in Alaska for native consumption within native villages or towns; and

(ii) The term “authentic native articles of handicrafts and clothing” means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.

(4) Notwithstanding the provisions of paragraph (1) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village. Such regulations may be established with reference to species, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the policy of this chapter. Such regulations shall be prescribed after a notice and hearings in the affected judicial districts of Alaska and as otherwise required by [section 1373](#) of this title, and shall be removed as soon as the Secretary determines that the need for their impositions has disappeared.

(f) Pre-Act endangered species parts exemption; application and certification; regulation; validity of sales contract; separability; renewal of exemption; expiration of renewal certification

(1) As used in this subsection--

(A) The term “pre-Act endangered species part” means--

(i) any sperm whale oil, including derivatives thereof, which was lawfully held within the United States on December 28, 1973, in the course of a commercial activity; or

(ii) any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

(B) The term “scrimshaw product” means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from, any bone or tooth of any marine mammal of

the order Cetacea. For purposes of this subsection, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving.

(2) The Secretary, pursuant to the provisions of this subsection, may exempt, if such exemption is not in violation of the Convention, any pre-Act endangered species part from one or more of the following prohibitions:

(A) The prohibition on exportation from the United States set forth in [section 1538\(a\)\(1\)\(A\)](#) of this title.

(B) Any prohibition set forth in [section 1538\(a\)\(1\)\(E\) or \(F\)](#) of this title.

(3) Any person seeking an exemption described in paragraph (2) of this subsection shall make application therefor to the Secretary in such form and manner as he shall prescribe, but no such application may be considered by the Secretary unless the application--

(A) is received by the Secretary before the close of the one-year period beginning on the date on which regulations promulgated by the Secretary to carry out this subsection first take effect;

(B) contains a complete and detailed inventory of all pre-Act endangered species parts for which the applicant seeks exemption;

(C) is accompanied by such documentation as the Secretary may require to prove that any endangered species part or product claimed by the applicant to be a pre-Act endangered species part is in fact such a part; and

(D) contains such other information as the Secretary deems necessary and appropriate to carry out the purposes of this subsection.

(4) If the Secretary approves any application for exemption made under this subsection, he shall issue to the applicant a certificate of exemption which shall specify--

(A) any prohibition in [section 1538\(a\)](#) of this title which is exempted;

(B) the pre-Act endangered species parts to which the exemption applies;

(C) the period of time during which the exemption is in effect, but no exemption made under this subsection shall have force and effect after the close of the three-year period beginning on the date of issuance of the certificate unless such exemption is renewed under paragraph (8); and

(D) any term or condition prescribed pursuant to paragraph (5)(A) or (B), or both, which the Secretary deems necessary or appropriate.

(5) The Secretary shall prescribe such regulations as he deems necessary and appropriate to carry out the purposes of this subsection. Such regulations may set forth--

(A) terms and conditions which may be imposed on applicants for exemptions under this subsection (including, but not limited to, requirements that applicants register inventories, keep complete sales records, permit duly authorized agents of the Secretary to inspect such inventories and records, and periodically file appropriate reports with the Secretary); and

(B) terms and conditions which may be imposed on any subsequent purchaser of any pre-Act endangered species part covered by an exemption granted under this subsection;

to insure that any such part so exempted is adequately accounted for and not disposed of contrary to the provisions of this chapter. No regulation prescribed by the Secretary to carry out the purposes of this subsection shall be subject to [section 1533\(f\)\(2\)\(A\)\(i\)](#) of this title.

(6)(A) Any contract for the sale of pre-Act endangered species parts which is entered into by the Administrator of General Services prior to the effective date of this subsection and pursuant to the notice published in the Federal Register on January 9, 1973, shall not be rendered invalid by virtue of the fact that fulfillment of such contract may be prohibited under [section 1538\(a\)\(1\)\(F\)](#) of this title.

(B) In the event that this paragraph is held invalid, the validity of the remainder of this chapter, including the remainder of this subsection, shall not be affected.

(7) Nothing in this subsection shall be construed to--

(A) exonerate any person from any act committed in violation of [paragraphs \(1\)\(A\), \(1\)\(E\), or \(1\)\(F\) of section 1538\(a\)](#) of this title prior to July 12, 1976; or

(B) immunize any person from prosecution for any such act.

(8)(A)(i) ¹ Any valid certificate of exemption which was renewed after October 13, 1982, and was in effect on March 31, 1988, shall be deemed to be renewed for a six-month period beginning on October 7, 1988. Any person holding such a certificate may apply to the Secretary for one additional renewal of such certificate for a period not to exceed 5 years beginning on October 7, 1988.

(B) If the Secretary approves any application for renewal of an exemption under this paragraph, he shall issue to the applicant a certificate of renewal of such exemption which shall provide that all terms, conditions, prohibitions, and other regulations made applicable by the previous certificate shall remain in effect during the period of the renewal.

(C) No exemption or renewal of such exemption made under this subsection shall have force and effect after the expiration date of the certificate of renewal of such exemption issued under this paragraph.

(D) No person may, after January 31, 1984, sell or offer for sale in interstate or foreign commerce, any pre-Act finished scrimshaw product unless such person holds a valid certificate of exemption issued by the Secretary under this subsection, and unless such product or the raw material for such product was held by such person on October 13, 1982.

(g) Burden of proof

In connection with any action alleging a violation of [section 1538](#) of this title, any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.

(h) Certain antique articles; importation; port designation; application for return of articles

(1) [Sections 1533\(d\)](#) and [1538\(a\)](#) and (c) of this title do not apply to any article which--

(A) is not less than 100 years of age;

(B) is composed in whole or in part of any endangered species or threatened species listed under [section 1533](#) of this title;

(C) has not been repaired or modified with any part of any such species on or after December 28, 1973; and

(D) is entered at a port designated under paragraph (3).

(2) Any person who wishes to import an article under the exception provided by this subsection shall submit to the customs officer concerned at the time of entry of the article such documentation as the Secretary of the Treasury, after consultation with the Secretary of the Interior, shall by regulation require as being necessary to establish that the article meets the requirements set forth in paragraph (1)(A), (B), and (C).

(3) The Secretary of the Treasury, after consultation with the Secretary of the Interior, shall designate one port within each customs region at which articles described in paragraph (1)(A), (B), and (C) must be entered into the customs territory of the United States.

(4) Any person who imported, after December 27, 1973, and on or before November 10, 1978, any article described in paragraph (1) which--

(A) was not repaired or modified after the date of importation with any part of any endangered species or threatened species listed under [section 1533](#) of this title;

(B) was forfeited to the United States before November 10, 1978, or is subject to forfeiture to the United States on such date of enactment, pursuant to the assessment of a civil penalty under [section 1540](#) of this title; and

(C) is in the custody of the United States on November 10, 1978;

may, before the close of the one-year period beginning on November 10, 1978, make application to the Secretary for return of the article. Application shall be made in such form and manner, and contain such documentation, as the Secretary prescribes. If on the basis of any such application which is timely filed, the Secretary is satisfied that the requirements of this paragraph are met with respect to the article concerned, the Secretary shall return the article to the applicant and the importation of such article shall, on and after the date of return, be deemed to be a lawful importation under this chapter.

(i) Noncommercial transshipments

Any importation into the United States of fish or wildlife shall, if--

(1) such fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any;

(2) such fish or wildlife is in transit or transshipment through any place subject to the jurisdiction of the United States en route to a country where such fish or wildlife may be lawfully imported and received;

(3) the exporter or owner of such fish or wildlife gave explicit instructions not to ship such fish or wildlife through any place subject to the jurisdiction of the United States, or did all that could have reasonably been done to prevent transshipment, and the circumstances leading to the transshipment were beyond the exporter's or owner's control;

(4) the applicable requirements of the Convention have been satisfied; and

(5) such importation is not made in the course of a commercial activity,

be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter while such fish or wildlife remains in the control of the United States Customs Service.

(j) Experimental populations

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

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

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

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

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

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

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

CREDIT(S)

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

Footnotes

¹ So in original. No. cl. (ii) has been enacted.

16 U.S.C.A. § 1539, 16 USCA § 1539

Current through P.L. 114-229.

Code of Federal Regulations

Title 43. Public Lands: Interior

Subtitle A. Office of the Secretary of the Interior

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

43 C.F.R. § 24.1

§ 24.1 Introduction.

Currentness

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

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

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

¹ “States” refers to all of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, the Commonwealth of Northern Mariana Islands and other territorial possessions, and the constituent units of government upon which these entities may have conferred authorities related to fish and wildlife matters.

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

AUTHORITY: 43 U.S.C. 1201.

Current through October 13, 2016; 81 FR 70906.

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Code of Federal Regulations

Title 43. Public Lands: Interior

Subtitle A. Office of the Secretary of the Interior

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

43 C.F.R. § 24.4

§ 24.4 Resource management and public activities on Federal lands.

Currentness

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

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

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

(d) While the several States therefore possess primary authority and responsibility for management of fish and resident wildlife on Bureau of Land Management lands, the Secretary, through the Bureau of Land Management, has custody of the land itself and the habitat upon which fish and resident wildlife are dependent. Management of the habitat is a responsibility of the Federal Government. Nevertheless, Congress in the Sikes Act has directed the Secretary of the Interior to cooperate with the States in developing programs on certain public lands, including those administered by

BLM and the Department of Defense, for the conservation and rehabilitation of fish and wildlife including specific habitat improvement projects.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Current through October 13, 2016; 81 FR 70906.

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Code of Federal Regulations

Title 50. Wildlife and Fisheries

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

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

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

Subpart H. Experimental Populations (Refs & Annos)

50 C.F.R. § 17.80

§ 17.80 Definitions.

Currentness

(a) The term experimental population means an introduced and/or designated population (including any off-spring arising solely therefrom) that has been so designated in accordance with the procedures of this subpart but only when, and at such times as the population is wholly separate geographically from nonexperimental populations of the same species. Where part of an experimental population overlaps with natural populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will only be recognized outside the areas of overlap. Thus, such a population shall be treated as experimental only when the times of geographic separation are reasonably predictable; e.g., fixed migration patterns, natural or man-made barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.

(b) The term essential experimental population means an experimental population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild. All other experimental populations are to be classified as nonessential.

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

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

Current through October 13, 2016; 81 FR 70906.

End of Document

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Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter I. United States Fish and Wildlife Service, Department of the Interior
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of Wildlife and Plants
Part 17. Endangered and Threatened Wildlife and Plants (Refs & Annos)
Subpart H. Experimental Populations (Refs & Annos)

50 C.F.R. § 17.81

§ 17.81 Listing.

Currentness

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

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

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

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

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

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

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

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

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

(d) The Fish and Wildlife Service shall consult with appropriate State fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population.

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

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

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

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

Current through October 13, 2016; 81 FR 70906.

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

50 C.F.R. § 17.82

§ 17.82 Prohibitions.

Currentness

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

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

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50 C.F.R. § 17.84

§ 17.84 Special rules—vertebrates.

Effective: December 16, 2015
Currentness

(a) [Reserved by 80 FR 70717]

(b) Colorado squawfish (*Ptychocheilus lucius*) and woundfin (*Plagopterus argentissimus*).

(1) The Colorado squawfish and woundfin populations identified in paragraph (6) below are experimental, nonessential populations.

(2) No person shall take the species, except in accordance with applicable State or Tribal fish and wildlife conservation laws and regulations in the following instances:

(i) For educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act; or

(ii) Incidental to otherwise lawful activities, provided that the individual fish taken, if still alive, is immediately returned to its habitat.

(3) Any violation of applicable State or Tribal fish and wildlife conservation laws or regulations with respect to the taking of this species (other than incidental taking as described in paragraph (b)(2)(ii) of this section) will also be a violation of the Endangered Species Act.

(c) Red wolf (*Canis rufus*).

(1) The red wolf populations identified in paragraphs (c)(9)(i) and (c)(9)(ii) of this section are nonessential experimental populations.

(2) No person may take this species, except as provided in paragraphs (c)(3) through (5) and (10) of this section.

(3) Any person with a valid permit issued by the Service under § 17.32 may take red wolves for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act and in accordance with applicable State fish and wildlife conservation laws and regulations;

(4)(i) Any person may take red wolves found on private land in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, Provided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others; and that such taking is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(ii) Any person may take red wolves found on lands owned or managed by Federal, State, or local government agencies in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, Provided that such taking is incidental to lawful activities, is unavoidable, unintentional, and not exhibiting a lack of reasonable due care, or is in defense of that person's own life or the lives of others, and that such taking is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(iii) Any private landowner, or any other individual having his or her permission, may take red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section when the wolves are in the act of killing livestock or pets, Provided that freshly wounded or killed livestock or pets are evident and that all such taking shall be reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(iv) Any private landowner, or any other individual having his or her permission, may harass red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section, Provided that all such harassment is by methods that are not lethal or physically injurious to the red wolf and is reported within 24 hours to the refuge manager (for the red wolf population defined in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer, as noted in paragraph (c)(6) of this section for investigation.

(v) Any private landowner may take red wolves found on his or her property in the areas defined in paragraphs (c)(9)(i) and (ii) of this section after efforts by project personnel to capture such animals have been abandoned, Provided that the Service project leader or biologist has approved such actions in writing and all such taking shall be reported within 24 hours to the Service project leader or biologist, the refuge manager (for the red wolf population defined

in paragraph (c)(9)(i) of this section), the Park superintendent (for the red wolf population defined in paragraph (c)(9)(ii) of this section), or the State wildlife enforcement officer for investigation.

(vi) The provisions of paragraphs (4)(i) through (v) of this section apply to red wolves found in areas outside the areas defined in paragraphs (c)(9)(i) and (ii) of this section, with the exception that reporting of taking or harassment to the refuge manager, Park superintendent, or State wildlife enforcement officer, while encouraged, is not required.

(5) Any employee or agent of the Service or State conservation agency who is designated for such purposes, when acting in the course of official duties, may take a red wolf if such action is necessary to:

(i) Aid a sick, injured, or orphaned specimen;

(ii) Dispose of a dead specimen, or salvage a dead specimen which may be useful for scientific study;

(iii) Take an animal that constitutes a demonstrable but non-immediate threat to human safety, or which is responsible for depredations to lawfully present domestic animals or other personal property, if it has not been possible to otherwise eliminate such depredation or loss of personal property. Provided That such taking must be done in a humane manner, and may involve killing or injuring the animal only if it has not been possible to eliminate such threat by live capturing and releasing the specimen unharmed on the refuge or Park;

(iv) Move an animal for genetic purposes.

(6) Any taking pursuant to paragraphs (c)(3) through (5) of this section must be immediately reported to either the Refuge Manager, Alligator River National Wildlife Refuge, Manteo, North Carolina, telephone 919/473-1131, or the Superintendent, Great Smoky Mountains National Park, Gatlinburg, Tennessee, telephone 615/436-1294. Either of these persons will determine disposition of any live or dead specimens.

(7) No person shall possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any such species taken in violation of these regulations or in violation of applicable State fish and wildlife laws or regulations or the Endangered Species Act.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (c) (2) through (7) of this section.

(9)(i) The Alligator River reintroduction site is within the historic range of the species in North Carolina, in Dare, Hyde, Tyrrell, and Washington Counties; because of its proximity and potential conservation value, Beaufort County is also included in the experimental population designation.

(ii) The red wolf also historically occurred on lands that now comprise the Great Smoky Mountains National Park. The Park encompasses properties within Haywood and Swain Counties in North Carolina, and Blount, Cocke, and Sevier Counties in Tennessee. Graham, Jackson, and Madison Counties in North Carolina, and Monroe County

in Tennessee, are also included in the experimental designation because of the close proximity of these counties to the Park boundary.

(iii) Except for the three island propagation projects and these small reintroduced populations, the red wolf is extirpated from the wild. Therefore, there are no other extant populations with which the refuge or Park experimental populations could come into contact.

(10) The reintroduced populations will be monitored closely for the duration of the project, generally using radio telemetry as appropriate. All animals released or captured will be vaccinated against diseases prevalent in canids prior to release. Any animal that is determined to be in need of special care or that moves onto lands where the landowner requests their removal will be recaptured, if possible, by Service and/or Park Service and/or designated State wildlife agency personnel and will be given appropriate care. Such animals will be released back into the wild as soon as possible, unless physical or behavioral problems make it necessary to return the animals to a captive-breeding facility.

(11) The status of the Alligator River National Wildlife Refuge project will be reevaluated by October 1, 1992, to determine future management status and needs. This review will take into account the reproductive success of the mated pairs, movement patterns of individual animals, food habits, and overall health of the population. The duration of the first phase of the Park project is estimated to be 10 to 12 months. After that period, an assessment of the reintroduction potential of the Park for red wolves will be made. If a second phase of reintroduction is attempted, the duration of that phase will be better defined during the assessment. However, it is presently thought that a second phase would last for 3 years, after which time the red wolf would be treated as a resident species within the Park. Throughout these periods, the experimental and nonessential designation of the animals will remain in effect.

(d) Topeka shiner (*Notropis topeka*).

(1) Where is the Topeka shiner designated as a nonessential experimental population (NEP)?

(i) The NEP area for the Topeka shiner is within the species' historical range and includes those waters within the Missouri counties of Adair, Gentry, Harrison, Putnam, Sullivan, and Worth identified below in paragraph (d)(5) of this section.

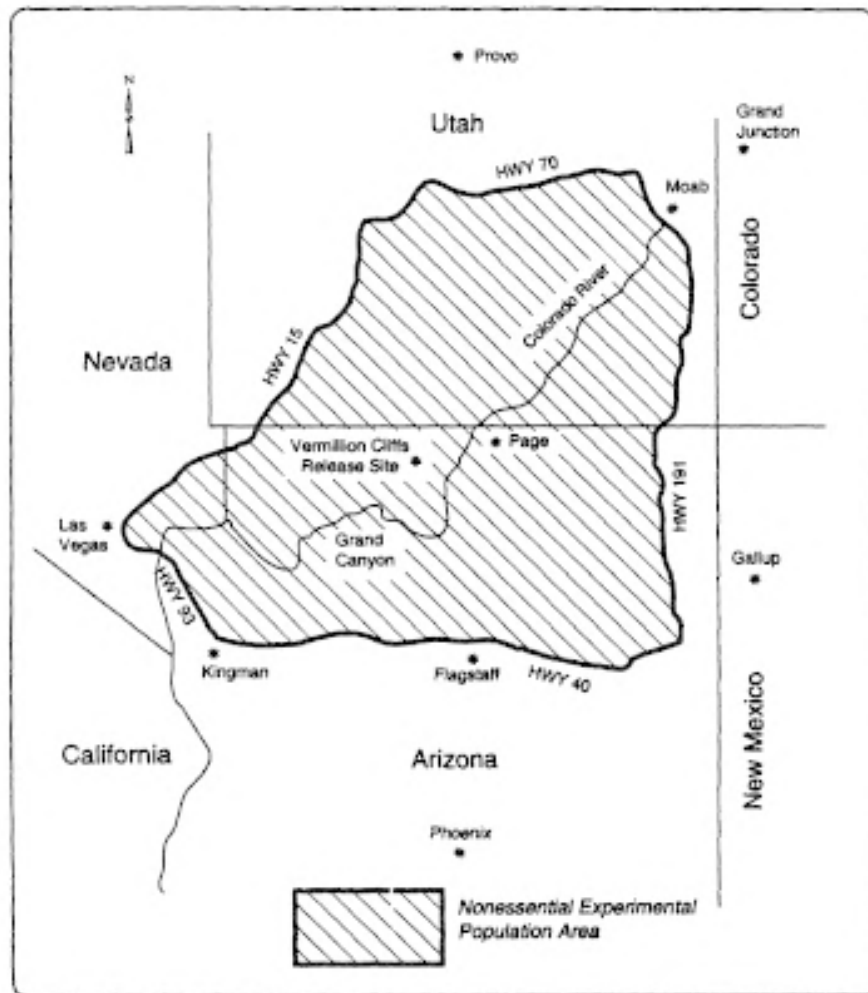
(ii) The Topeka shiner is not known to currently exist in Adair, Gentry, Putnam, Sullivan, and Worth Counties in Missouri, or in those portions of Harrison County, Missouri, where the NEP is being designated. Based on its habitat requirements and potential predation by other fish predators, we do not expect this species to become established outside this NEP area, although there is a remote chance it may.

(iii) We will not change the NEP designations to “essential experimental,” “threatened,” or “endangered” within the NEP area without a public rulemaking. Additionally, we will not designate critical habitat for this NEP, as provided by 16 U.S.C. 1539(j)(2)(C)(ii).

(2) What activities are not allowed in the NEP area?

CALIFORNIA CONDOR

Nonessential Experimental
Population Area And Release Site



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

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

(2) Determinations. The Mexican wolf population reestablished in the Mexican Wolf Experimental Population Area (MWEPA), identified in paragraph (k)(4) of this section, is one nonessential experimental population. This nonessential experimental population will be managed according to the provisions of this rule. The Service does not

intend to change the nonessential experimental designation to essential experimental, threatened, or endangered. Critical habitat cannot be designated under the nonessential experimental classification, [16 U.S.C. 1539\(j\)\(2\)\(C\)\(ii\)](#).

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

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

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

Depredation means the confirmed killing or wounding of lawfully present domestic animals by one or more Mexican wolves. The Service, Wildlife Services, or other Service-designated agencies will confirm cases of wolf depredation on lawfully present domestic animals. Cattle trespassing on Federal lands are not considered lawfully present domestic animals.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Opportunistic harassment means scaring any Mexican wolf from the immediate area by taking actions such as discharging firearms or other projectile-launching devices in proximity to, but not in the direction of, the wolf, throwing objects at it, or making loud noise in proximity to it. Such harassment might cause temporary,

non-debilitating physical injury, but is not reasonably anticipated to cause permanent physical injury or death. Opportunistic harassment of Mexican wolves can occur without a permit issued by the Service or its designated agency.

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

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

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

(C) Aggressive when unprovoked toward humans.

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

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

Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct ([16 U.S.C. 1532\(19\)](#)).

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

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

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

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

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

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

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

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

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

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

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

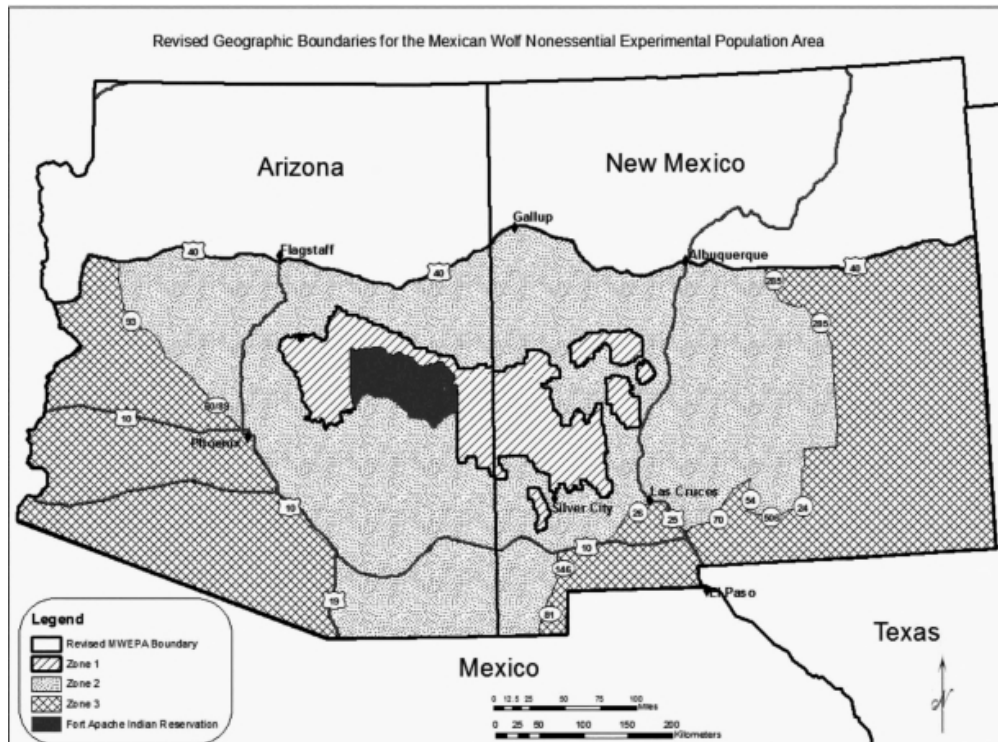
Zone 3 means an area within the MWEPA into which Mexican wolves will be allowed to disperse and occupy, but neither initial releases nor translocations will occur there.

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

(B) Zone 3 is two separate geographic areas on the eastern and western sides of the MWEPA. One area of Zone 3 is in western Arizona, and the other is in eastern New Mexico. In Arizona, the northern boundary of Zone 3 is Interstate Highway 40; the eastern boundary extends south from Interstate Highway 40 and follows State Highway 93, State Highway 89/60, Interstate Highway 10, and Interstate Highway 19 to the United States–Mexico international border; the southern boundary is the United States–Mexico international border; the western boundary is the Arizona–California State border. In New Mexico, the northern boundary of Zone 3 is Interstate Highway 40; the eastern boundary is the New Mexico–Texas State border; the southern boundary is the United States–Mexico international border heading west, then follows State Highway 81/146 north to Interstate Highway 10, then along State Highway 26 to Interstate Highway 25, the southern boundary continues along State Highway 70/54/506/24;

the western boundary follows the eastern edge of Otero County to the north and then along the southern and then eastern edge of Lincoln County until it follows State Highway 285 north to the northern boundary of Interstate Highway 40.

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



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

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

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

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

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

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

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

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

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

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

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

(i) Take in defense of human life. Under section 11(a)(3) of the Act and § 17.21(c)(2), any person may take (which includes killing as well as nonlethal actions such as harassing or harming) a Mexican wolf in self-defense or defense of the lives of others. This take must be reported as specified in accordance with paragraph (k)(6) of this section. If the Service or a designated agency determines that a Mexican wolf presents a threat to human life or safety, the Service or the designated agency may kill the wolf or place it in captivity.

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

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

(iv) Take on non-Federal lands.

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

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

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

(v) Take on Federal land.

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

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

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

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

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

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

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

(1) Describes what data indicate that the wild ungulate herd is below management objectives, what data indicate that the impact on the wild ungulate herd is influenced by Mexican wolf predation, why Mexican wolf removal is a warranted solution to help restore the wild ungulate herd to State game and fish agency management objectives, the type (level and duration) of Mexican wolf removal management action being proposed, and how wild ungulate herd response to wolf removal will be measured and control actions adjusted for effectiveness;

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

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

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

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

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

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

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

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

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

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

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

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

- (1) Evidence of wounded domestic animal(s) or remains of domestic animal(s) that show that the injury or death was caused by Mexican wolves;
- (2) The likelihood that additional Mexican wolf-caused depredations or attacks of domestic animals may occur if no harassment, nonlethal control, translocation, placement in captivity, or lethal control is taken;
- (3) Evidence of attractants or intentional feeding (baiting) of Mexican wolves; and
- (4) Evidence that Mexican wolves are habituated to humans, human residences, or other facilities regularly occupied by humans, or evidence that Mexican wolves have exhibited unprovoked and aggressive behavior toward humans.

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

(viii) Unintentional take.

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

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

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

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

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

(9) Management.

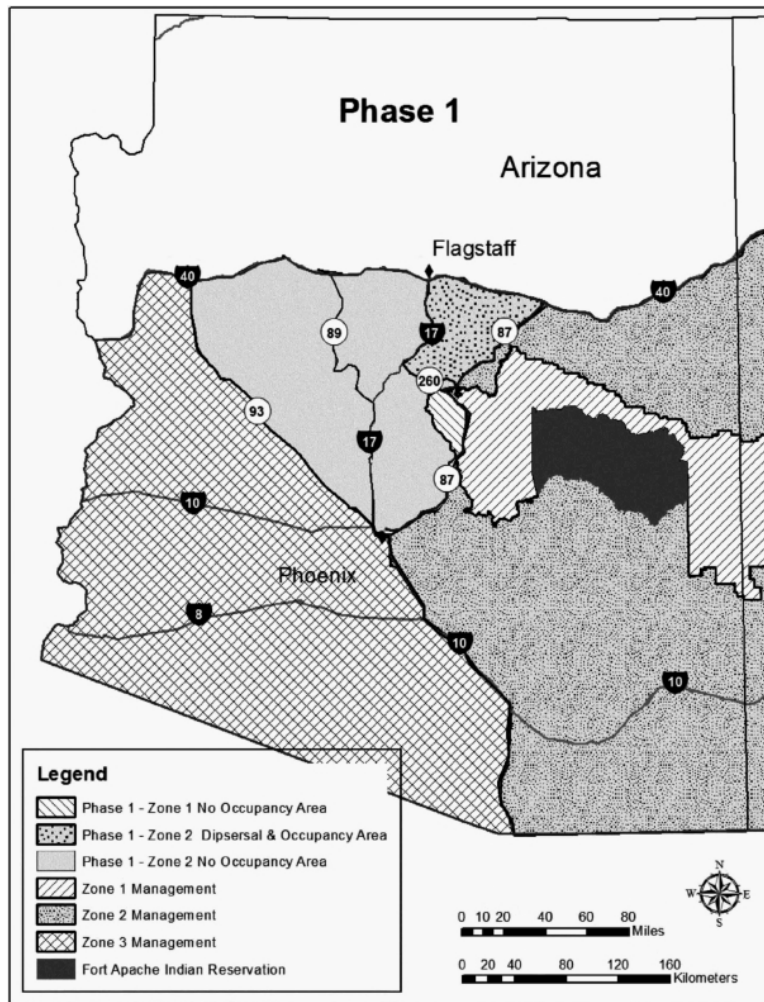
(i) On private land within Zones 1 and 2, as defined in paragraph (k)(3) of this section, of the MWEPA, the Service or designated agency may develop and implement management actions to benefit Mexican wolf recovery in cooperation with willing private landowners, including initial release and translocation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

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

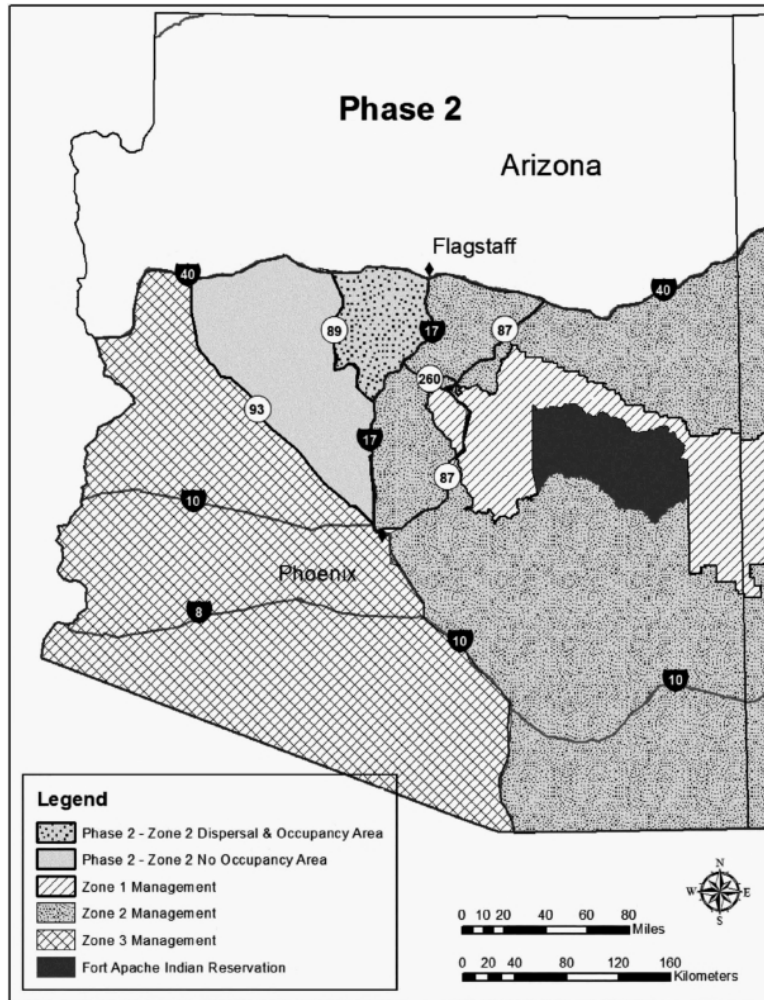
(iii) Based on end-of-year counts, we will manage for a population objective of 300 to 325 Mexican wolves in the MWEPA in Arizona and New Mexico. So as not to exceed this population objective, we will exercise all management options with preference for translocation to other Mexican wolf populations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

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

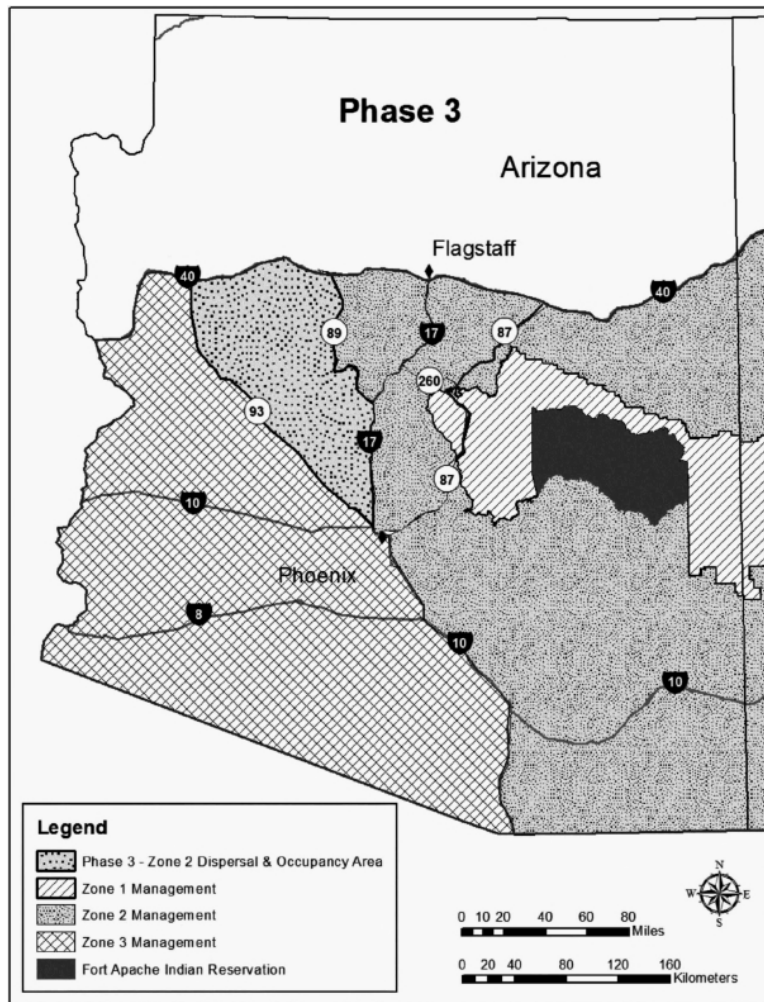
(A) Phase 1 will be implemented for the first 5 years following February 17, 2015. During this phase, initial releases and translocation of Mexican wolves can occur throughout Zone 1 with the exception of the area west of State Highway 87 in Arizona. No translocations can be conducted west of State Highway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



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



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



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

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

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

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

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

(l) Grizzly bear (*Ursus arctos horribilis*).

(1) Where does this special rule apply? The special rule in this paragraph (l) applies to the designated Bitterroot Grizzly Bear Experimental Population Area (Experimental Population Area), which is found within the species' historic range and is defined as follows:

The boundaries of the Experimental Population Area are delineated by U.S. 93 from its junction with the Bitterroot River near Missoula, Montana, to Challis, Idaho; Idaho 75 from Challis to Stanley, Idaho; Idaho 21 from Stanley to Lowman, Idaho; State Highway 17 from Lowman to Banks, Idaho; Idaho 55 from Banks to New Meadows, Idaho; U.S. 95 from New Meadows to Coeur d'Alene, Idaho; Interstate 90 from Coeur d'Alene, Idaho, to its junction with the Clark Fork River near St. Regis, Montana; the Clark Fork River from its junction with Interstate 90 near St. Regis to its confluence with the Bitterroot River near Missoula, Montana; and the Bitterroot River from its confluence with the Clark Fork River to its junction with U.S. Highway 93, near Missoula, Montana (See map at the end of this paragraph (l)).

(2) What is the legal status of the grizzly bear?

(i) The grizzly bear is listed as “threatened” in § 17.11 (h) and protected under this part. However, the grizzly bear population to which this paragraph (l) applies is considered a nonessential experimental population in accordance with section 10(j) of the Act.

(ii) We have determined that, as of December 18, 2000, no grizzly bear population exists in the Experimental Population Area. We find, in accordance with § 17.81 (b), that the reintroduction of grizzly bears as a nonessential experimental population, as defined in § 17.81 (b), will further the conservation of the species and will be consistent with provisions of section 10(j) of the Act, which requires that an experimental population be geographically separate from other nonexperimental populations of the same species. We also find, in accordance with § 17.81 (c) (2), that the experimental population of grizzly bears in the Experimental Population Area is not essential to the survival of the species in the wild.

(iii) Grizzly bears within the Experimental Population Area and the Recovery Area will be accommodated through management provisions provided for in this paragraph (l) and through management plans and policies developed by the Citizen Management Committee (Committee; see paragraph (l)(6) of this section). After reintroduction, every grizzly bear found within the Experimental Population Area will be considered a member of the nonessential experimental population.

(iv) In the conterminous United States, a grizzly bear that is outside the Experimental Population Area identified in paragraph (l)(1) of this section will be considered as threatened.



KeyCite Yellow Flag - Negative Treatment

Proposed Regulation

Code of New Mexico Rules Currentness
Title 19. Natural Resources and Wildlife
Chapter 31. Hunting and Fishing
Part 10. Hunting and Fishing - Manner and Method of Taking (Refs & Annos)

N.M. Admin. Code 19.31.10

19.31.10. HUNTING AND FISHING - MANNER AND METHOD OF TAKING

19.31.10.1 ISSUING AGENCY: New Mexico Department of Game and Fish.

[19.31.10.1 NMAC - Rp, 19.31.10.1 NMAC, 4-1-2007]

19.31.10.2 SCOPE: Hunters, anglers, trappers and the general public. Additional requirements may be found in Chapter 17 NMSA 1978 and Chapters 31, 32, and 33 of Title 19.

[19.31.10.2 NMAC - Rp, 19.31.10.2 NMAC, 4-1-2007]

19.31.10.3 STATUTORY AUTHORITY: [17-1-14](#) and [17-1-26 NMSA 1978](#) provide that the New Mexico state game commission has the authority to establish rules and regulations that it may deem necessary to carry out the purpose of Chapter 17 NMSA 1978 and all other acts pertaining to protected species.

[19.31.10.3 NMAC - Rp, 19.31.10.3 NMAC, 4-1-2007]

Credits

19.31.10.4 DURATION: Permanent.

[19.31.10.4 NMAC - Rp, 19.31.10.4 NMAC, 4-1-2007]

19.31.10.5 EFFECTIVE DATE: April 1, 2007, unless a later date is cited at the end of a section.

[19.31.10.5 NMAC - Rp, 19.31.10.5 NMAC, 4-1-2007]

19.31.10.6 OBJECTIVE: To establish general rules, restrictions, requirements, definitions, and regulations governing lawful hunting, fishing, or trapping and the lawful taking or killing of game animals, furbearers, game birds, and game fish, water pollution, possession of wildlife, permits and licenses issued, importation, intrastate transportation, release of wildlife, restrictive devices for fish, manner and methods of hunting and fishing and use of department lands.

[19.31.10.6 NMAC - Rp, 19.31.10.6 NMAC, 4-1-2007; A, 4-1-2009]

19.31.10.7 DEFINITIONS:

A. **“Big game species”** shall mean deer, bear, cougar, elk, pronghorn antelope (American pronghorn), Barbary sheep, bighorn sheep, javelina, oryx, and Persian ibex.

B. **“Modern firearms”** shall mean center-fire firearms, not to include any fully automatic firearms. Legal shotguns shall be only those shotguns capable of being fired from the shoulder.

C. **“Muzzle-loader or muzzle-loading firearms”** shall mean those rifles and shotguns in which the charge and projectile are loaded through the muzzle. Only blackpowder, Pyrodex or equivalent blackpowder substitute may be used. Use of smokeless powder is prohibited. Legal muzzle-loader shotguns shall be only those shotguns capable of being fired from the shoulder.

D. **“Restricted muzzle-loading rifle”** shall mean any muzzle-loading rifle using open sights, black powder or equivalent and firing a traditional lead bullet. The use of in-line ignition, scopes, pelleted powder, smokeless powder and sabots, including powerbelt-type projectiles, are prohibited.

E. **“Bow”** shall mean compound, recurve, or long bow. Sights on bows shall not project light nor magnify.

F. **“Arrows”** shall mean only those arrows or bolts having broadheads with steel cutting edges.

G. **“Trotline”** shall be synonymous with “set line” or “throw line” or “jug”, and shall mean a fishing line that is used without rod or reel and that need not be held in the hand or closely attended.

H. **“Angling”** shall mean taking or attempting to take fish by angling hook and line, with the line held in the hand or attached to a pole or rod or other device that is held in the hand or closely attended.

I. **“Spear fishing”** shall mean taking or attempting to take game fish with spears, gigs, and arrows with barbs that are discharged under the surface of the water.

J. **“Bait fish”** is defined as those nongame fish which are not otherwise protected by statute or regulation.

K. **“Chumming”** is defined as a means of attracting fish by placing organic materials, non-injurious to aquatic life, into the water.

L. **“Protected species”** shall mean any of the following animals:

(1) all animals defined as protected wildlife species and game fish under [Section 17-2-3 New Mexico Statutes Annotated 1978](#) Compilation;

(2) all animals defined as furbearing animals under [Section 17-5-2 New Mexico Statutes Annotated 1978](#) Compilation;

(3) all animals listed as endangered species or subspecies as stated in regulation(s) set by the state game commission.

M. “Retention” or “retain” shall mean the holding of in captivity.

N. “Established road” is defined as follows:

(1) a road, built or maintained by equipment, which shows no evidence of ever being closed to vehicular traffic by such means as berms, ripping, scarification, reseeding, fencing, gates, barricades or posted closures;

(2) a two-track road which shows use prior to hunting seasons for other purposes such as recreation, mining, logging, and ranching and which shows no evidence of ever being closed to vehicular traffic by such means as berms, ripping, scarification, reseeding, fencing, gates, barricades or posted closures.

O. “Non-toxic shot” shall mean shot approved for use by the U. S. fish and wildlife service.

P. “Director” shall mean the director of the New Mexico department of game and fish.

Q. “Baiting” shall mean the placing, exposing, depositing, distributing, or scattering of any salt, grain, scent or other feed on or over areas where hunters are attempting to take protected game mammals or game birds.

R. “Nets” shall mean cast nets, dip nets, and seines which shall not be longer than 20 feet and shall not have a mesh larger than three-eighths of an inch.

S. “Barbless lure or fly” shall mean an artificial lure made of wood, metal, or hard plastic or an artificial fly made from fur, feathers, other animal or man-made materials tied onto an angling hook to resemble or simulate insects, bait fish, or other foods. A barbless fly or lure may only bear a single hook, from which any or all barbs must be removed or bent completely closed, or which are manufactured without barbs. Living or dead arthropods and annelids, or rubber or plastic moldings of these or other foods are not included.

T. “Crossbow” shall mean a device with a bow limb or band of flexible material that is attached horizontally to a stock and has a mechanism to hold the string in a cocked position. Sights or lights on crossbows shall not project light. This definition shall apply to hunting for all species and be effective 9-1-2012.

U. “Angling hook” shall mean a single, double, or treble (triple) point attached to a single shank.

V. **“Sporting arms or weapon types”** shall be designated as follows:

- (1) all hunt codes denoted with -1- shall authorize use of any legal weapon;
- (2) all hunt codes denoted with -2- shall authorize use of bows only;
- (3) all hunt codes denoted with -3- shall authorize use of bows, crossbows and muzzle-loading firearms, except that bows and crossbows shall not be allowed during restricted muzzle-loading hunts.

W. **“Bag limit”** shall mean the protected animal, qualified by species, sex, age, antler requirement, or size allowed by rule that a legally licensed hunter may attempt to take or harvest.

X. **“Written permission”** shall mean a document (which may include a valid hunting, trapper, or fishing license) that asserts the holder has permission from the private land owner or his designee to hunt, fish, or trap on the landowner's property. The information on the document must be verifiable and include the name, date, and phone number of the person granting the permission.

Y. **“Bow fishing”** shall mean taking or attempting to take game fish with arrows with barbs that are discharged above the surface of the water by a bow. Arrows must be attached by string, line, or rope to facilitate fish retrieval.

Z. **“Drone”** is defined as any device used or designed for navigation or flight in the air that is unmanned and guided remotely or by an onboard computer or onboard control system. Drones may also be referred to as “Unmanned Aerial Vehicle (UAV)” or “Unmanned Aerial Vehicle Systems (UAVS)”

[19.31.10.7 NMAC - Rp, 19.31.10.7 NMAC, 4-1-2007; A, 6-30-2008; A, 4-1-2009; A/E, 9-1-2012; A, 12-13-2013; A, 9-15-2014]

19.31.10.8 UNLAWFUL SUBSTANCE IN PUBLIC WATERS: It shall be unlawful for any person, firm, corporation or municipality to introduce, directly or indirectly, into any public water of this state any substance that may stupefy, injure, destroy, or drive away from such water any protected species or may be detrimental to the growth and reproduction of those protected species except as exempted in [17-2-20 NMSA 1978](#).

[19.31.10.8 NMAC - Rp, 19.31.10.8 NMAC, 4-1-2007]

19.31.10.9 POSSESSION OR SALE OF PROTECTED SPECIES: It shall be unlawful to possess, sell, or offer for sale all or part of any protected species except as provided below:

A. License or permit: A person may possess protected species or parts thereof that they have lawfully taken (killed) under a license or permit.

B. Game taken by another: Any person may have in their possession or under their control any protected species or parts thereof that have been lawfully taken by another person, if they possess a written statement which shall be provided by the donor of the protected species, or parts thereof, and which shall contain the following:

- (1) the kind and number of game or furbearer parts donated;
- (2) the date and county where the game or furbearer was lawfully taken;
- (3) the donor's name, address, and the number of the hunting or fishing or trapping license under which the game or furbearer was lawfully taken;
- (4) the date and place of the donation.

C. Retention of live animals: It shall be unlawful to retain protected species in a live condition except under permit or license issued by the director for the following purposes:

- (1) zoos open for public display;
- (2) in class A parks;
- (3) in projects for scientific research and propagation;
- (4) a rehabilitation permit;
- (5) under a falconry permit, only those birds listed on the permit;
- (6) under a protected mammal permit, only those mammals listed on the permit;
- (7) under a scientific collection permit, one may collect and possess only those species listed on the permit;
- (8) in transit through New Mexico when the transporter can demonstrate proof of legal possession of the protected animal being transported.

D. Sale of game animal parts: Only skins, heads, antlers, horns, or claws of legally taken protected species and feathers from non-migratory game birds may be bartered or sold. (Internal organs of protected species may not be sold). The disposer must supply to the recipient a written statement which shall contain the following:

- (1) description of the skin, head, antlers, horns or claws, or feathers involved;

(2) the date and county where the game was taken;

(3) the disposer's name, address and hunting license number under which the game was taken;

(4) the date and place of the transaction.

E. Possession of game animal parts found in the field: It shall be unlawful to possess heads, horns, or antlers of protected species found in the field without invoice or permit from the department of game and fish, with the exception of obviously shed antlers.

F. Big game and turkey: For licensed hunters of any big game species or turkey, the licensee killing the animal shall immediately punch or completely fill in (black out) the area designated for the appropriate species on the license. Immediately upon arriving at a vehicle, camp or a place of storage, the licensee must permanently fill in the proper date and time of kill on their license.

(1) The properly punched or blacked-out license shall be attached or accompany the carcass while the carcass is left unattended in any vehicle, field, or while it is in camp or at a residence or other place of storage. The punched or blacked-out license may be removed from the carcass while the carcass is being removed from the field to a camp or vehicle. In situations where numerous trips are required to remove the carcass from the field, the punched or blacked-out license shall remain attached to that portion of the carcass left unattended in a camp or vehicle.

(2) Once removed from the field, the licensee must ensure the carcass or parts thereof are accompanied by a properly filled out and punched or blacked-out license or other license information as determined by the director.

(3) It shall be unlawful for any licensee to fail to properly punch or completely black out the area designated by appropriate species on the license immediately upon killing any big game species or turkey.

(4) It shall be unlawful for any licensee for any big game or turkey to fail to properly fill in the date and time of kill on their license as required by rule.

(5) It shall be unlawful to possess any big game species or turkey that are unaccompanied by a properly punched, blacked-out or filled out license or unaccompanied by the other license information as determined by the director.

(6) It shall be unlawful for any person to transport or possess the carcass of any big game animal or turkey without proof of sex until the carcass arrives at a residence, taxidermist, meat processing facility, place of final storage or if required, is inspected and documented or pelt tagged by a department official.

G. Possession and sale of live wild turkey prohibited: It shall be unlawful to sell, attempt to sell or possess wild turkey (*Meleagris gallopavo* ssp.) in New Mexico, including captive raised birds, except as by permit issued by the director for verifiable scientific, education, and temporary purposes or for commercial sales to entities outside of the state of New Mexico.

H. Seizure: Any conservation officer or other officer authorized to enforce game laws and regulations shall seize the carcass of any protected species that is possessed contrary to this section.

[19.31.10.9 NMAC - Rp, 19.31.10.9 NMAC, 4-1-2007; A, 10-31-2013]

19.31.10.10 PERMITS AND LICENSES ISSUED: Permits and licenses may only be issued by the director or his designee as follows:

A. Uses of wildlife:

- (1) importation
- (2) depredation
- (3) scientific collection
- (4) possession
- (5) propagation
- (6) sale
- (7) commercial hunting or fishing
- (8) release
- (9) falconry
- (10) rehabilitation
- (11) zoo

B. Permit or license provisions: Specific provisions for applications, conditions, reporting, and other stipulations for permits or licenses will be provided by the department of game and fish with each permit and license.

C. Violation of permit or license provisions: It is unlawful for any person receiving any permit or license provided in Subsection A of 19.31.1.10 NMAC to violate any provision of this section or any provision listed on the permit or license. If such an invalidated permit or license authorized possession of wildlife, the wildlife shall be subject to seizure by any officer authorized to enforce the provisions of Chapter 17 NMSA 1978. It shall be unlawful to purchase, possess, barter, transfer, transport, sell, or offer to sell any imported wildlife contrary to the provisions of any import permit.

[19.31.10.10 NMAC - Rp, 19.31.10.10 NMAC, 4-1-2007]

19.31.10.11 RELEASE OF WILDLIFE: It shall be unlawful for any person or persons to release, intentionally or otherwise, or cause to be released in this state any mammal, bird, fish, reptile or amphibian, except domestic mammals, domestic fowl, or fish from government hatcheries, without first obtaining a permit from the department of game and fish.

[19.31.10.11 NMAC - Rp, 19.31.10.13 NMAC, 4-1-2007]

19.31.10.12 RESTRICTIVE DEVICES FOR FISH: The director may require that a screen, paddle wheel, or other device to prevent passage of fish be installed by the owner of any canal or ditch into which waters containing protected fish are diverted. The director may also require that the owner maintain the device during periods when waters are being diverted.

[19.31.10.12 NMAC - Rp, 19.31.10.14 NMAC, 4-1-2007]

19.31.10.13 USE OF VEHICLES AND ROADS IN HUNTING:

A. Roads: It shall be unlawful to shoot at, wound, take, attempt to take, or kill any protected species on, from, or across any graded paved, or maintained public road and including the areas lying within right-of-way fences or 40 feet from the edge of the pavement or maintained surface, in absence of right-of-way fences.

B. Roads, artificial wildlife: It shall be unlawful to shoot at artificial wildlife on, from, or across any graded, paved, or maintained public road and including the areas lying within right-of-way fences or 40 feet from the edge of the pavement or maintained surface, in absence of right-of-way fences.

C. Vehicles, boats, aircraft: It shall be unlawful to shoot at any protected species from within a motor vehicle, power boat, sailboat, or aircraft. **EXCEPTION** - Migratory birds may be taken from a motor-driven boat (or other craft with attached motor) or sailboat when resting at anchor or fastened within or immediately alongside a fixed hunting blind or is used solely as a means of picking up dead birds.

D. Harassing protected wildlife: It shall be unlawful, at any time, to pursue, harass, harry, drive, or rally any protected species by use of or from a motor-driven vehicle, powerboat, sailboat, drone, or aircraft.

E. Hunting after air travel: It shall be unlawful for anyone to hunt for or take any protected species until after the start of legal hunting hours on the day following any air travel except by regularly scheduled commercial airline flights or legitimate direct flight to the final destination.

F. Use of aircraft for spotting game: It shall be unlawful to use aircraft or drone to spot or locate and relay the location of any protected species to anyone on the ground by any means of communication or signaling device or action.

G. Using information gained from air flight:

(1) It shall be unlawful to hunt for or to take, or assist in the hunting for or taking of, any protected species with the use of information regarding location of any protected species gained from the use of any aircraft until 48 hours after such aircraft use.

(2) It shall be unlawful to hunt for or to take, or assist in the hunting for or taking of, any protected species with the use of information regarding location of any protected species gained from the use of any drone at any time.

H. Vehicle off of established road: During the seasons established for any protected species, it shall be unlawful to drive or ride in a motor vehicle which is driven off an established road when the vehicle bears a licensed hunter, fisherman or trapper. EXCEPTION: 1) Snowmobiles; 2) To retrieve lawfully taken game not in an area closed to vehicular traffic. 3) All landowners, lessees or their employees, while on their owned or leased lands in connection with legitimate agricultural activities.

I. Closed roads: During the seasons established for any protected species, it shall be unlawful to knowingly occupy, drive, or cause to be driven any motor vehicle on a closed road when the vehicle bears a licensed hunter, angler or trapper.

J. Handicapped license:

(1) Shooting from a vehicle: The holder of a handicap license is authorized to shoot at and kill protected species during their respective open seasons from a stationary motor-driven vehicle that is not on a public road or highway. The director may issue permits to shoot from a stationary vehicle to applicants who provide certification that the applicant is permanently disabled in accordance with the American Disability Act. Such certification shall be signed by an M.D. or O.D. licensed to practice in the applicant's state of residence.

(2) Driving off established roads: Holders of a handicap license may, with permission of the landowner, lessee, or land management agency, drive off established roads to hunt for or take squirrels or game birds, excluding turkey, during open seasons.

(3) Assistance for handicapped hunter: The holder of a handicapped license may be accompanied by another person to assist in reducing to possession any big game animal which has clearly been wounded by the licensed handicapped hunter.

K. Aircraft, drone and vehicle exemptions to this rule: The Director may exempt a person from the prohibition of utilizing an aircraft, drone or vehicle for management purposes.

[19.31.10.13 NMAC - Rp, 19.31.10.17 NMAC, 4-1-2007; A, 9-15-2014; A/E, 9-1-2015]

19.31.10.14 FISHING:

A. Angling: Game fish may be taken by angling in all waters that are open for fishing.

B. Trotlines:

(1) It is unlawful for any person to set more than one trotline at a time. It is unlawful to tie or join together trotlines belonging to two or more persons.

(2) It is unlawful for trotlines to have more than 25 angling hooks.

(3) A person fishing with a trotline shall personally visit and inspect the trotline at least once every 24 hours. Failure to check a trotline every 24 hours is a violation of this paragraph.

(4) It is unlawful for anyone to tamper with another's trotline.

(5) A person fishing with a trotline shall attach to it an identification tag that is visible above the water line. The identification tag shall bear the fisherman's name, address, fishing license number, and the date the trotline was set. An unlicensed fisherman under 12 years of age shall also list his date of birth.

(6) It is unlawful to set or use a trotline in trout waters, with the following exceptions: Abiquiu lake, Chama river downstream from the northern boundary of the Monastery of Christ in the Desert, Gila river downstream from its junction with its east fork, Navajo lake and the Rio Grande downstream from its junction with the Chama river.

(7) Any conservation officer or other officer authorized to enforce the game laws may seize and confiscate any trotlines not set in accordance with this subsection.

C. Illegal device or substance: It is unlawful to use any device or substance capable of catching, stupefying, or killing fish except as permitted by regulation.

D. Bait: It is unlawful to use protected fish, live bullfrogs, or live bullfrog tadpoles as bait in any waters containing protected species. EXCEPTION: the genus *Lepomis* taken by legal means of angling may be used as live bait in the water from which they were taken only in the following waters: Abiquiu reservoir, Cochiti lake, Elephant Butte reservoir, Caballo reservoir, Stubblefield lake, Maxwell lakes, Clayton lake, Conchas lake, Ute lake, Santa Rosa lake, Lake Sumner, Brantley reservoir, and Navajo reservoir. *Lepomis* may be used as dead bait; roe, viscera, and eyes of legally taken game fish may be used as bait; and bullfrogs and bullfrog tadpoles may be used as dead bait. Live bullfrogs or live bullfrog tadpoles may not be in possession while fishing.

E. Use of bait fish:

- (1) It is unlawful to use gar (*Lepisosteus* spp.) and goldfish (*Carassius auratus*) as bait in all waters.
- (2) It is unlawful to use live common carp (*Cyprinus carpio*), river carpsucker (*Carpoides carpio*), and smallmouth buffalo (*Ictiobus bubalus*) in all waters. However, these species may be used as dead bait in any water where bait may be used.
- (3) It is unlawful to use bait fish in all trout waters except fathead minnows and red shiners may be used in the following trout waters: Abiquiu, Clayton lake, Jackson lake, Lake 13 (Maxwell refuge), Navajo lake, Caballo lake, the Rio Grande downstream of the Taos junction bridge (excluding the special trout water described in [19.31.4.11 NMAC](#)), Power Dam lake, and the Animas river.
- (4) It is unlawful to use any bait fish in Bitter lake national wildlife refuge and Bottomless lakes state park.
- (5) Bait fish may be used in all other waters with the following restrictions:
 - (a) In the Gila river and San Francisco river drainages only fathead minnows may be used.
 - (b) In the Pecos river drainage only fathead minnows and red shiners may be used.
 - (c) In the Rio Grande drainage only fathead minnows, red shiners, and shad may be used except in Elephant Butte and Caballo where golden shiners are also allowed
 - (d) In the Canadian river drainage only fathead minnows, red shiners, and shad may be used.
 - (e) In the San Juan river drainage only fathead minnows and red shiners may be used.
 - (f) In Eagle Nest and Heron lakes only dead bait fish may be used. No live bait fish may be in possession.

F. Release of bait fish: It is unlawful to release any bait fish into any water containing game fish.

G. Eradication of fish: In waters where fish are being eradicated or where water shortage warrants reduction of fish numbers, the director may permit licensed fishermen and unlicensed persons under 12 years of age to take and possess game fish in numbers exceeding current bag and possession limits. In granting such permission, the director may specify bag and possession limits and manner and method of taking for such waters.

H. Methods for taking bait fish for personal use: Licensed fishermen and unlicensed persons under 12 years of age may take bait fish for personal use only in waters containing game fish by angling, nets, traps, spears, arrows, and seines. All protected species of fish taken in seines, nets, and traps shall be immediately returned to the water.

I. Illegal taking of bait fish: It is unlawful for licensed minnow dealers to take bait fish for sale from waters not specified on their licenses. They may take these fish only by use of traps, seines, or cast nets, as specified on their licenses. All protected species of fish taken in such traps, seines, or nets shall be immediately returned to the water from which they were taken.

J. Permits for taking bait fish: The director may issue permits for the use of nets, seines, traps, or cast nets in taking bait fish in waters containing protected species of fish. The permit shall specify methods of taking, places for taking, and duration of the permit. The permittee shall report monthly the species, numbers and poundage of bait fish taken during the preceding month.

K. Limit on angling hooks: It is unlawful to angle with more than two (2) barbless lures or flies with single point angling hooks on a single line when fishing the special trout water on the San Juan river designated in [Subsection A. of 19.31.4.11 NMAC](#).

L. [Reserved]

M. Number of fishing poles: It is unlawful to angle with more than one pole without having a current two rod validation or stamp affixed on the current license. It is unlawful under any circumstance to angle with more than two poles.

N. Exceeding daily bag limit: It is unlawful to exceed the daily bag limit or possession limit of any protected fish species, as specified in [19.31.4.11 NMAC](#).

O. Exceeding daily bag or possession limit - Penalty Assessment: For those fish species or waters where the daily bag limit or possession limit is more than two fish as specified in [19.31.4.11 NMAC](#), violators that exceed the bag limit or possession limit by four fish or less shall be offered a penalty assessment. For those fish species or waters with special, reduced or restricted bag limits or possession limits of two or less as specified in [19.31.4.11 NMAC](#), violators that exceed the bag limit or possession limit by one fish shall be offered a penalty assessment.

P. Snagging game fish: It is unlawful to snag game fish except during the special Kokanee salmon season as specified in [19.31.4.9 NMAC](#).

Q. Chumming: It is unlawful to “CHUM” except in the following waters: All waters designated as warm waters; Gila river downstream from its junction with its east fork; Rio Grande downstream from its junction with the Chama river, excluding the special trout water below Elephant Butte dam described in [Subsection A. of 19.31.4.11 NMAC](#).

R. Special trout waters: Only barbless lures or flies may be used in the special trout waters designated in [Subsection A. of 19.31.4.11 NMAC](#), except in the special trout water on the Rio Grande below Elephant Butte dam in which soft plastic lures may also be used, and in the following waters any legal angling gear and legal bait for trout waters may be used: Conservancy Park lake/Tingley beach the Kids' pond and Central pond, the Vermejo river system within Vermejo Park ranch boundaries, Gilita and Willow creeks, and those waters designated in [Subparagraph \(e\) of Paragraph \(4\) of Subsection A. of 19.31.4.11 NMAC](#).

S. Attracting or concentrating fish:

(1) **Artificial lights:** Use of artificial lights is permitted for attracting game fish.

(2) **Disturbing the bottom:** It is unlawful in all special trout waters defined in [Subsection A. of 19.31.4.11 NMAC](#), to disturb or dislodge aquatic plant growth, sediment, or rocks for the purpose of attracting or concentrating fish. It shall also be unlawful to angle in the immediate vicinity where such disturbance has occurred.

T. Spearfishing and bow fishing:

(1) Game fish may be taken by spearfishing and bow fishing only in lakes and reservoirs open to fishing.

(2) In addition, during the season established by [Subsection B. of 19.31.4.9 NMAC](#), Kokanee salmon may be taken by the use of spears, gigs, and arrows with barbs that are discharged above or below the water and not driven by explosives, gas, air, or crossbow, except in the Pine river where spears, gigs, and arrows are prohibited.

[19.31.10.14 NMAC - Rp, 19.31.10.18 NMAC, 4-1-2007; A, 6-30-2008; A, 4-1-2010; A, 7-16-2012; A, 12-13-2013; A/E, 9-1-2015]

19.31.10.15 LANDS AND WATERS OWNED, ADMINISTERED, CONTROLLED, OR MANAGED BY THE STATE GAME COMMISSION:

A. Posting of signs: The state game commission may prohibit, modify, condition, or otherwise control the use of areas under its control by posting of signs as may be required in any particular area.

B. Violating provisions of posted signs: It shall be unlawful to violate the provisions of posted signs on areas under the control of the state game commission.

C. Trespass on state game commission owned lands: It shall be unlawful to hunt, fish, camp, or trespass upon state game commission owned lands unless allowed under regulation or provided for under Subsection A.

[19.31.10.15 NMAC - Rp, 19.31.10.19 NMAC, 4-1-2007]

19.31.10.16 AREAS CLOSED TO HUNTING, FISHING AND TRAPPING: The following areas shall remain closed to hunting, fishing, and trapping, except as permitted by regulation.

A. Sugarite canyon state park.

B. Portion of the Wild Rivers recreation area: an area bounded on the north by the power line from Bear Crossing to Red River hatchery, south along the Red River to the confluence of the Rio Grande, and north along the Rio Grande to the power lines at Bear Crossing is closed to all hunting; Taos valley overlook.

C. All wildlife management areas (except non-game hunting shall be allowed on the Water canyon WMA January 1 through March 31 annually).

D. Valle Vidal area.

E. Sub-Unit 6B (Valles Caldera national preserve)

[19.31.10.16 NMAC - Rp, 19.31.10.20 NMAC, 4-1-2007; A, 3-15-2011]

19.31.10.17 REGULATIONS PERTAINING TO BOATS, OTHER FLOATING DEVICES, AND MOTORS:

A. **Charette, Clayton, and McAllister lakes:** On the following lakes controlled by the department of game and fish, boats and other floating devices with or without electric or gas motors shall be permitted only during the season and hours when fishing is permitted. Boats or floating devices on these lakes shall not be operated at greater than normal trolling speed: Charette, Clayton, and McAllister lakes

B. On **Springer lake**, boats and other floating devices with or without motors shall be permitted; provided, however, that boats or floating devices shall not be operated at greater than normal trolling speed when water storage is less than 1,000 acre feet.

C. On **Ramah lake**, boats and floating devices shall not be operated at greater than normal trolling speed.

D. On the following lakes controlled by the department of game and fish, only boats and other floating devices using electric motors or with motors that are not in use shall be permitted: **Bear canyon, Bill Evans, Green Meadow, Fenton, Hopewell, Jackson, lake Roberts, Maddox, Morphy, Quemado, Snow, Wall, Conoco lake, and waters located on the Ladd S. Gordon wildlife area.**

E. On the following lakes controlled by the department of game and fish, only boats and other floating devices using no motors shall be permitted: **Bernardo waterfowl management area, La Joya waterfowl management area, McGaffey, San Gregorio, Shuree ponds.**

F. On the following lakes controlled by the department of game and fish, no boats or other floating devices shall be permitted: **Bonito, Laguna del Campo lake at Los Ojos state fish hatchery, Monastery lake, Power dam, and Red River hatchery pond.**

G. Department of game and fish personnel or persons authorized by the director of the department of game and fish may use gasoline powered outboard motors on all lakes mentioned in this chapter while performing official duties.

[19.31.10.17 NMAC - Rp, 19.31.10.21 NMAC, 4-1-2007; A, 7-16-2012]

19.31.10.18 UNLAWFUL TAKING OR KILLING OF GAME ANIMALS, FURBEARERS, GAME BIRDS, OR GAME FISH ON PRIVATE LAND:

A. It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on any private property that is in compliance with [30-14-1](#) and [30-14-6 NMSA 1978](#) posting requirements without possessing written permission from the landowner or person in control of the land or trespass rights, unless otherwise permitted in rule or statute.

B. It shall be unlawful to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish on private property if the consent to enter or remain has been denied or withdrawn by the owner or person in control of the land or trespass rights, per 30-14-1 NMSA 1978, unless otherwise permitted in rule or statute.

C. It shall be unlawful to knowingly enter upon any private property to hunt, capture, take, attempt to take, or kill any game animal, furbearer, game bird, or game fish without possessing written permission from the landowner or person in control of the land or trespass rights unless otherwise permitted in rule or statute.

D. Any game animals, furbearers, game birds, or game fish taken in violation of this section shall be subject to seizure.

[19.31.10.18 NMAC - N, 4-1-2009]

19.31.10.19 TAKING GAME ANIMALS, FURBEARERS, GAME BIRDS BY CROSSBOW:

A. Crossbows may be used to take or kill any game animal, furbearer or game bird by a licensed hunter in possession of a valid department mobility impaired (MI) card or in possession of a reasonable accommodation issued by the director, or as otherwise allowed by rule.

B. It shall be unlawful to hunt with a crossbow without a hunter possessing a MI card or reasonable accommodation from the director, or contrary to rule or hunt code.

C. It shall be unlawful to hunt with a crossbow that has a scope, telescopic sight or magnification device during any bow only hunt for big game.

[19.31.10.19 NMAC - A/E, 9-1-2012]

19.31.10.20 MANNER AND METHOD PENALTY ASSESSMENTS: Individuals who commit the following violations shall be offered penalty assessments:

Size limits (fish)	Contrary to: 19.31.4 NMAC
Waters with age or individuals with disabilities use restrictions	Contrary to: 19.31.4 NMAC
Use of live animals	Contrary to: 19.31.5; 19.31.6; 19.31.11; 19.31.12; 19.31.13; 19.31.14; 19.31.15; 19.31.16; 19.31.17; 19.31.21 NMAC
Use of a calling device	Contrary to: 19.31.5; 19.31.6; 19.31.11; 19.31.12; 19.31.13; 19.31.14; 19.31.15; 19.31.16; 19.31.17; 19.31.21 NMAC
Unlawful ammunition / weapon type	Contrary to: 19.31.5; 19.31.6; 19.31.11; 19.31.12; 19.31.13; 19.31.14; 19.31.15; 19.31.16; 19.31.17; 19.31.21 NMAC
Shooting hours violations	Contrary to: 19.31.5; 19.31.6 NMAC
Possession of game animal parts found in field	Contrary to: 19.31.10 NMAC
Shoot at artificial wildlife from the road	Contrary to: 19.31.10 NMAC
Harassing wildlife	Contrary to: 19.31.10 NMAC
Driving off road with licensed hunter/angler/trapper	Contrary to: 19.31.10 NMAC
Driving on a closed road	Contrary to: 19.31.10 NMAC
Trotline violations	Contrary to: 19.31.10 NMAC
Unlawful bait	Contrary to: 19.31.10 NMAC
Unlawful use of bait fish	Contrary to: 19.31.10 NMAC
Unlawful release of bait fish	Contrary to: 19.31.10 NMAC
More than two hooks on San Juan special trout water	Contrary to: 19.31.10 NMAC
More than two poles	Contrary to: 19.31.10 NMAC

Exceeding the bag or possession limit of fish as Established in 19.31.14 NMAC	Contrary to: 19.31.10 NMAC
Snagging of game fish	Contrary to: 19.31.10 NMAC
Chumming	Contrary to: 19.31.10 NMAC
Bait/barbs on special trout waters	Contrary to: 19.31.10 NMAC
Disturbing the bottom “shuffling”	Contrary to: 19.31.10 NMAC
Spearfishing and bow fishing violations	Contrary to: 19.31.10 NMAC
Violation of posted signs	Contrary to: 19.31.10 NMAC
Use of dogs	Contrary to: 19.31.12; 19.31.13; 19.31.14; 19.31.15; 19.31.16; 19.31.17; 19.31.21 NMAC
Non toxic shot requirement on commissioned lands	Contrary to: 19.31.5; 19.31.6; 19.31.16 NMAC
Habitat stamp (Sikes Act)	Contrary to: 19.34.6 NMAC
Two poles without validation stamp	Contrary to: 19.31.10 NMAC
Habitat management and access validation stamp (HMAV)	Contrary to: 17-4-34 NMAC

[19.31.10.20 NMAC - N/E, 9-1-2015]

19.31.10.21 DIRECTOR'S AUTHORITY TO ACCOMMODATE DISABILITY OR MEDICAL IMPAIRMENT: The director may authorize reasonable modifications to the manner and method of take for any licensee who has a verifiable medical condition that, in the director's sole discretion, necessitates such accommodation. In order to apply for such accommodation, the licensee shall complete and submit any form, information and records required by the director. Any licensee granted an accommodation must adhere to all other rules as to manner and method of take that are not specifically waived by such accommodation; and shall adhere to any restrictions imposed by the director.

[19.31.10.20 NMAC - N, 10-31-2013; 19.31.10.21 NMAC - Rn/E, 19.31.10.20 NMAC, 09-01-2015]

HISTORY OF 19.31.10 NMAC:

Pre-NMAC History: The material in this part was derived from that previously file with the Commission of Public Records - State Records Center and Archives:

DFR 67-5 Basic Regulation No. 500, Concerning Method and Manner of Hunting, Taking, Possessing, Disposing, and Transporting of Game Animals, Birds, Fish or Bullfrogs, or parts thereof, Taken in New Mexico, Use and Occupancy of Lands and Waters Administered, Owned, Controlled or Managed by the State Game Commission, 5-25-67.

DGF 68-11 Basic Regulation No. 525, Concerning Method and Manner of Hunting, Taking, Possessing, Disposing, and Transporting of Game Animals, Game Birds, Game Fish or Bullfrogs, or parts thereof, Taken in New Mexico, the Use and Occupancy of Lands and Waters Administered, Owned, Controlled or Managed by the State Game Commission, 8-21-68.

DGF 72-6 Basic Regulation 550 Governing Water Pollution, Water Diversion, Animal Releases, Possession of Game, Manner of Hunting and Fishing, and Use of Department Lands, 5-31-72.

Regulation No. 612 Basic Regulation Governing Water Pollution, Water Diversion, Animal Releases, Possession of Game, Manner of Hunting and Fishing, Use of Department Lands, Retention of Protected Species, Permits and Licenses Issued, and the Hunter Safety Certificate Requirement, 3-2-82.

Regulation No. 677 Basic Regulation Governing Water Pollution, Possession of Game, Permits and Licenses Issued, Retention and Importation of Protected Species, Manner of Hunting and Fishing, Use of Department Lands, Hunter Training Course Required, Hunting License Revocation, Camping Near a Water Hole, 6-25-90.

Order No. 5-91 Requiring that Live-Firing Courses be Taught only by Department of Game and Fish and Volunteer Hunter Education Instructors Certified in Live-Firing Instruction, 10-3-91.

NMAC History:

19 NMAC 31.1, Hunting and Fishing - Manner and Method of Taking, 3-1-95.

History of Repealed Material:

19.31.10 NMAC, Hunting and Fishing - Manner and Method of Taking - Repealed 4-1-2007.

Current with all new rules, amendments, and repeals received by September 16, 2016

N.M. Admin. Code 19.31.10, NM ADC 19.31.10

End of Document

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Code of New Mexico Rules Currentness
Title 19. Natural Resources and Wildlife
Chapter 35. Captive Wildlife Uses
Part 7. Importation of Live Non-Domestic Animals, Birds and Fish (Refs & Annos)

N.M. Admin. Code 19.35.7

19.35.7. IMPORTATION OF LIVE NON-DOMESTIC ANIMALS, BIRDS AND FISH

19.35.7.1 ISSUING AGENCY: New Mexico Department of Game and Fish.

[19.35.7.1 NMAC - Rp, 19.35.7.1 NMAC, 1-31-14]

19.35.7.2 SCOPE: Persons who desire to bring wildlife species into the state of New Mexico. It may include the general public, pet importers, holders of Class “A” park licenses, department permittees and others.

[19.35.7.2 NMAC - Rp, 19.35.7.2 NMAC, 1-31-14]

19.35.7.3 STATUTORY AUTHORITY: 17-1-14, 17-1-26 and 17-3-32.

[19.35.7.3 NMAC - Rp, 19.35.7.3 NMAC, 1-31-14]

Credits

19.35.7.4 DURATION: Permanent.

[19.35.7.4 NMAC - Rp, 19.35.7.4 NMAC, 1-31-14]

19.35.7.5 EFFECTIVE DATE: January 31, 2014, unless a later date is cited at the end of a section.

[19.35.7.5 NMAC - Rp, 19.35.7.5 NMAC, 1-31-14]

19.35.7.6 OBJECTIVE: To provide consistent criteria for the importation of live non-domesticated animals into New Mexico and to protect native wildlife against the introduction of contagious or infectious diseases, undesirable species and address human health and safety issues.

[19.35.7.6 NMAC - Rp, 19.35.7.6 NMAC, 1-31-14]

19.35.7.7 DEFINITIONS:

A. “Accredited laboratory” A lab recognized for CWD testing by the New Mexico department of game and fish.

B. “Animal health emergency” A situation in which people or animals are at risk of exposure to infectious or contagious diseases as determined by the director.

C. “APHIS” Animal and plant health inspection service, United States department of agriculture.

D. “Applicant” Any person or entity that causes or submits a department application for importation.

E. “Carnivore” Any animal within the order carnivora.

F. “Certificate of compliance” An official department document declaring an applicant's ability to resume importation application eligibility.

G. “Certified Herd” A herd that has attained certified status as defined in the current USDA chronic wasting disease program standards.

H. “Closed herd sales” Sales of animals from a herd directly to the buyer in a manner that allows the buyer to transport the animals from the producer's premises directly to the buyer's premises without contact with animals from another herd, and without contact with other pens or transport facilities used by any other herd.

I. “Chronic Wasting Disease” or “CWD” is a transmissible spongiform encephalopathy of cervids.

J. “CWD-Exposed Animal” is an animal that is part of a CWD-positive herd, or that has been exposed to a CWD-positive animal or contaminated premises within the previous 60 months.

K. “CWD-Exposed herd” is a herd in which a CWD-positive animal resided within 60 months prior to that animal's diagnosis as CWD-positive.

L. “CWD-Positive herd” is a herd in which a CWD-positive animal resided at the time it was diagnosed and which has not been released from quarantine.

M. “CWD-Suspect animal” is an animal for which unofficial CWD test results, laboratory evidence, or clinical signs suggest a diagnosis of CWD, but for which laboratory results have been inconclusive or not yet conducted.

N. “CWD-Suspect herd” is a herd for which laboratory evidence or clinical signs suggest a diagnosis of CWD, but for which laboratory results have been inconclusive or not yet conducted.

O. “CWD-Trace-Back herd” is an exposed herd in which a CWD-positive animal has resided during the 60 months prior to the diagnosis.

P. “CWD-Trace-Forward herd” is a CWD-exposed herd that has received CWD-exposed animals from a CWD-positive herd during the 60 months prior to the diagnosis of CWD in the CWD-positive herd.

Q. “Dangerous animal” An animal that due to its nature, biology or its behavior, including predatory or venomous animals, that may present a risk to the health, safety or well-being of the public or other animals including native wildlife, domestic pets or livestock.

R. “Department” Shall mean New Mexico department of game and fish.

S. “Director” Shall mean the director of the department of game and fish.

T. “Importer” Any person or entity that causes an animal to be brought, transported or shipped into New Mexico with the exception of common mail carriers and delivery service providers during the course of their regular duties.

U. “Invasive animal” Any non-native animal, except protected wildlife, including any aquatic invasive species (AIS), whose introduction into New Mexico may cause or is likely to cause harm to the economy, environment, protected wildlife, human health or safety.

V. “Isolation” A period of time imported animals are separated and observed. The observation pen must have fences at least eight feet high. The isolation pen must prevent nose-to-nose contact with all wild ungulates during the observation period.

W. “Mixed herd” A herd comprised of animals from different sources and held to allow contact or commingling.

X. “Mixed herd sales” Sales from sale barns, auctions, private arrangements, or other facilities that allow joint penning or adjacent penning of animals from more than one closed herd, or otherwise facilitate or permit commingling, direct contact, or holding, boarding, or sharing the premises by more than one herd simultaneous or successively in time.

Y. “Non-domesticated animal” For the purposes of this rule, any animal species that is wild by nature not listed as semi-domesticated or protected under chapter 17 NMSA, 1978.

Z. “NPIP” National poultry improvement program.

AA. “Official Animal Identification” A device or means of animal identification approved by USDA to uniquely identify individual animals nationally. The animal identification must include a nationally unique identification number that adheres to one of the following:

(1) national uniform ear tagging system.

(2) animal identification number (AIN)

(3) premises-based number system using a premises identification number (PIN) in conjunction with a livestock production numbering system

(4) any other numbering system approved by USDA for the identification of animals in commerce.

BB. “Protected wildlife” Shall mean those taxonomic groups of mammals, birds and fish listed in Chapter 17 NMSA, 1978, including any species that are listed as either state or federally threatened or endangered.

CC. “Release from captivity” For the purpose of this rule, the act of removing from confinement, letting go, liberating or setting free any imported, live non-domesticated animal into the wild.

DD. “Semi-domesticated animal” For the purpose of this rule, the director may designate an animal species as semi-domesticated in those instances where individual members of such species are commonly tamed, raised, bred or sold in captivity.

EE. “Species importation list” A list containing protected, non-game and semi-domesticated animal species established, maintained, updated or amended by the director of the New Mexico department of game and fish. The species importation list may contain importation requirements, restrictions and conditions for each animal species listed.

FF. “Qualified expert” Only a person officially designated by the director to import a specific non-domesticated animal.

GG. “Undesirable animal” An animal that may have adverse impacts to health, management or safety.

HH. “USDA” United States department of agriculture.

[19.35.7.7 NMAC - Rp, 19.35.7.7 NMAC, 1-31-14; A, 12-15-2014]

19.35.7.8 IMPORTATION OF LIVE NON-DOMESTICATED ANIMALS: It shall be unlawful to import any live non-domesticated animal into New Mexico without first obtaining appropriate permit(s) issued by the director except those animals identified within the species importation list group I. The state game commission must 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, conditioning, establishment or reestablishment in New Mexico. The director shall only issue a department permit in accordance with commission direction following their review of an application submitted under this section of rule. Permits will only be issued when all application requirements and provisions have been met. Failure to adhere to or violation of permit provisions may result in the applicant/importer becoming ineligible for importation(s). The pendency or determination of any administrative action or the pendency or determination of a criminal prosecution for the same is not a bar to the other.

[19.35.7.8 NMAC - Rp, 19.35.7.8 NMAC, 1-31-14; A, 12-15-2014]

19.35.7.9 [Reserved]

19.35.7.10 DIRECTOR'S AUTHORITY:

A. Species importation list: The director of the New Mexico department of game and fish shall develop a species importation list. The species importation list shall be established, maintained, updated or amended by the director as species information and concerns become available and are identified. The species importation list shall be grouped into the following minimum importation "groups" based on the following criteria.

(1) Species importation list group I are designated semi-domesticated animals and do not require an importation permit.

(2) Species importation list group II may be for live non-domesticated animals that are not known to be either invasive or dangerous and do not present a known risk to the health, safety or well-being of the public, domestic livestock or to native wildlife and their habitats.

(3) Species importation list group III may be for live non-domesticated animals that present minimal or manageable concerns that will require specific provisions that must be met prior to issuing an importation permit to address health, safety or well-being of the public, domestic livestock or to native wildlife and their habitats.

(4) Species importation list group IV may be for live non-domesticated animals that are considered dangerous, invasive, undesirable, state or federal listed threatened, endangered, a furbearer or any other species of concern as identified by the director. The importation of these species are prohibited for the general public but may be allowed for, scientific study, department approved restoration and recovery plans, zoological display, temporary events/entertainment, use as service animal or by a qualified expert.

(5) Any species of live non-domesticated animal not currently on the species importation list will be designated group IV until such time as another determination is made by the director.

B. Non-domesticated animal importation: The director may, in times of animal health emergency, suspend all importation activities or suspend importation of selected taxa for indefinite periods of time to protect wild and domestic animals from infectious disease epidemics and to protect the people of New Mexico from zoonoses.

C. Non-domesticated animal intrastate movement: the director may suspend intrastate movement in an animal health emergency.

D. Eligibility requirements for importation (cooperative compliance): The director may declare any applicant or importer who fails to comply with any importation conditions or provisions as ineligible for future importation

permits or ability to supply animals into New Mexico until all permit violations are corrected and the appropriate certificate of compliance fees are paid in full.

(1) The director may require an applicant to obtain a certificate of compliance prior to becoming eligible to import any live non-domesticated animals and may impose additional corrective measures in those instances where violations of this provision have been identified.

(2) The director may impose a cease-and-desist order that makes an applicant ineligible to apply for an importation permit for up to a year in those instances where corrective measures have not been implemented or repeated violations have occurred.

E. Certificate of compliance fee: The director shall determine the appropriate certificate of compliance fee per violation not to exceed \$500.00 based on the following criteria:

(1) department expenses including manpower, travel, inspection and compliance monitoring;

(2) department office expenses including mailing, shipping, certificate issuance;

(3) animal care, treatment, housing and feeding;

(4) other miscellaneous expenses.

F. Qualified expert: the director shall determine the process and the requirements for a person to be designated a qualified expert for each applicable species.

(1) The director may require an applicant to provide specific qualifications including, but not limited to the following: professional references, experience, training, education and facility specifications.

(2) The determination to approve or deny a qualified expert designation by the director is final and is not subject to appeal.

G. Application notices and documents.

(1) The director shall determine required forms, applications and documents to carry out the provisions of this rule.

(2) The director shall determine noticing and posting provisions to carry out the provisions of this rule.

(3) The director shall determine the permit and application conditions and requirements to carry out the provisions of this rule.

H. The director shall determine the process and requirements for re-entry into the state.

I. The director shall determine the process for expediting applications and permits including an additional application fee of \$25.00.

[19.35.7.10 NMAC - Rp, 19.35.7.10 NMAC, 1-31-14]

19.35.7.11 [Reserved]

19.35.7.12 APPLICATION FOR IMPORTATION:

A. Any applicant requesting an importation permit for non-domesticated animals must submit the following information with the application:

(1) a containment or confinement plan indicating where and how the species will be maintained;

(2) a current and valid certificate from an accredited veterinarian certifying that each animal or rearing facility of origin has been inspected and is in good general health, disease free or that each animal or rearing facility of origin tests disease free for any specific disease(s) following the testing requirements and procedures as identified by the department during the application process, except;

(a) the department may approve an animal supplier that is currently enrolled in an accredited animal breeding program or facility health monitoring standards such as NPIP, AZA, or other government sanctioned program;

(b) the department may approve detailed and verifiable facility of origin health monitoring plans and records to be submitted by an organization(s) in lieu of a health or rearing facility inspection certificate from an accredited veterinarian;

(3) proof from the county and city into which the animal will be imported and held that possession of the animal is allowed;

(4) proof that all necessary federal permits have been obtained;

(5) proof that the requested species does not possess or have the immediate potential to carry infectious or contagious diseases; and

(6) confirmation by the applicant or person in authority representing the applicant agreeing to any conditions and provisions listed on the respective permit; and

(7) any importing person or entity must notify the department of game and fish within 24 hours of any disease indications or symptoms that manifest themselves among the imported animals.

B. Additional conditions for the importation of a dangerous animal; applicant shall agree to the following provisions before an importation permit is approved:

(1) enter into a department approved written agreement releasing the department from liability;

(2) agree to meet all department approved posted warning requirements;

(3) agree to provide a department approved written warning to any person receiving such animal;

(4) government agencies or other entities as designated by the director may be exempted from the liability or warning requirements in this subsection.

C. All application fees are non-refundable.

[19.35.7.12 NMAC - Rp, 19.35.7.12 NMAC, 1-31-14]

19.35.7.13 TEMPORARY IMPORTATION: Importation into the state for exhibition, advertising, movies etc. may be approved on an expedited basis provided that the animal will not be in the state for a period of more than 30 days. Specific requirements for the animals will be listed on the application and permit. Specific requirements for importation may be listed on the application. The department will have the final authority to list all conditions on the permit that will be required prior to final approval.

[19.35.7.13 NMAC - Rp, 19.35.7.13 NMAC, 1-31-14]

19.35.7.14 IMPORTATION OF CERTAIN FISH OR FISH EGGS INTO NEW MEXICO: All fish species or eggs of the families salmonidae, esocidae, percichthyidae, ictaluridae, centrarchidae, percidae, may be imported into the state provided that all conditions stated on the application and permit are met, including the following:

A. the name of department approved supplier pursuant to this regulation;

B. description of water into which fish will be released is provided; description must include: legal owner of water; legal description of location (township, range, section); county; name of water; size of water (surface acres-lake; miles-stream); source and discharge of water; major use of water; a map of sufficient size and detail to allow the water to be located by someone unfamiliar with the area shall be included;

C. species, size, pounds, and number of fish to be imported will be specified;

D. purpose of importation will be specified;

E. full description of person or persons requesting importation, to include: name, address, telephone number, name of contact person;

F. GPS coordinates (latitude and longitude in degree decimal minutes (DDM) using WGS 84 datum for each location where fish are stocked.

G. *Oreochromis niloticus* and *oreochromis mossambicus* may be imported into the state provided that:

(1) all requirements set forth in the application and on the permit are met

(2) all other regulatory requirements, including those set forth herein, are met

[19.35.7.14 NMAC - Rp, 19.35.7.14 NMAC, 1-31-14; A, 10-15-2015]

19.35.7.15 APPROVED SUPPLIERS OF FISH OR FISH EGGS FOR IMPORTATION INTO NEW MEXICO:

A. The department will maintain a listing of approved fish suppliers.

B. All approved fish suppliers or their agent must carry a department-issued copy of the importation permit while transporting fish to the approved release site in New Mexico.

C. Approved supplier or their agent must notify the department of intended port of entry for importation of fish or fish eggs into New Mexico.

D. Approved supplier may be required to provide a presence/absence disease history (e.g., furunculosis bacterium, enteric redmouth bacterium, proliferative kidney disease, ceratomyxosis of salmonids, etc.) of the hatchery facility if requested by the New Mexico department of game and fish.

E. Approved suppliers shall meet the criteria and provide pathogen-free certification as specified herein.

F. Salmonids:

(1) For the infectious hematopoietic necrosis virus (IHNV), infectious pancreatic necrosis virus (IPNV), and viral hemorrhagic septicemia (VHS).

(a) Disease testing will be conducted by another state wildlife agency, United States fish and wildlife service; USDA certified source or other source approved by the New Mexico department of game and fish.

(b) Disease testing of fish must use American fisheries society (AFS) blue book or meet OIE (office international des epizooties) standards.

(c) Disease testing will be conducted on an annual basis; annual inspection must have occurred within the previous 12 months of application date.

(d) 60 fish per lot will be sampled.

(e) For all lots of fish not originating on facility, supplier must provide a historical account documenting fish were reared only at New Mexico department of game and fish approved aquaculture facilities.

(2) Salmonids -for the whirling disease pathogen and bacterial kidney disease.

(a) Disease testing will be conducted by another state wildlife agency, United States fish and wildlife service; USDA certified source or other source approved by the New Mexico department of game and fish.

(b) Lots of fish older than six months will be sampled.

(c) 60 fish per lot will be sampled.

(d) Inspection will include at least one lot of susceptible salmonids (rainbow trout, cutthroat trout, rainbow-cutthroat hybrids) which has been on the hatchery's water source for at least 10 months.

(e) Disease testing will be conducted on an annual basis. Annual inspection must have occurred within the previous 12 months of application date.

(f) Positive findings of whirling disease by pepsin-trypsin digestion shall be considered presumptive; positive findings of whirling disease by histology shall be considered confirmatory.

(g) For all lots of fish not originating on facility, supplier must provide a historical account documenting fish were reared only at New Mexico department of game and fish approved aquaculture facilities.

(h) Supplier may be required to provide a whirling disease history of the hatchery facility if requested by the New Mexico department of game and fish.

(i) Presumptive findings: Any presumptive findings of disease with no confirmatory testing shall be deemed a positive finding of the disease.

(j) Positive findings of disease: Any facility deemed to have tested positive, by confirmatory findings or presumptive findings without confirmatory testing, under this rule shall be barred from importation into the state of New Mexico until the facility is shown to be pathogen free for a minimum of two consecutive years and has met all other requirements.

(k) Renovated facilities: A facility that has been deemed positive under this rule and has undergone complete renovation may apply for importation privileges as a new facility once it has had at least one annual inspection and has met all other requirements. Complete renovation for the purposes of this rule shall be defined as a facility that has: 1) closed, secured, and sanitized all water sources, 2) confined all water conveyance to closed sealed pipes, and 3) constructed all rearing spaces out of hard surfaced materials. Proof of renovation must be provided with the application for importation privileges. On-site inspection of the facility after renovation may be required prior to authorization to import.

G. Warm water fish:

(1) Disease testing will be conducted by another state wildlife agency, United States fish and wildlife service; USDA certified source or other source approved by the New Mexico department of game and fish.

(2) Disease testing of fish must use American Fisheries Society (AFS) blue book procedures or meet OIE standards.

(3) Disease testing will be conducted on an annual basis. Annual inspection must have occurred within the previous 12 months of application date.

(4) 60 warm water fish per lot shall be tested for viruses and bacteria.

(5) *Oreochromis niloticus* and *oreochromis mossambicus* shall be certified as to species and as either all male or otherwise sterile by a qualified independent laboratory or by other means approved by the director.

(6) *Oreochromis niloticus* and *oreochromis mossambicus* capable of reproduction and certified as to species by a qualified, independent laboratory or by other means approved by the director may be approved for import only to a qualified expert.

(7) Approved supplier will document whether fish on the facility have ever been diagnosed with channel catfish virus.

H. Triploid grass carp: A notarized certificate of triploidy issued by another state wildlife agency, United States fish and wildlife service, USDA certified source or other source approved by the New Mexico department of game and fish must be provided for all grass carp imported into New Mexico.

I. Approved suppliers shall provide signed written assurance to the department that the fish rearing facilities are free of aquatic nuisance species (ANS) and aquatic invasive species (AIS). Failure to provide this assurance shall be reason to deny importation privileges. Approved suppliers shall be liable for any introduction of ANS or AIS caused by their actions.

[19.35.7.15 NMAC - Rp, 19.35.7.15 NMAC, 1-31-14; A, 10-15-2015]

19.35.7.16 [Reserved]

19.35.7.17 IMPORTATION CONDITIONS FOR THE FAMILIES BOVIDAE, ANTILOCAPRIDAE AND CERVIDAE: All live protected wildlife species of the families bovidae, antilocapridae, and cervidae imported in the state of New Mexico shall meet the following criteria.

A. Be permanently identified with any 2 of the following devices, one of which must be an official animal identification. All identification data shall be registered with the department:

- (1) implanted electronic identification device.
- (2) ear tag with park identification number.
- (3) tamper-proof ear tag with imprinted national identification number.
- (4) USDA metal ear tags.

B. Be examined by an accredited veterinarian prior to importation. Each animal shall be accompanied by a pre-approved health certificate, certifying a disease-free status.

C. Test negative for brucellosis. Serum testing shall be done not more than 30 days prior to importation. All serum samples shall be tested by a cooperative state federal brucellosis laboratory.

D. Test negative for bovine tuberculosis not more than 90 days prior to importation. Animals to be imported must originate from a herd that had a negative whole-herd tuberculosis test not more than 12 months prior to importation or have a current "tuberculosis free herd" certificate issued from the state of origin through a USDA accreditation program. Bovine tuberculosis testing must be performed with the current USDA approved method and be conducted by a federally accredited veterinarian. Exception: Wild sheep are exempt from this testing requirement.

E. Only cervids enrolled and in the state CWD herd certification program and from a herd that has achieved certified status, and that does not show clinical signs associated with CWD may be imported into New Mexico.

(1) No cervid shall be allowed to enter the state if it has had any contact with a CWD suspect, exposed, positive, trace-forward or trace-back animal within 60 months prior to time of importation.

(2) No cervid coming through mixed herd sales or auctions shall be allowed to enter the state. Only animals from closed sales may be imported.

(3) No cervid shall enter the state in a conveyance that has held CWD suspect, exposed, positive, trace-forward or trace-back animals.

F. All elk to be imported into the state of New Mexico shall be tested for genetic purity. Only Rocky Mountain elk (*Cervus elaphus nelsoni*) will be allowed to be imported into the state of New Mexico. Any elk showing red deer hybridization or hybridization of other elk subspecies will not be allowed into the state. All testing shall be done ONLY by a New Mexico department of game and fish approved laboratory.

G. All progeny from female elk impregnated prior to importation into New Mexico shall be tested for hybridization of red deer and other elk subspecies.

H. White-tailed deer subspecies to be imported into the state of New Mexico must have originated and must exist west of the 100th meridian and test negative for meningeal worm.

I. Be permitted in compliance with Subsection A of 19.31.1.10 NMAC.

(1) Cost of testing: All testing will be at owner's expense.

(2) After entering the state, all animals shall be held in a separate facility by the owner and/or importer. All imported animals, prior to release, may be inspected at any time by a department of game and fish official or designee.

(3) Owners/importers must notify the department of game and fish within 24 hours of any disease indications or symptoms that manifest themselves among the imported animals prior to final inspection.

(4) Animals shall be held in isolation in the event of an animal health emergency as declared by the director.

(5) Final inspection / permit validation: No animals may be released from the separate facility into the class A park or other enclosure until the owner has received a release approval signed by a department of game and fish official.

[19.35.7.17 NMAC - Rp, 19.35.7.17 NMAC, 1-31-14]

19.35.7.18 INTRASTATE TRANSPORTATION FOR THE FAMILIES BOVIDAE, ANTILOCAPRIDAE AND CERVIDAE:

A. Transporting requirements: All live cervids transported within the state of New Mexico shall be legally possessed and permanently identified with any 2 of the following devices, one of which must be an official animal identification. All identification data shall be registered with the department:

- (1) implanted electronic identification device.
- (2) ear tag with park identification number.
- (3) tamper-proof ear tag with imprinted national identification number.
- (4) USDA metal ear tags.

B. The director may suspend intrastate movement in an animal health emergency.

[19.35.7.18 NMAC- Rp, 19.35.7.18 NMAC, 1-31-14]

19.35.7.19 RELEASE FROM CAPTIVITY FOR IMPORTED ANIMALS: No person shall release from captivity an imported animal into New Mexico except by obtaining a release permit from the director. The transfer of an imported animal from one person to another person does not constitute a release from captivity.

A. Prior to approval by the director an applicant must:

- (1) submit a plat of the release area;
- (2) submit verification that landowners, tribal officials, state officials, federal officials and county officials that may be directly affected by the release have been notified of the potential release in writing and have been given 20 days to respond to the release; responses must be submitted with the application; it is the responsibility of the applicant to notify the above and submit responses to the department; failure to notify as indicated herein or to submit responses will result in the application being rejected until this condition is met and any compliance fees are paid;
- (3) demonstrate that the intended release is provided for in state or federal resource or species management plans or strategies (CWCS).

B. Any individual or group of isolated animals in which signs of infectious or contagious disease is evident will not be released, will remain in isolation, and, at the recommendation of the state veterinarian:

(1) the animals shall be treated and restored to health until they no longer pose a threat of infection to wild, free ranging wildlife or to other captive animals in the facility; or

(2) the isolated animals shall be destroyed and remains will be disposed in a manner conforming to state, federal or local rules and regulations.

C. The director shall not approve any release permit that conflicts with current conservation management.

D. The state game commission must review any permit application for any carnivore that will be held, possessed or released on private land for the purpose of recovery, reintroduction, conditioning, establishment or reestablishment in New Mexico. The director shall only issue a department permit in accordance with commission direction following their review of an application submitted under this section of rule.

[19.35.7.19 NMAC - Rp, 19.35.7.19 NMAC, 1-31-14; A, 12-15-2014]

19.35.7.20 [Reserved]

19.35.7.21 DENIAL OF PERMIT APPLICATION: The appropriate department division chief shall notify the applicant of a denial to import non-domesticated animals in writing. A denied application will not be further considered unless the applicant is granted an allowance through the director's review or the commission appeal process.

[19.35.7.21 NMAC - Rp, 19.35.7.21 NMAC, 1-31-14]

19.35.7.22 IMPORTATION PERMIT APPEAL PROCESS: The denial of an importation permit may only be set aside if each step in the application and appeal process is adhered to sequentially and the appeal is conducted in accordance with the following procedures.

A. Director's review: any applicant whose importation permit application has been denied may request a review by the director in accordance with the following procedures.

(1) The applicant must submit by certified mail a written request to the director within 30 days of denial.

(2) A request for the director's review must contain the reason for the objection.

(3) The director will consider any additional evidence and information that was not previously considered in the initial denial.

(4) The director will consider any conflicts with native wildlife, threats to human health, domestic animals or livestock and qualified expert designation when making a determination.

(5) The designation within a specified group on the director's species importation list cannot be used as the basis for review or appeal.

(6) The director shall make a determination and send the applicant his decision within 45 days.

(7) The determination to approve or deny a qualified expert designation by the director is final and is not subject to appeal.

B. Commission appeal: any applicant may appeal the decision by the director in accordance with the following procedures.

(1) The applicant must submit by certified mail a written appeal to the chairman of the state game commission within 20 days of denial by the director.

(2) The appeal to the chairman must contain the reason for the objection.

C. Basis for decision: The commission may set aside the decision of the director only if;

(1) the commission determines that the decision of the director was arbitrary or capricious;

(2) the decision of the director was not based on law or regulation;

(3) the appellant provides additional data or proves significant evidence that contradicts the data of the department;

(4) the decision of the commission shall be final.

D. An appeal filed with the commission will be heard at the next scheduled commission meeting subject to agenda item availability and related time constraints.

[19.35.7.22 NMAC- Rp, 19.35.7.22 NMAC, 1-31-14]

19.35.7.23 EXCEPTIONS: Employees of the New Mexico department of game and fish and other state agencies acting in the course of their official duties are not required to have an importation permit. However, all disease testing requirements specified in this rule must be met prior to importation.

[19.35.7.23 NMAC- Rp, 19.35.7.23 NMAC, 1-31-14]

HISTORY OF 19.35.7 NMAC:

NMAC History:

19 NMAC 31.1, Hunting and Fishing - Manner and Method of Taking, filed 3-1-95.

19.35.7 NMAC, Importation of Live Non-Domesticated Animals, Birds and Fish, filed 3-17-00.

History of Repealed Material:

19.35.7 NMAC, Importation of Live Non-Domesticated Animals, Birds and Fish, filed 3-17-00 - Repealed effective 7-9-10.

19.35.7 NMAC, Importation of Live Non-Domesticated Animals, Birds and Fish, filed 7-9-10 - Repealed effective 1-31-13.

Current with all new rules, amendments, and repeals received by September 16, 2016

N.M. Admin. Code 19.35.7, NM ADC 19.35.7

End of Document

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**Mexican Wolf Recovery Program:
Progress Report #18**

Reporting Period: January 1 – December 31, 2015

Prepared by: U.S. Fish and Wildlife Service

Cooperators: Arizona Game and Fish Department, USDA-APHIS Wildlife Services, US Forest Service, and White Mountain Apache Tribe



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Foreword

The U.S. Fish and Wildlife Service (Service) is the lead agency responsible for recovery of the Mexican wolf (*Canis lupus baileyi*), pursuant to the Endangered Species Act of 1973, as amended (Act, or ESA). The Mexican Wolf Recovery Program has two interrelated components: 1) Recovery – includes aspects of the program administered by the Service that pertain to the overall goal of Mexican wolf recovery and delisting from the list of threatened and endangered species, and 2) Reintroduction – includes aspects of the program implemented by the Service and cooperating States, Tribes, other Federal agencies, and counties that pertain to management of the reintroduced Mexican wolf population in the Mexican Wolf Experimental Population Area (MWEPA). This report provides details on both aspects of the Mexican Wolf Recovery Program. The reporting period for this progress report is January 1 – December 31, 2015.

Background

The Mexican wolf is listed as endangered under the Act in the southwestern United States and Mexico (80 FR 2488-2512, January 16, 2015). It is the smallest, rarest, southernmost occurring, and most genetically distinct subspecies of the North American gray wolf.

Mexican wolves were extirpated from the wild in the southwestern United States by 1970, primarily as a result of a decades-long concerted effort to eradicate them due to livestock conflicts. Recovery efforts for the Mexican wolf began when it was listed as an endangered species in 1976. In the late 1970s and early 1980s, the initiation of a binational captive breeding program originating from just seven wolves saved the Mexican wolf from extinction.

The recovery effort for the Mexican wolf focuses on maintenance of the captive breeding population and the reestablishment of wolves in the wild, as recommended by the 1982 Mexican Wolf Recovery Plan. Mexican wolves were first released to the wild in March 1998.

Today, the reintroduced population is managed and monitored by an Interagency Field Team (IFT) comprised of staff from the Service, Arizona Game and Fish Department (AGFD), White Mountain Apache Tribe (WMAT), US Forest Service, and U.S. Department of Agriculture-Wildlife Services (USDA-WS). The New Mexico Department of Game and Fish withdrew as a partner agency in 2011. In Mexico, federal agencies initiated a reintroduction effort in 2011 pursuant to Mexico's federal laws and regulations.

PART A: RECOVERY ADMINISTRATION**1. Mexican Wolf Captive Breeding Program***a. Mexican Wolf Species Survival Plan (SSP)*

The SSP is a binational captive breeding program between the United States and Mexico for the Mexican wolf. Its mission is to reestablish the Mexican wolf in the wild through captive breeding, public education, and research. SSP members routinely transfer Mexican wolves among participating facilities for breeding to promote genetic exchange and maintain the health and genetic diversity of the captive population. Wolves in these facilities are rigorously managed in accordance with a Service-approved standard protocol.

This year, the SSP held its annual binational meeting to plan and coordinate wolf breeding, transfers, and related activities among facilities at the Chapultepec Zoo in Mexico City, Mexico. The meeting entailed updates on the reintroduced populations in the US and Mexico, discussion on the gamete banking plan for 2016, evaluation and selection of release candidates for both the US and Mexico, and reports on research including advances in gamete banking, potential effects of a variety of contraception methods, and progress toward lifetime reproductive planning for female wolves.

As of July 2015, the SSP captive population includes approximately 243 captive Mexican wolves managed in 54 facilities in the United States and Mexico. This current population size is only slightly above the SSP goal of housing a minimum of 240 wolves with a target population size of 300 to ensure the security of the species in captivity and produce surplus animals for reintroduction.

The SSP captive population was the sole source population to reestablish the species in the wild, as it was extirpated throughout its range in the United States and Mexico. The SSP captive population is now the source to improve the genetic diversity by providing wolves for release into the wild population. Thus, without the SSP, recovery of the Mexican wolf would not be possible. Wolves that are considered genetically well represented in the SSP population may be designated for release. Within that pool of wolves, suitable release candidates are determined based on criteria such as genetic makeup, reproductive performance, behavior, and physical suitability. Additional analyses are performed to ensure that the reintroduced population is receiving wolves of appropriate and balanced genetic history. This minimizes any adverse effects to the genetic integrity of the captive population, in the event that wolves released to the wild do not survive. Based on these standards, this year the SSP identified two Mexican wolf pairs to breed at the Service's Sevilleta Wolf Management Facility for potential release in the US in 2016.



Mexican wolf F1362 at the Sevilleta Wolf Management Facility. Credit: US Fish and Wildlife Service.

b. Mexican Wolf Pre-Release Facilities

Mexican wolves are acclimated prior to release to the wild in captive facilities designed to house wolves in a manner that fosters wild characteristics and behaviors. The Service oversees the management at two of these facilities; the Ladder Ranch and Sevilleta Wolf Management Facilities, located in New Mexico within the MWEPA. At these facilities, wolves are managed with minimal exposure to humans for the purpose of minimizing habituation to humans and maximizing pair bonding, breeding, pup rearing, and healthy pack structure development. These facilities have been successful in breeding wolves for release and are integral to Mexican wolf recovery efforts. To further minimize habituation to humans, public visitation to the Ladder Ranch and Sevilleta facilities is not permitted.

Release candidates are sustained on carnivore logs and a zoo-based exotic canine diet formulated for wild canids. Diets of release candidates are supplemented with carcasses of road-killed ungulate species, such as deer and elk, and scraps from local game processors (meat, organs, hides, and bones) from wild game/prey species only. Release candidates are given annual examinations to vaccinate for canine diseases (e.g., parvo, adeno2, parinfluenza, distemper and rabies viruses, etc.), are dewormed, have laboratory evaluations performed, and have their overall health condition evaluated. Animals are treated for other veterinary purposes on an as-needed basis.

Sevilleta Wolf Management Facility

The Sevilleta Wolf Management Facility (Sevilleta) is located on the Sevilleta National Wildlife Refuge near Socorro, New Mexico and is managed entirely by the Service. There are a total of eight enclosures, ranging in size from 0.25 acre to approximately 1.25 acres, and a quarantine pen. In 2015 the refuge staff continued to assist Mexican Wolf Recovery Program staff in the maintenance and administration of the wolf pens. Through the course of the year, 11 individual wolves were housed at Sevilleta. At the start of the year, four wolves were housed at Sevilleta. During the year, four wolves were received from participating SSP institutions in the United States, plus three wolves were received from the MWEPA. Four wolves were transferred out of Sevilleta; two wolves to SSP facilities in the United States, and two wolves to the MWEPA. One death and no births occurred at Sevilleta in 2015. At year's end, the facility housed six wolves.

Ladder Ranch Wolf Management Facility

The Ladder Ranch Wolf Management Facility (Ladder Ranch), owned by R. E. Turner, is located on the Ladder Ranch near Truth or Consequences, New Mexico. There are a total of five enclosures, ranging in size of 0.25 acre to 1.0 acre. The caretaking of wolves at the facility is carried out by an employee of the Turner Endangered Species Fund, though the facility is managed and supported financially by the Service. During 2015, two individual wolves were housed at the Ladder Ranch. Both wolves were transferred out to SSP facilities in the United States. No births or deaths occurred at the Ladder Ranch in 2015. At year's end, the Ladder Ranch was not housing any Mexican wolves.

2. Recovery Planning

This year, the Service continued its effort to revise the 1982 Mexican Wolf Recovery Plan. The Service invited participants from New Mexico Department of Game and Fish, Arizona Game and Fish Department, Utah Division of Wildlife Resources, Colorado Parks and Wildlife, federal agencies in Mexico, and independent scientists from the US and Mexico to assist us in gathering and assessing scientific information pertinent to our development of a revised recovery plan. We expect to produce a draft recovery plan for public and peer review in early 2017, and a final recovery plan by the end of November 2017. The Service previously initiated the revision of the recovery plan, but did not produce an agency-approved draft or final plan.

Additional updates on the revision of the recovery plan will be available during 2016-2017 on our website, <https://www.fws.gov/southwest/es/mexicanwolf/MWRP.cfm>.

3. Mexican Gray Wolf Subspecies Listing

On January 16, 2015, we finalized a rule to list the Mexican wolf as an endangered subspecies (80 FR 2488-2512, January 16, 2015). The Mexican wolf has been protected as endangered by the Act since 1976; our 2015 listing rule served to separate the Mexican wolf from the gray wolf proposed delisting determination (78 FR 35664, June 13, 2013). Our determination on the Mexican wolf resulted in a revision to the List of Endangered and Threatened Wildlife by making a separate entry for the Mexican wolf. We found that the Mexican wolf is endangered

due to illegal shooting, inbreeding, loss of heterozygosity, loss of adaptive potential, small population size, and the cumulative effect of these factors.

4. Revision to the Nonessential Experimental Population of the Mexican Wolf and Environmental Impact Statement

On January 16, 2015, the Service published the Revision to Regulations for the Nonessential Experimental Population of the Mexican Wolf (80 FR 2512-2567, January 16, 2015). This 2015 10(j) Rule provides a fourfold expansion of the area where Mexican wolves are expected to occur and a tenfold increase in the area where Mexican wolves can initially be released from captivity compared to the previous 1998 10(j) rule. The 2015 10(j) Rule also allows management activities in Arizona to be methodically phased west of Highway 87 over a period of up to 12 years (with triggers that would enable westward expansion), extends the MWEPA's southern boundary to the US-Mexico border in Arizona and New Mexico, clarifies definitions (including provision for take of Mexican wolves), and provides a population objective of 300-325 Mexican wolves in the MWEPA.

In coordination with development of this rule, the Service completed the Final Environmental Impact Statement for the Proposed Revision to Regulations for the Nonessential Experimental Population of the Mexican Wolf, pursuant to the National Environment Policy Act, in November 2014 (79 FR 70154-70155). We issued a Record of Decision on January 6, 2015, selecting Alternative One (Proposed Action and Preferred Alternative) for implementation.

5. Summary of 2015 Litigation

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

Defendants: Secretary of the Interior, US Fish and Wildlife Service

Intervenors: Protect American Now; Colorado Farm Bureau; NM Farm and Livestock Bureau; Utah Farm Bureau; Coalition of AZ and NM Counties for Stable and Economic Growth

Allegation: Violation of ESA for failure to prepare a recovery plan

Date NOI Filed: September 10, 2014

Date Complaint Filed: November 11, 2014

Case Number/Court: 4:14-cv-0472 JGZ (D. Ariz.)

Status: Settlement discussions ongoing

Plaintiffs: Center for Biological Diversity; Defenders of Wildlife

Defendants: Secretary of the Interior; US Fish and Wildlife Service

Intervenors: State of Arizona (Defendant)

Allegation: (APA) Violations of NEPA in revising the 10(j) Rule and issuance of associated 10(a)(1)(A) permit

Date NOI Filed: No NOI Filed on alleged APA violations; January 16, 2015 NOI pertaining to 10(a)(1)(A) permit

Date Complaint Filed: January 16, 2015; amended complaint filed March 23, 2015

Case Number/Court: 4:15-cv-00019-LAB (D. Ariz.)

Status: Ongoing

Plaintiffs: AZ and NM Coalition of Counties for Stable Economic Growth et al (18 plaintiffs)
Defendants: US Fish and Wildlife Service; Secretary of the Interior; Dan Ashe; Benjamin Tuggle
Intervenors: None
Allegation: Violations of APA, NEPA, Regulatory Flex Act. E.O. 12898 in implementing the Record of Decision/FEIS and 2015 10(j) Rule
Date NOI Filed: No NOI filed
Date Complaint Filed: February 12, 2015
Case Number/Court: 4:15-cv-00179-FRZ (D. Ariz.)
Status: Consolidated with District of Arizona case 4:15-cv-00019-JGZ

Plaintiffs: Wild Earth Guardians; New Mexico Wilderness Alliance; Friends of Animals
Defendants: Director of the US Fish and Wildlife Service; Secretary of the Interior
Intervenors: None
Allegation: Violation of ESA for not considering essential status for Mexican wolves; Violation of NEPA for not assessing revisions to final rule
Date NOI Filed: March 24, 2015
Date Complaint Filed: July 2, 2015
Case Number/Court: 4:15-cv-00285-JGZ (D. Ariz.)
Status: Consolidated with District of Arizona case 4:15-cv-00019-JGZ

Plaintiffs: State of Arizona
Defendants: Secretary of the Interior, US Fish and Wildlife Service
Intervenors: State of Colorado; NM Department of Game and Fish; State of Utah (Plaintiffs)
Allegation: Violation of ESA for failure to revise recover plan
Date NOI Filed: January 20, 2015
Date Complaint Filed: June 8, 2015
Case Number/Court: 4:15-cv-00245-JGZ (D. Ariz.)
Status: Settlement discussions ongoing

Plaintiffs: Safari Club International
Defendants: Secretary of the Interior; US Fish and Wildlife Service
Intervenors: Center for Biological Diversity, Defenders of Wildlife (Defendants)
Allegation: Violations of ESA, APA, and NEPA promulgating the 2015 10(j) Rule and FEIS/ROD
Date NOI Filed: August 3, 2015
Date Complaint Filed: October 16, 2015
Case Number/Court: 4:16-cv-00094-JGZ (D. Ariz.)
Status: Ongoing



Mexican wolf M1130 at the Sevilleta Wolf Management Facility during capture and processing in preparation for release. Credit: Pascal Berlioux.

6. Reintroduction Project Structure

At the end of 2015, the signatories to the Memorandum of Understanding (MOU) that guides the reintroduction and management of the Mexican wolf population in the MWEPA included AGFD, USDA-Forest Service, USDA-WS, WMAT, and the Service, as well as the cooperating counties of Gila, Graham, Greenlee, and Navajo in Arizona and the Eastern Arizona Counties Organization (ECO). A copy of this MOU can be found at <https://www.fws.gov/southwest/es/mexicanwolf/documents.cfm>. The MOU is currently being revised to address the provisions of the revised 2015 10(j) Rule.

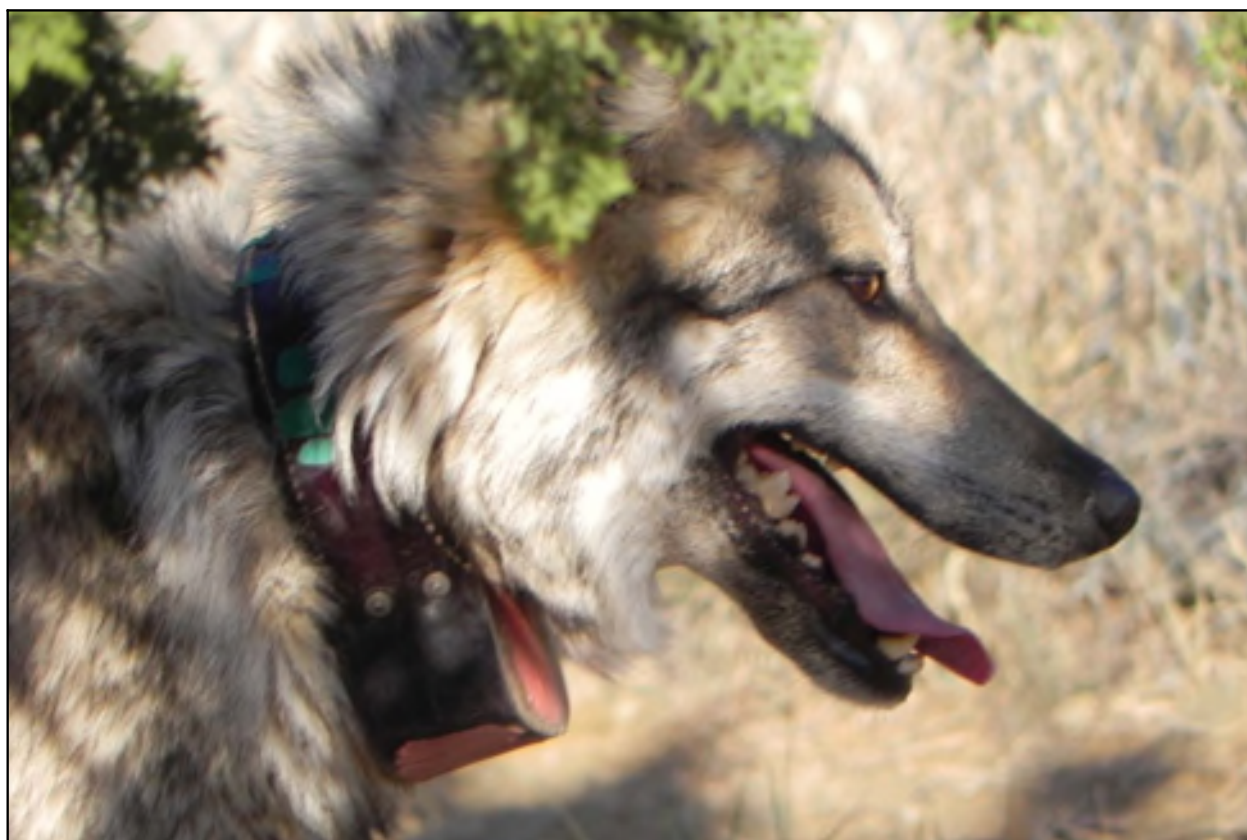
Each year the IFT produces an Annual Report, detailing Mexican wolf field activities (e.g., population status, reproduction, mortalities, releases/translocations, dispersal, depredations, etc.) in the MWEPA. The 2015 report is included as PART B of this document. Monthly MWEPA project updates are available at <https://www.fws.gov/southwest/es/mexicanwolf> or you may sign up to receive them electronically by visiting <http://www.azgfd.gov/eservices/subscribe.shtml>. Additional information about the Reintroduction Project can be found on the Service's web page at: <https://www.fws.gov/southwest/es/mexicanwolf> or AGFD's web page at: <https://www.azgfd.com/wildlife/speciesofgreatestconservneed/mexicanwolves/>

7. Cooperative Agreements

In 2015, the Service funded cooperative agreements with AGFD, National Fish and Wildlife Foundation (NFWF) San Carlos Apache Tribe (SCAT), TEF, The Living Desert, University of Idaho, University of New Mexico, and WMAT. The Service also provides funding to AGFD through section 6 of the Act, which requires 25% percent matching funds from Arizona.

Cooperator	USFWS/Mexican Wolf Project Funds Provided in 2014
AGFD	\$ 165,000
NFWF	\$ 40,000
SCAT	\$ 40,000
TEF	\$ 29,000
The Living Desert	\$ 30,000
University of New Mexico	\$ 10,000
University of Idaho	\$ 10,000
White Mountain Apache Tribe	\$ 205,000

In addition to the above agreements, the Service also provided funding for several miscellaneous contracts for veterinary, helicopter, mule packing and other services. For more information on Program costs to date visit <https://www.fws.gov/southwest/es/mexicanwolf/documents.cfm>



Mexican wolf F1305 at the Sevilleta Wolf Management Facility. Credit: US Fish and Wildlife Service.

8. Mexican Wolf/Livestock Interdiction Fund and Mexican Wolf/Livestock Council

The Service, in cooperation with the National Fish and Wildlife Foundation, established the Mexican Wolf /Livestock Interdiction Trust Fund (Interdiction Fund) on September 23, 2009. The objective of the Interdiction Fund is to generate long-term funding for prolonged financial support to livestock operators within the framework of conservation and recovery of Mexican wolf populations in the Southwest. Funding will be applied to initiatives that address management, monitoring, and other proactive conservation needs for Mexican wolves as they relate to livestock, including alternative livestock husbandry practices, grazing management alternatives, livestock protection, measures to avoid and minimize depredation, habitat protection, species protection, scientific research, conflict resolution, compensation for damage, education, and outreach activities.

In 2015, the 11 member Coexistence Council that administers the Mexican Wolf/Livestock Interdiction Trust Fund (Fund) changed its name to the Mexican Wolf/Livestock Council. The following table reflects disbursements of funds associated with the Fund from its initiation through the end of 2015. The Council continued implementation of its strategic plan, approved in 2014, focusing on reducing livestock/wolf conflicts and the need for management removals of depredating or nuisance wolves. More information can be found at

<http://www.coexistencouncil.org/>

Year	Direct Compensation for Livestock Lost	Payments for Wolf Presence	Total
2011	\$18,181	N/A	\$18,181
2012	\$22,600	N/A	\$22,600
2013	\$27,594	\$85,500	\$113,094
2014	\$63,724	\$85,500	\$149,224
2015	\$104,144	Applications due June 1, 2016	TBD

9. Literature Cited

US Fish and Wildlife Service. 1982, Mexican Wolf Recovery Plan 1982, US Fish and Wildlife Service, Albuquerque, New Mexico.

US Fish and Wildlife Service. 1998, Final Rule. Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico, 63 *Federal Register* 1752-1772.

US Fish and Wildlife Service, 2013, Proposed Rule. Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife and Maintaining Protections for the Mexican Wolf (*Canis lupus baileyi*) by Listing It as Endangered, 78 *Federal Register* 35664-35719.

US Fish and Wildlife Service, 2014. Final Environmental Impact Statement for the Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf. 79 *Federal Register* 70154-70155.

US Fish and Wildlife Service, 2015. Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf. 80 *Federal Register* 2512-2567.

US Fish and Wildlife Service, 2015. Endangered Status for the Mexican Wolf. 80 *Federal Register* 2488-2512.

PART B: REINTRODUCTION

Mexican Wolf Experimental Population Area Interagency Field Team Annual Report Reporting Period: January 1 – December 31, 2015

Prepared by:

Arizona Game and Fish Department, U.S. Department of Agriculture - Animal and Plant Health Inspection Service - Wildlife Services, U.S. Forest Service, U.S. Fish and Wildlife Service, and White Mountain Apache Tribe.

Lead Agencies:

Arizona Game and Fish Department (AGFD)
USDA-APHIS Wildlife Services (USDA-WS) U.S. Fish and Wildlife Service (USFWS)
U.S. Forest Service (USFS)
White Mountain Apache Tribe (WMAT)

The 2015 annual report reflects the 2014 population parameters published in the 2014 annual report addendum (<http://www.fws.gov/southwest/es/mexicanwolf/documents.cfm>).

1. Introduction

This report summarizes results of Mexican Wolf Interagency Field Team (IFT) activities during 2015. The Mexican Wolf Reintroduction Project (Reintroduction Project) is part of a larger recovery program that is intended to reestablish the Mexican wolf (*Canis lupus baileyi*) within its historical range.

The Reintroduction Project is conducted in accordance with a nonessential experimental population Final Rule (USFWS 2015; 2015 10(j) Rule) that expanded the Mexican Wolf Experimental Area (MWEPA) south of Interstate 10 to the United States-Mexico border, discontinued the designation of the Blue Range Wolf Recovery Area and White Sands Wolf Recovery Area, and established three management areas (Zone 1, 2, and 3: Fig. 1) south of Interstate 40 in Arizona and New Mexico. These new designations resulted in a fourfold increase in suitable habitat that Mexican wolves can occupy (Zones 1-3) and a tenfold increase in areas that Mexican wolves can be released and/or translocated (Zone 1-2). Zone 1 includes all of the Apache, Gila, and Sitgreaves national Forests; the Payson, Pleasant Valley and Tonto Basin Ranger Districts of the Tonto National Forest; and the Magdalena Ranger District of the Cibola National Forest. In 2000, the White Mountain Apache Tribe (WMAT) agreed to allow free-ranging Mexican wolves to inhabit the Fort Apache Indian Reservation (FAIR). The FAIR is in east-central Arizona, and provides 2440 mi² (6319 km²) of area that wolves may occupy.

In March 1998, the first release of Mexican wolves occurred on the Alpine and Clifton Ranger Districts of the Apache-Sitgreaves National Forest, Arizona. The wild population peaked at 110 wolves in 2014, but declined to a minimum count of 97 wolves in 2015 principally due to reduced pup survival in 2015 relative to 2014. One translocation and one initial release occurred in 2015. At the end of 2015, the wild population totaled a minimum of 97 wolves, and 21 packs;

12 of which produced at least one pup that survived to year-end. More information on population statistics can be found at

<http://www.fws.gov/southwest/es/mexicanwolf/> and
http://www.azgfd.gov/w_c/es/wolf_reintroduction.shtml

Wolf age and sex abbreviations used in this document:

A = alpha/breeder (wolf that has successfully bred and produced/sired at least one pup)

M = adult male (> two years old)

F = adult female (> two years old)

m = subadult male (one - two years old)

f = subadult female (one - two years old)

mp = male pup (< one year old)

fp = female pup (< one year old)

2. Methods

The IFT followed Standard Operating Procedures (SOPs) approved by the Lead Agencies. The following definitions apply to this report:

Breeding pair: a pack that consists of an adult male and female and at least one pup of the year surviving through December 31.

Wolf pack: two or more wolves that maintain an established territory. In the event that one of the wolves dies, the remaining wolf, regardless of pack size, retains the pack name.

Initial Releases: the release of Mexican wolves to the wild within Zone 1 (Figure 1), or in accordance with tribal or private land agreements in Zone 2 (Figure 1), that have never been in the wild, or releasing pups that have never been in the wild and are less than 5 months old within Zones 1 or 2. The initial release of pups less than 5 months old into Zone 2 allows for the cross-fostering of pups from the captive population into the wild, as well as enables translocation-eligible adults to be re-released in Zone 2 with pups born in captivity (see 2015 10(j) rule at www.fws.gov/southwest/es/mexicanwolf/pdf/Mx_wolf_10j_final_rule_to_OFR.pdf).

Translocations: the release of Mexican wolves into the wild that have previously been in the wild. In the MWEPA translocations will occur only in Zones 1 and 2 (Figure 1; see 2015 10(j) Rule at www.fws.gov/southwest/es/mexicanwolf/pdf/Mx_wolf_10j_final_rule_to_OFR.pdf).

Depredation: confirmed killing or wounding of lawfully-present domestic animals by one or more Mexican wolves.

Depredation incident: means the aggregate number of livestock killed or mortally wounded by an individual wolf or by a single pack of wolves at a single location within a one-day (24 hr.) period, beginning with the first confirmed kill, as documented in an initial IFT incident investigation pursuant to SOP 11.0.

Releases and Translocations

Initial release candidates are considered genetically surplus to the captive breeding program. Translocation candidates are wolves with prior wild experience, which are re-released into the wild from captivity or another location in the wild. Mexican wolves are acclimated prior to release to the wild in captive facilities designed to house wolves in a manner that fosters wild characteristics and behaviors. The Service oversees the management at two of these facilities; the Ladder Ranch and Sevilleta Wolf Management Facilities, located in New Mexico within the MWEPA.

In pre-release facilities, contact between wolves and humans is minimized. Carcasses of road-killed native prey species, primarily deer (*Odocoileus* spp.) and elk (*Cervus canadensis*), supplement the routine diet of processed canine food supplied to wolves. Genetically and socially compatible breeding pairs are established and evaluated for physical, reproductive, and behavioral suitability for direct release into the wild. Single wolves are also evaluated for release and potential pairing with wolves in the wild.

Prior to release, wolves may be adversely conditioned to avoid certain food types (i.e., domestic livestock) and human presence. As close to release as possible, wolves may be subjected to taste aversion conditioning in efforts to deter their use of domestic livestock as a food source. Separately, or in addition to taste aversion conditioning, wolves in pre-release facilities may be hazed (purposefully harassed) prior to release in efforts to increase their avoidance of humans and/or inhabited areas.

Wolves are released or translocated using either a soft release or a hard release method. The soft release method holds wolves at the release site for one day to several months to acclimate them to the specific area. Soft release pens are constructed of chain link and are approximately 0.30 acre in size. A modified soft release consists of placing the wolves in an acclimation pen approximately 0.13 acre in size and built of nylon mesh, with electric fencing interwoven into the structure. Flagging is also attached to the pen walls approximately every two feet, as a visual barrier to discourage wolves from running into pen walls. Wolves generally self-release within a few days. A hard release is a direct release of a wolf (or wolves) from a crate into the wild or into an enclosure built of fladry (flagging hanging on a rope surrounding a small protected area; sometimes the fladry “fence-line” is electrified).

Radio Telemetry Monitoring

In 2015, all wolves equipped with radio-collars were monitored by standard radio telemetry from the ground and once weekly from the air as opportunity allowed. In addition, many wolves were equipped with GPS collars to provide more detailed location information. Visual observations, wolf behavior, evidence of a kill site, associated uncollared wolves, and fresh sign were also noted when possible. Location data were entered into the project’s Access database for analysis.

Aerial and satellite locations of wolves were used to develop home ranges (White and Garrott 1990). Until 2014, wolf home range polygons were generated using the minimum convex polygon (MCP) method (White and Garrott 1990). However, kernel methods can provide more accurate home range estimates than minimum convex polygon (MCP) models (Seaman and Powell 1996) and have shown to be robust to variation in the number of locations used to create

the home range (Seaman et al. 1999). Thus, kernel density estimates were used to generate home range polygons for 2015.

Home ranges were calculated using ≥ 20 individual locations on a pack, pair, or single wolf exhibiting territorial behavior over a period of \geq six months. For 2015, the number of individual locations used ranged from 25 to 366 locations, depending on the number of individual locations obtained throughout the year. To maximize sample independence, individual radio-collared wolf locations were included in home range calculations only if individual wolf locations were spatially or temporally separated from other pack members equipped with radio-collars. Individual point selection was accomplished with R (R Core Team 2015). This limited pseudo-replication of locations. Home range polygons were generated using the 95% fixed kernel method (Seaman and Powell 1996) in the Geospatial Modeling Environment platform in conjunction with ArcGIS 10 (Beyer 2014, ESRI 2011). Home ranges were not calculated for wolves that had < 20 locations, displayed dispersal behavior, or exhibited non-territorial behavior during 2015.



Mexican wolf M1241. Credit: Mexican Wolf IFT

Occupied Range

Occupied wolf range was calculated based on the following criteria: (1) a five mile (eight km) radius around all aerial or GPS locations of radio monitored wolves over the past three years; (2) a five mile (eight km) radius around all uncollared wolf locations and wolf sign over the past three years; (3) a MCP is then placed over all buffered locations; if buffered locations are greater than ten miles apart, a separate MCP is generated for those points, and (4) per the 2015 Final Rule, occupied range does not include tribal lands.

Predation and Depredation Investigations

Throughout the year, project personnel investigated ungulate carcasses as they were discovered to determine sex, age, general body condition, and whether the carcass had been scavenged or killed by wolves. In addition, the IFT continued to study Mexican wolf kill rates and prey selection within the MWEPA on non-tribal lands. GPS cluster analysis was conducted using data from downloadable GPS collars to detect predation events during a 30-day time period in winter (February/March) and summer (June/July). A GPS cluster was defined as a group of two or more GPS points in which each point is <100m from its nearest neighbor (Sand et al. 2005, Ruth et al. 2010, Metz et al. 2012); GPS fix rates were set to one point every two hours in winter and every hour in summer. To reduce the potential of missing wolf killed prey, 25% of all single GPS points were randomly selected in ArcGIS for investigation (Sand et al. 2005). Identified GPS clusters were investigated within one week of determination, following abandonment by wolves; all points within a cluster were investigated regardless if a carcass was located at a previous GPS point (Ruth et al. 2010). The information gathered will be used to gain a more robust measure of the biomass required per wolf to sustain a viable wolf population, determine the prey characteristics (e.g. species, sex, age, and nutritional condition) selected by Mexican wolves, and assess kill site characteristics. All domestic livestock carcasses located via cluster analyses were reported to USDA-WS wolf specialists to initiate a depredation investigation.

USDA-WS wolf specialists investigated suspected wolf depredations on livestock, including livestock located during the predation study, within 24 hours of receiving a report. Not all dead livestock were found, or found in time to document cause of death. Accordingly, depredation numbers in this report represent the minimum number of livestock killed by wolves.

Since the beginning of Mexican wolf reintroduction in 1998, the 17 year mean number of cattle confirmed killed by wolves per year is 14.2, which extrapolates to 26.3 cattle killed per year/100 Mexican wolves.

Wolf Management

The IFT hazed wolves on foot or by vehicle in cases where wolves localized near areas of human activity, or were found feeding on, chasing, or killing livestock. When necessary, the IFT used rubber bullets, cracker shells, and fladry to encourage aversive response to humans and to discourage nuisance and depredation behavior. The IFT captured wolves with foot-hold traps to collar, translocate, or remove wolves from the wild for specific management purposes. In addition, wolves that establish themselves outside the MWEPA are captured and brought back into the MWEPA or temporarily held in captivity, per the Final Rule (USFWS 2015).

Proactive Management Activities

The IFT utilized various proactive management activities in an attempt to reduce wolf-livestock conflicts in the MWEPA. Proactive management approaches and tools available to the IFT include:

Turbo Fladry: electric fence with colored flagging installed around livestock holding pastures and private property designed to discourage wolf presence inside the perimeter of the fencing.

Hay and Supplements: feed and mineral supplements purchased for livestock producers who opt to hold livestock on private property during livestock calving season or wolf denning periods.

Range Riders: contract employees with radio telemetry equipment who assist livestock producers in monitoring wolf movements in relation to livestock, providing human presence, and conducting light hazing to deter wolves away from cattle. Range Riders without telemetry equipment provided additional human presence to deter wolves.

Altering Livestock Grazing Rotations: moving livestock between different pastures within USFS grazing allotments in order to avoid areas of high wolf use that may correspond to den and rendezvous sites.

Exclusionary Fencing: eight-foot-high fence enclosing areas of private property for the purposes of protecting especially vulnerable animals or to address other specific property protection purposes.

Radio Telemetry Equipment: monitoring equipment used by the IFT, and in some cases issued to livestock producers to facilitate their own proactive management activities and aid in the detection and prevention of wolf depredations.

Diversionsary Food Cache: road-killed native prey carcasses or carnivore logs provided to wolves in areas to reduce potential conflicts with livestock.

Supplemental Food Cache: road-killed native prey carcasses or carnivore logs provided to wolves in order to assist a pack or remnant of a pack in feeding young of the year when extenuating circumstances reduce their own ability to do so (e.g. one animal raising young or just after initial releases and translocations).

Population Estimation

The year-end population estimate is derived from information gathered through a variety of methods that are deployed annually by the IFT from November 1st through the year-end helicopter count. The IFT continued to employ comprehensive efforts initiated in 2006 to make the 2015 year-end population estimate more accurate. Management actions implemented included increased surveys and focus on trapping for uncollared wolves, greater coordination and investigation of wolf sightings provided through the public and other agency sources, deployment of remote trail cameras (blind and scented), and utilizing howl surveys and food caches in conjunction with remote cameras in areas of suspected uncollared wolf use.

Wolf sign (i.e. tracks, scats) was documented by driving roads and hiking canyons, trails, or other areas closed to motor vehicles. Confirmation of uncollared wolves was achieved via visual observation, remote cameras, howling, scats, and tracks. Ground survey efforts for suspected packs having no collared members were documented using global positioning system (GPS) and geographical information systems (GIS) software and hardware. GPS locations were recorded and downloaded into GIS software for analysis and mapping. Survey data were also recorded daily on forms and compiled in an Access database.

In January and February 2016, aircraft were used to document free-ranging wolves for the end-of-year 2015 population count and to capture wolves to affix radio collars. Including January and February data in the December 31 end-of-year count (and in this 2015 annual report) is appropriate, because wolves alive in these months were also alive in the preceding December (i.e. whelping only occurs in Spring, and any wolf added to the population via initial release or translocation after December 31 and before the end of the survey is not counted in the year-end minimum population count). Fixed-wing aircraft were used to locate wolves and assess the potential for darting wolves from the helicopter. A helicopter was used to more accurately count the number of uncollared wolves associated with collared wolves in all areas and to capture target animals (e.g. uncollared wolves, injured wolves, or wolves with old collars) where the terrain allowed.

As part of the 2015 population year-end count, the IFT coordinated with and surveyed members of the local public to identify possible wolf sightings. Ranchers, private landowners, wildlife managers, USFS personnel, and other agency cooperators were contacted to increase wolf sighting data for the database. All such sightings were analyzed by the IFT to determine those that most likely represented unknown wolves or packs for purposes of completing the year-end count.

Documentation of wolves or wolf sign, obtained through the above methods, was also used to guide IFT efforts to trap uncollared single wolves or groups. The IFT objective was to have at least one member of each pack collared. Through these various methods, the IFT was able to count uncollared wolves not associated with collared wolves.

Mortality

Wolf mortalities were identified via telemetry and public reports. Mortality signals from radio collars were investigated within 12 hours of detection to determine the status of the wolf. Carcasses were investigated by law enforcement agents and necropsies were conducted to determine proximate cause of death. Causes were summarized for all known wolf deaths.

For wolves equipped with radio-collars, mortality, missing, and removal rates were calculated using methods presented in Heisey and Fuller (1985). Wolves not located or documented alive for three or more months are considered missing or “fate unknown.” These wolves may have died, dispersed, or have a malfunctioned radio collar. The IFT calculated annual cause-specific mortality rates (i.e. human-caused versus natural/unknown mortality) for the population. Management removals can have an effect equivalent to mortalities on the free-ranging population of Mexican wolves (see Paquet et al. 2001). Thus, the IFT also calculated yearly cause-specific removal rates for wolves equipped with radio-collars. Wolves are removed from

the population for three primary causes: (1) cattle depredations, (2) nuisance to humans, and (3) other (principally to pair with other wolves or to move a wolf to a more appropriate area without any of the other causes occurring first). Each time a wolf was moved, it was considered a removal, regardless of the animal's status later in the year (e.g. if the wolf was translocated or held in captivity). The IFT calculated an overall failure rate of wolves in the wild by combining mortality, missing (only those wolves that went missing under questionable scenarios), and removal rates to represent the overall yearly rate of wolves affected (i.e. dead, missing, or managed) in a given year.



Mexican wolf pup associated with the Iron Creek Pack. Credit: US Fish and Wildlife Service.

Public Outreach

The IFT outreach efforts affirm the project's commitment to engage in effective communication, identify various outreach mechanisms, and standardize certain outreach activities. These goals help ensure timely, accurate, and effective two-way communication between and among cooperating agencies and the public. Project personnel conducted outreach activities on a regular basis, as a means of disseminating information to stakeholders, concerned citizens, and government and non-government organizations. Outreach was facilitated through monthly updates, field contacts, handouts, informational display booths, web page updates, and phone contacts. The IFT provided formal presentations at local livestock producer meetings and conducted one public meeting in 2015 to gather comment on proposed Mexican wolf initial release and translocation actions within the MWEPA.

During 2015, the IFT posted Mexican wolf reintroduction project updates within the MWEPA once each month at places such as USFS offices, US post offices, and libraries, as well as on the AGFD Mexican wolf web site at http://www.azgfd.gov/w_c/es/wolf_reintroduction.shtml and the USFWS Mexican wolf web site at <http://www.fws.gov/southwest/es/mexicanwolf>. Interested parties could sign up to receive the update electronically by visiting the AGFD web site at <http://azgfd.gov/signup>. The IFT faxed monthly project updates to primary cooperating agencies, stakeholders and interested citizens.

The IFT also produced a wolf location map bi-weekly to inform cooperators and the public of areas occupied by wolves. The map was posted on the USFWS web site at <http://www.fws.gov/southwest/es/mexicanwolf/RWL.cfms>.

Project personnel made contact with campers, hunters, and other members of the public within the MWEPA and provided them with information about the wolf project. These contacts focused on advising the public of the potential for encountering wolves, providing general recommendations for recreating in wolf-occupied areas and explaining legal provisions of the non-essential experimental population rule. The IFT also utilized these contacts to collect information on wolf sightings, tracks and scat from the public.

3. Results

Specific information regarding wolves on the FAIR and the San Carlos Apache Reservation (SCAR) is not included in this report in accordance with Tribal agreements.

a. Population Status

At the end of 2015, the minimum population estimate was 97 wolves. Pups comprised 24% of this population, which is a 31% decrease from the previous year.

At the beginning of 2015, the collared population consisted of 55 wolves among 19 packs and four single/unaffiliated wolves. At year end, forty-eight collared wolves (29 adults, 12 subadults, and 7 pups) among 21 packs and four single wolves were documented which was a slight increase in the number of collared wolves from 2014.

A total of 49 uncollared wolves were documented in the MWEPA at the end of 2015 (*note: uncollared wolves captured during the January and February 2016 helicopter operation were included as uncollared animals associated with known packs above*). Thirty-six of the 49 uncollared wolves were associated with 15 packs in which individuals were equipped with radio-collars (Table 1).

The IFT documented two uncollared groups of wolves in New Mexico and three uncollared single wolves (one in Arizona, two in New Mexico) which were not associated with collared packs. Additional uncollared animals were found on the FAIR in 2015. These areas will be priorities for IFT trapping efforts in 2016.

Nine natural pairings of breeding age wolves in the MWEPA population occurred in 2015. The natural pairings of dispersing or single wolves resulted in the designation of four new packs: Panther Creek, Buckalou, Bearwallow, and Marble. Breeding animals were also naturally replaced in three other packs: Hoodoo, Mangas, and Fox Mountain. Finally, two pairs formed naturally but were not designated as packs in 2015. M1161/f1332 paired in January, but f1332 was discovered dead before they were designated a pack. Also, M1284/f1392 paired in late 2015 and at year-end had not been designated a pack.

A total of 8 single wolves equipped with radio-collars (M1161, M1282, M1284, M1331, f1332, m1350, M1337, M1338) were part of the population for a portion of the year. Three of these wolves (M1161, M1331, and M1338) were alive at the end of the year. All of the wolves that were alive at the end of the year ($n = 97$) were born in the wild.

b. Reproduction

In 2015, 14 packs exhibited denning behavior which included eight packs in Arizona (Bluestem, Tse ighan lige (Diamond), Elk Horn, Hawks Nest, Marble, Hoodoo, Panther Creek, and Tsay-O-Ah) and six packs in New Mexico (Iron Creek, Lava, San Mateo, Luna, Dark Canyon, Prieto). All of these packs but Elk Horn and Luna were confirmed to have produced wild-born litters. The IFT documented a minimum of 42 pups born with a minimum of 23 (14 pups in Arizona and 9 pups in New Mexico) surviving in the wild until year-end which showed that at least 55% of the pups documented in early counts survived until the end of the year (Table 1). This marked the 14th consecutive year in which wild born wolves bred and raised pups in the wild. Of the 21 known packs at the end of 2015, all but the Coronado pack formed naturally in the wild.



Mexican wolf pups associated with the Prieto Pack. Credit: US Fish and Wildlife Service.

c. Releases and Translocations

The IFT conducted one soft release of a pair of wolves (wild born AF1305 with naïve M1130) (Table 2). Early in the year the Rim pack consisted of two siblings traveling together (AF1305 and m1336). The IFT captured and placed them into captivity to prevent their breeding with one another. In an effort to pair-bond AF1305 with another male it was placed in captivity with M1130 from the captive population. On April 24, AF1305, thought to be pregnant at the time, was translocated with M1130 (an initial release) into a soft release pen within the Rim pack territory. It was later determined that AF1305 was not pregnant. The pair split up soon after release. M1130 traveled throughout the MWEPA, and began exhibiting nuisance behavior, and was lethally removed from the population on May 20. AF1305 remained in its territory. On December 14, AF1305 was located dead; cause of death is pending necropsy.

d. Home Ranges and Movements

During 2015 the IFT calculated home ranges for 18 packs or individuals exhibiting territorial behavior. These home ranges ranged from 83 square miles (215 square kilometers) for the Hawks Nest pack to 1673 square miles (4333 square kilometers) for the Fox Mountain pack, with an average home range size of 376 square miles (976 square kilometers). The Fox Mountain pack's home range appears large relative to the other packs; this is due to the pack shifting its home range from historic Fox Mountain territory into historic Willow Spring's territory after the Willow Springs pack broke up. Home ranges were not calculated for single animals or packs that did not display territorial behavior or did not have enough usable locations to generate a home range; this included the Bear Wallow, Coronado, and Mangas packs, which are represented with a red dot on the home range map (Figure 3, Table 3).

Mexican wolves occupied 13,329 mi² (34,522 km²) of the MWEPA during 2015 (Fig. 4). In comparison, Mexican wolves occupied 7,255 mi² (18,791 km²) of the MWEPA during 2014.

e. Mortality

The IFT has documented 124 wolf mortalities in the wild since 1998 (Table 4), thirteen of which occurred in 2015 (Table 5). Five of the documented wolf mortalities in 2015 were considered illegal, including: AF1212, f1332, mp1385, f1388, and f1390. Two wolves died of natural causes: AF903 died following interspecific competition (killed by other wolves) and AM1185 died of pericardial hemorrhage resulting in heart failure; necropsy results also noted older injuries consistent with a possible vehicle strike. Wolf fp1438 died within two weeks post capture and is therefore considered capture related mortality; although a specific cause of death could not be determined via necropsy. Five other mortalities are awaiting necropsy (AF1279, fp1389, AF1305, m1450, and m1351). Other more frequent causes of death should be considered a minimum estimate of mortality, since some pups and uncollared wolves may die without those mortalities being documented by the IFT. Eight wolves from New Mexico (AF1246, AM1252, f1348, m1349, m1350, M1391, M1337, and M1282) and two wolves from Arizona (M1243 and f1395) were listed as "fate unknown" during 2015. The fate unknown wolves tallied above do not include animals whose collars have failed but were known to be in the population at the end of the year. The analyses below include those animals as missing for the purposes of radio day

calculations and missing classification.

The IFT monitored 74 individual wolves equipped with radio-collars for a total of 17,305 radio days during 2015. A total of twenty-seven wolves equipped with radio-collars were considered removed ($n = 4$), dead ($n = 10$), or missing ($n = 13$). Uncollared animals that were documented dead (m1351 [previously collared, but dropped collar in 2014], m1450) were not included in this analysis (see Table 5 for information on these animals). In addition, the capture related mortality of fp1438 was censored from the analysis. Only two (AF1246 and m1350) of the thirteen wolves that went missing in 2015 were considered to have gone missing under questionable scenarios without documentation as being alive later in the year. Thus, these two animals were included as failures at the time of last location during 2015. The overall survival rate was 0.713, or a corresponding failure rate of 0.287. The overall failure rate was composed of the human caused mortality rate (0.090; $n = 5$), natural mortality rate (0.036; $n = 2$), unknown/awaiting necropsy mortality rate (0.054; $n = 3$), boundary removal rate (0.00; $n = 0$), missing wolves rate (0.036; $n = 2$), cattle depredation removal rate (0.018; $n = 1$), nuisance removal rate (0.018; $n = 1$), and other removal rate (0.036; $n = 2$)

f. Wolf Predation

Four packs containing at least one GPS collar were selected for the predation study in 2015, two in New Mexico (Luna and Single M1161) and two in Arizona (Bluestem and Hawks Nest). All four packs were studied during the winter period, however, due to collar failures in late winter, only Bluestem and Hawks Nest were studied in Arizona during the summer period. Pack sizes during study periods varied from a minimum of one single adult to nine animals (adults, sub-adults and pups).

During the winter and summer of 2015 (a total of 128 days; total study days for all packs across all study periods), we investigated 129 single GPS point locations and 225 GPS cluster locations from three wolf packs and one individual wolf. We located 59 total prey carcasses including 52 elk, six mule deer, and one Coues white-tailed deer. Of the carcasses investigated, 12 were considered confirmed wolf kills, 33 were considered probable wolf kills, 7 were considered possible wolf kills, and seven were considered unknown. Of the 129 single point locations investigated, we found remains of elk neonates at three of these points. Elk comprised 88% of all carcasses investigated; the other 12% were comprised of deer. Of the elk kills investigated 50% were elk calves while 11.5% were adult cow elk, 22.5% were adult male elk, 4% were adult unknown sex, 4% were yearling unknown sex and 8% were elk of unknown age and sex. Kill rates and consumption rates were used to estimate the total number of prey killed/wolf/day and total kg biomass/wolf/day, respectively. Initial results for investigations in 2015 indicate that a single Mexican wolf may impact ungulate populations equivalent to killing 13.59 cow elk, scavenging on 2.43 cow elk, killing 3.24 mule deer does, and 1.01 white-tailed doe deer annually, which equates to 6.53 kg/wolf/day. These data are slightly higher than the average, but within the range of similar studies conducted on northern gray wolves.

g. Wolf Depredation

During 2015, USDA-WS and other members of the IFT conducted of 90 investigations involving 102 animals reported as having potential Mexican wolf involvement. Of these 90 investigations, 83 involved cattle ($n = 95$ animals), one involved a horse ($n = 1$), and six involved dogs ($n = 6$). Average IFT response time between the reporting of an incident to the initiation of an on-site investigation was < 24 hours.

Of the 90 investigations completed in 2015, 62 (68%) were determined to be wolf-related (confirmed or probable determination; Table 7). Forty-nine cattle deaths were confirmed as wolf depredations in 48 investigations; five cattle deaths were probable wolf depredations in five investigations; eight injured cattle were confirmed as being wolf related in four investigations; and five injured dogs were confirmed as wolf related in 2015 in five investigations. Seventy-six percent ($n = 47$) of the 62 investigations determined to be wolf related occurred in New Mexico and 24% ($n = 15$) occurred in Arizona (Table 7). Thirty-one percent ($n = 28$) of the 90 total investigations were determined to be unknown or non-wolf related. These mortality causes included: unknown, black bear, coyote, dog, respiratory illness, natural causes, Javelina, and lightning.

Seventy-seven percent ($n = 69$) of the 90 investigations conducted were in response to reports from ranchers and the public and the remaining 23% ($n = 21$) were in response to reports from the IFT. Eleven percent ($n = 7$) of the 62 investigations determined to be wolf related were found and reported by the IFT (Table 7).

In total, 26 of the 49 (53%) confirmed depredations, resulting in the death of livestock, involved uncollared wolves not associated with collared packs (Table 7). One wolf, Fox Mountain mp1384 was removed in 2015 for repeated depredations.

The depredation rate for 2015 extrapolates to 50.5 confirmed killed cattle/100 wolves using the number of confirmed killed cattle ($n = 49$; Table 7) compared to the final population count ($n = 97$). The 2015 rate is above the previous 17 year recovery program mean of 26.3 confirmed killed cattle/100 wolves/year.

h. Management Actions

In 2015, 41 different wolves were captured and/or removed a total of 42 times. Twenty wolves were captured, collared for the first time, processed, and released on site for routine monitoring purposes by the IFT (Table 8). Eighteen wolves were captured, re-collared, processed and released on site, or simply released on site with the current collar (Table 8). One wolf was captured to receive veterinary care.

Three wolves were captured and removed from the wild pursuant to USFWS approved removal orders. Wolf m1384 from the Fox Mountain pack was removed for repeated livestock depredations (Table 7). Wolves AF1305 and m1336 were removed to deter breeding among siblings and to facilitate pair-bonds with unrelated wolves.

The IFT collared 20 previously uncollared wolves in 2015, including: 11 pups (mp1347, mp1396, fp1397, fp1399, fp1438, mp1440, mp1441, fp1442, fp1444, fp1445, and mp1446), one adult (M1394), and eight subadults (f1395, m1398, m1404, f1405, f1437, f1439, f1443, and m1447). Trapping was also conducted on the FAIR; however, wolf numbers on the FAIR are not provided at the request of the WMAT.

In 2015, the IFT investigated 16 reported instances of nuisance behavior (Table 9). Individual reports could be related to multiple causes (e.g., wolf near a house and in proximity to people). Thus, the investigations were classified as in response to reports of potential wolves: near human dwellings/camps ($n = 10$), chasing/harassing or near livestock ($n = 3$), in proximity to people ($n = 7$). Of the seven instances of potential wolves near humans, two involved interactions with dogs.

Of the 16 reports twelve were likely or known Mexican wolf involvement; tracks near building ($n = 1$), chasing/harassing livestock ($n = 1$), near occupied residences ($n = 3$), chasing livestock near occupied residence ($n = 1$), close proximity to people and residence ($n = 3$), following human with dogs or horse on trails ($n = 2$), dog injury ($n = 1$). Of these, six involved two collared wolves. Wolf m1350 was involved in two incidences of being in proximity to the same occupied residence. M1130 was reported near a residence in mid-May (Table 9). Over the next 3 days, M1130 was reported near other residences in the same vicinity and was reported on 3 occasions to be in close proximity to people without display of normal fear of people. The IFT's attempts at hazing him from the area during this time were unsuccessful. M1130 was lethally removed for repeated nuisance behavior. Other reported nuisance incidents involved uncollared wolves. Trail cameras, tracking, telemetry, howling, and trapping were used by IFT members during investigations to gather evidence of wolf involvement on reported nuisance problems. Hazing was used to move wolves away from residences and livestock.

i. Proactive Management Activities

The IFT, working with Non-Governmental Organizations (NGO), used proactive management to assist in reducing wolf-livestock conflicts in the BRWRA (Table 10). The Reintroduction Project and NGOs spent approximately \$164,500 on proactive management activities affecting an estimated 10 Allotments in Arizona and 12 in New Mexico. The IFT, agency contract employees, and NGO contract employees spent approximately 11,800 hours implementing proactive management activities during 2015.

The agencies and NGOs purchased hay and supplements during the calving season for two ranchers in Arizona and New Mexico to help prevent depredation of livestock. Project personnel met with Forest District Rangers, biologists and range staffs to discuss wolf avoidance livestock management options during the wolf denning season. The IFT coordinated with the Alpine, Clifton, Springerville, Quemado, Wilderness, and Reserve Ranger Districts and stakeholders in Arizona and New Mexico to address potential conflicts between livestock and wolves. In several of these cases, livestock were scheduled to graze in or near pastures where wolves were denning. In pursuing efforts to reduce interactions between livestock and denning wolves, the Districts and livestock producers changed pasture rotations and moved livestock into alternate pastures during the denning season, where possible. The

suggested livestock movements were voluntary for the livestock producers.

During 2015, the Reintroduction Project and NGOs contracted 17 range riders (8 in Arizona, and 9 in New Mexico; Table 10) to assist 20 livestock producers (12 in Arizona, 8 in New Mexico) in monitoring wolves in proximity to cattle. Range riders monitored approximately 30 allotments within 10 wolf pack home ranges, one single wolf home range and one uncollared group of wolves, and provided additional oversight of livestock and light hazing of wolves when they were among livestock. Twenty-four confirmed depredation incidents occurred on monitored allotments while range riders were under contract (Table 10).

The IFT issued radio telemetry equipment to livestock producers (9 in Arizona, 14 in New Mexico) in areas where wolf-livestock conflicts were prevalent. Most of these equipment loans were in association with range riders. The IFT trained livestock producers to use the telemetry equipment to monitor wolves in the vicinity of cattle or residences, and instructed them on non-injurious hazing techniques.

Supplemental food caches are utilized to assist a pack or remnant of a pack in feeding young of the year when extenuating circumstances (such as a death of one of the adults) reduce their own ability to do so. In 2015 no supplemental feeding was required.

Diversionsary food caches are utilized to reduce potential conflicts between wolves and livestock, primarily in areas where depredations have occurred in the past. Diversionsary food caches were established for six packs during 2015. In New Mexico a total of 7 diversionsary food caches were established to reduce depredations within the territories of Luna, Lava, Prieto, and Willow Springs packs. In Arizona a total of two diversionsary food caches were established within the Bluestem and Panther Creek pack territories.

j. Non-IFT Wolf Sighting Reports

In 2015, the IFT received a total of 41 wolf sighting reports from the public. The IFT determined 37 reports were non-wolf sightings (coyote, dogs, etc.), and four reports were likely uncollared/unknown wolves. The public is encouraged to report Mexican wolf sightings to help the IFT locate undocumented packs and track movements of wolves within and around the MWEPA, and are provided the 1-888-495-WOLF (9653) number to report Mexican wolf sightings.

k. Uncollared wolf sign

The IFT analyzed unoccupied range, uncollared wolf sign and sighting reports from the public to target 18 areas in Arizona and New Mexico (Fig. 2) in an effort to document and/or radio collar unknown wolves in and around the MWEPA. Nine uncollared wolves in New Mexico and one uncollared wolf in Arizona were documented in 2015 as a result of this effort (Fig 2 – C, K, L, P, and R: Table 11).

1. Public Outreach

The IFT and other project personnel provided a total of 19 presentations and status reports to approximately 2,388 people in federal and state agencies, conservation groups, rural communities, schools, wildlife workshops, and various other public, private, tribal institutions throughout Arizona, New Mexico and White Mountain Apache Tribal lands. Ninety-nine percent of the presentations were for the MWEPA target audience. In addition, biweekly contacts were made to cooperating agencies and stakeholders to inform stakeholders of wolf locations. Project updates were faxed to, or posted at, 41 different individuals/locations on a monthly basis across the MWEPA. Endangered Species Updates containing current project and recovery program information also went out to an average of 19,128 people a month. The AZGFD Mexican wolf website was visited 9,826. The USFWS interactive map was viewed 139 times per month. However the site peak viewing was at a high of 250 views in a 1 month timeframe. Outreach presentations can be scheduled by contacting the IFT at 1-888-495-WOLF (9653).

Utilizing available USFS kiosks and various road pullouts within the MWEPA, the IFT maintained metal signs and laminated posters that provide information on how to minimize conflicts with wolves. The IFT also maintained USFWS reward posters at USFS kiosks and local businesses in the MWEPA as necessary, to provide notice of a \$10,000 reward for information leading to the apprehension of individuals responsible for illegal Mexican wolf killings.



Mexican wolf and a black bear at the site of a diversionary food cache. Credit: US Fish and Wildlife Service.

4. Summary

The 2015 end-of-year count confirmed a minimum of 97 wolves, 48 wolves (29 adults, 12 subadults, and 7 pups) of which were equipped with radio-collars. The population consisted of 21 packs (11 in Arizona, 10 in New Mexico). Forty-nine uncollared wolves, including 10 uncollared singles and groups were documented throughout 2015. Thirty-six of the 49 uncollared wolves were associated with 15 packs in which individuals were equipped with radio-collars (Table 1). Three single wolves equipped with radio-collars (M1161, M1331, and M1284) were still alive at year-end and two previously fate unknown wolves (AM1330 and AM1249) were documented alive during the end of year count. There are likely more undocumented free-ranging wolves in the population, but most of these are likely single animals because wolf packs generally leave more sign and their existence/presence is easier to document.

The IFT conducted one initial release and one translocation in 2015. Early in the year the Rim pack consisted of two siblings traveling together (AF1305 and m1336). The IFT captured and placed them into captivity to prevent their breeding with one another. AF1305 was paired in captivity with M1130 from the captive population. AF1305 (translocated) and M1130 (initial released) were soft released together into the Rim Pack territory. The pair split up soon after release. M1130 traveled throughout the MWEPA, and began exhibiting nuisance behavior, and was lethally removed from the population on May 20. AF1305 remained in its territory. On December 14, AF1305 was located dead; cause of death is pending necropsy.

Twelve packs produced wild-conceived, wild-born litters, which represents the 14th consecutive year in which wild-born Mexican wolves bred and raised pups in the wild. In addition, all documented wolves in the population were wild-born. The population benefit of being pups recruited to the population was offset by the 13 mortalities of free-ranging wolves in 2015, including five adults, five subadults, and three pups

Home ranges were calculated for 18 packs or individuals exhibiting territorial behavior. The 95% fixed kernel method produced an average home range size of 376 mi² (976 km²), with home ranges varying from 83 mi² to 1673 mi² (215 km² to 4,333 km²).

Native prey used by wolves consisted primarily of elk; however, there were also 48 confirmed livestock depredation incidents resulting in 49 cattle killed. In addition, five injured dogs were confirmed to have been caused by wolves.

The IFT captured 41 wolves a total of 43 times for routine monitoring ($n = 39$) and management actions ($n = 2$). Additionally, two wolves (m1336 and AF1305) were captured to prevent potential mating between siblings. Two wolves (mp1384 and m1398) were captured twice.

In 2015, the IFT analyzed 41 reports of wolf sightings from the public; 90% of these reports were non-wolf sightings (coyote, dogs, deer, etc.), and 10% were likely uncollared/unknown wolves. The IFT searched 18 areas in and around the MWEPA for new wolf presence, and documented wolves in 5 of those areas.

Project personnel provided 19 presentations and status reports to approximately 2,388 people in

federal and state agencies, conservation groups, rural and urban communities, guide/outfitter organizations, livestock associations, schools, fairs, and various other public and private institutions. In addition, biweekly contacts were made to cooperating agencies and stakeholders. Endangered Species Updates containing current project and recovery program information went out to an average of 19,128 people a month.

The IFT acknowledges the assistance of all agency personnel and volunteers who provided data and support services for the operational field portion of the Mexican wolf reintroduction project during this reporting period. Individuals listed in Appendix C collected data or provided other information for this report.

5. Discussion

The IFT documented a minimum of 97 Mexican wolves in 2015 (Fig. 5; Table 1), and a minimum of 7 breeding pairs (Table 1). However, the minimum total number of pups alive at the end of the year was lower ($n = 23$; Table 1) than the previous year ($n = 39$) and pup survival (% of pups alive of the total produced) was 55% at the end of the year. In addition, the number of known mortalities increased from 11 in 2014 to 13 in 2015 (Table 4). However, nine natural pairings resulted in new pairs, packs and breeder replacement that collectively have the significant potential to contribute to reproduction in 2016.

Based on meta-analysis of gray wolf literature, Fuller et al. (2003) identified a 0.34 mortality rate as the inflection point of wolf populations. Theoretically, wolf populations below a 0.34 mortality rate would increase naturally, and wolf populations above a 0.34 mortality rate would decrease. The Mexican wolf population had an overall failure (mortality plus removal plus missing rate) rate of 0.287 in 2015. This failure rate would predict an increasing population which was not the case in 2015. The lack of increase in the population was likely due to a combination of factors rather than just failure rate, which decreased from 0.31 to 0.287 in 2014 and 2015, respectively. For instance, the number of pups recruited dropped from 39 to 23 in 2014 and 2015, respectively. The number of initial releases and translocations also fell from 14 wolves to 2 in 2014 and 2015, respectively. The failure rate remains low largely due to minimal ($n = 4$) management removals of radio-collared wolves from the population. While the low number of management removals is encouraging for population growth, the majority of the population losses in 2015 were either due to human-caused mortalities or missing animals rather than management removals. It is difficult to determine the effect on the population from missing animals because individuals could still be alive. Five mortalities were human-caused (all five are known or likely illegal mortalities), two were natural, one was killed by other wolves, and five are waiting necropsy results. Efforts to reduce the level of mortality, while replacing the individual animals lost through initial releases and translocations will continue to be a priority. The IFT will also continue to document the uncollared wolf component of the population.

The 2015 confirmed killed cattle rate extrapolates to approximately 50.5 depredations/100 wolves and is higher than the previous 17-year recovery program mean of 26.3 confirmed killed cattle per 100 wolves. It is also the highest recorded since the first year of recovery in 1998. It is important to note the standard for extrapolating the annual confirmed killed cattle rate/100 wolves uses the end of year wolf population count, which does not include wolves that died or

were removed during 2015. Thus, the confirmed killed cattle rate per 100 wolves, as a matter of practice, underestimated the denominator, which inflates the total rate. Nevertheless, the high depredation rate in 2015 is cause for concern. The IFT will implement a variety of methods to attempt to reduce this depredation rate in 2016.

A high number of mortalities may exceed growth from natural recruitment, translocations, and initial releases in a given year. Nonetheless, a combination of initial releases, translocations, natural pair formations, and reproduction next year could result in an increase in the Mexican wolf population. The Reintroduction Project management objective for 2016 is a 10% increase in the minimum wolf population counts and/or the addition of at least two packs that produce a minimum of one pup that survives to December 31, while minimizing negative impacts of wolves. Changes to the Mexican wolf reintroduction project are outlined in the 2015 Final Rule http://www.fws.gov/southwest/es/mexicanwolf/pdf/Mx_wolf_10j_final_rule_to_OFR.pdf. The IFT will continue the implementation of this rule while evaluating its effectiveness during 2016.

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Table 1. Status of Mexican wolf packs in Arizona and New Mexico, as of December 31, 2015.

Pack	Wolf ID	Reproduction ^a	Pups at Year End ^b	No. Collared	No. Uncollared	Min pack Size ^c
Bearwallow, AZ	M1338, F1335	0	0	2	0	2
Buckalou, AZ	M1161 ⁱ , f1405	0	0	1	1	2
Bluestem, AZ*	AF1042 ⁱ , AM1341, M1330 ⁱ , F1333, m1382, f1404, f1443	8	3	5	4	9
Canyon Creek, NM	F1246 ^f , M1252 ^f	0	0	0	0	0
Coronado, NM	M1051 ⁱ , f1348 ^f , m1349 ^f , m1351 ^e	0	0	0	1	1
Dark Canyon, NM*	AF923, AM992, M1293, m1354, m1347, fp1444	3	1	6	1	7
Elk Horn, AZ	AF1294, M1342	0	0	2	0	2
Fox Mountain, NM	AF1212 ^e , AM1158 ⁱ , M1396, m1384 ^h	0	0	1	1	2
Hawks Nest, AZ*	AM1038, AF1280 ⁱ , m1383, fp1438 ^e , f1439	5	2	3	3	6
Hoodoo, AZ*	M1290, F1395 ^f , mp1441	2	1	2	0	2
Iron Creek, NM*	AM1240, AF1278	5	3	2	3	5
Lava, NM	AF1295, AM1285 ⁱ , mp1446	1	1	2	1	3
Luna, NM	AF1115 ^j , AM1155, M1398	0	0	2	2	4
Mangas, NM	M1296	0	0	1	0	1
Marble, AZ*	AF1340, AM1330 ⁱ , mp1440, fp1442	5	3	3	2	5
Maverick, AZ	AM1183, AM1291	0	0	2	2	4
Panther Creek, AZ	AF1339, AM1394	1	0	2	0	2
Prieto, NM*	AF1251 ⁱ , AM1387 ⁱ , m1386, f1392	6	3	3	6	9
Rim, AZ	AF1305 ^e , M1336 ^h , M1130 ^h	0	0	0	0	0
San Mateo, NM	AF903 ^e , M1345, f1399 ⁱ	1	1	1	2	3
Willow Springs, NM	AF1279 ^f , AM1185 ^e , M1391 ^f , m1385 ^e , f1390 ^e , f1397	0	0	1	0	1
Radio collared wolf, AZ	f1332 ^e	0	0	0	0	0
Radio collared wolf, NM	M1337 ^f	0	0	0	0	0
Radio collared wolf, NM	M1282 ^f	0	0	0	0	0
Radio collared wolf, NM	M1284	0	0	1	0	1
Radio collared wolf, NM	M1331	0	0	1	0	1
Radio collared wolf, NM	m1350 ^f	0	0	0	0	0
Uncollared wolf, AZ	m1450 ^e	0	0	0	0	0
Weimer Canyon, AZ	Uncollared wolf	0	0	0	1	1
Laguna Abel, NM	Uncollared wolf	0	0	0	1	1
San Mateo Mountains, NM	Uncollared wolves	0	0	0	3	3
Pueblo Creek, NM	Uncollared wolves	0	0	0	4	4
Boiler Peak, NM	Uncollared wolf	0	0	0	1	1

Pack	Wolf ID	Reproduction ^a	Pups at Year End ^b	No. Collared	No. Uncollared	Min pack Size ^c
FAIR	Uncollared wolves	N/A ^d	N/A ^d	N/A ^d	N/A ^d	N/A ^d
SCAR	Uncollared wolves	N/A ^d	N/A ^d	N/A ^d	N/A ^d	N/A ^d
Totals^j		42	23	48	49	97

Table 1. Continued.

^a Reproduction-maximum number of pups documented in 2015.^b Pups at year end documented surviving until December 31, 2015.^c Min pack size-total number of wolves (collared, uncollared, pups) documented at year end.^d Wolf numbers on FAIR and SCAR are not displayed at the request of the tribes.^e Died during 2015.^f Fate unknown during 2015.^g Radio collared wolf not missing for 3 months, but not located nor believed alive by IFT through December 31, 2015.^h Removed from wild for management purposes during 2015.ⁱ Dispersed and joined existing pack.^j Radio collar no longer functions; but, documented alive through December 31, 2015.^l Totals include wolves occurring on FAIR and SCAR.

* A pack that meets the definition of a breeding pair.

Table 2. Mexican wolves initial released or translocated from captivity or the wild in Arizona and New Mexico during January 1 – December 31, 2015.

Wolf pack	Wolf #	Release Site	Release Date	Released or Translocated
Rim	AF1305	Fish Bench	April 24	Translocated
Rim	M1130	Fish Bench	April 24	Released

Table 3. Home range sizes of free-ranging Mexican wolf packs in Arizona and New Mexico, January 1 – December 31, 2015.

Pack	Home range size mi² (km²)	Number of independent locations	Availability of radio locations during 2014
Bluestem	223 (578)	366	12 Months
Buckalou	432 (1120)	231	11 Months
Dark Canyon	226 (586)	136	12 Months
Diamond	465 (1203)	124	8 Months
Elk Horn	130 (338)	68	12 Months
Fox Mountain	1673 (4333)	37	12 Months
Hawks Nest	83 (215)	278	12 Months
Hoodoo	599 (1550)	127	12 Months
Iron Creek	110 (285)	161	12 Months
Lava	255 (794)	95	12 Months
Luna	295 (660)	95	12 Months
Marble	256 (664)	134	10 Months
Maverick	424 (1099)	25	12 Months
Panther Creek	154 (399)	86	10 Months
Prieto	196 (508)	106	12 Months
San Mateo	502 (1299)	42	12 Months
Tsay-O-Ah	340 (886)	105	12 Months
Willow Springs	407 (1055)	251	12 Months
Average^a	376 (976)	137	11.5 Months

^aAverages were based on packs with enough locations to calculate home ranges.

Table 4. Wild Mexican wolf mortalities documented in Arizona and New Mexico, 1998-2015.

Year	Illegal Mortality ^a	Vehicle collision	Natural ^b	Other ^c	Unknown	Awaiting necropsy	Annual Total
1998	4	0	0	1	0	0	5
1999	0	1	2	0	0	0	3
2000	2	2	1	0	0	0	5
2001	4	1	2	1	1	0	9
2002	3	0	0	0	0	0	3
2003	7	4	0	0	1	0	12
2004	1	1	1	0	0	0	3
2005	3	0	0	0	1	0	4
2006	1	1	1	1	2	0	6
2007	2	0	1	0	1	0	4
2008	7	2	2	0	2	0	13
2009	4	0	4	0	0	0	8
2010	5	0	1	0	0	0	6
2011	3	2	3	0	0	0	8
2012	4	0	0	0	0	0	4
2013	5	0	0	2	0	0	7
2014	7	1	3	0	0	0	11
2015	5	0	2	1	0	5	13
Total	67	15	23	6	8	5	124

^aIllegal mortality causes of death may include, but are not limited to known or suspected illegal shooting with a firearm or arrow, and public caused trap related mortalities.

^bNatural causes of death may include, but are not limited to predation, starvation, interspecific strife, lightening, and disease.

^cOther causes of death include capture-related mortalities and legal shootings by the public.

Table 5. Mexican wolf mortalities documented in Arizona and New Mexico during January 1 - December 31, 2015.

Wolf ID	Pack	Age (years)	Date Found	Cause of Death
AF1212	Fox Mountain	3	January 27	Illegal mortality
AF1279	Willow Springs	≥5	February 13	Awaiting necropsy
f1332	Single	1	February 17	Illegal mortality
mp1385	Willow Springs	<1	February 17	Illegal mortality
f1388	Tse ighan lige (Diamond)	1	March 17	Illegal mortality
fp1389	Tse ighan lige (Diamond)	<1	March 24	Awaiting necropsy
fp1438	Hawks Nest	<1	September 4	Capture related mortality
f1390	Willow Springs	1	September 8	Illegal mortality
AF903	San Mateo	≥13	November 30	Intraspecific strife
AF1305	Rim	3	December 14	Awaiting necropsy
m1450	Single	1	December 19	Awaiting necropsy
AM1185	Willow Springs	6	December 27	Natural
m1351	Coronado	1	December 28	Awaiting necropsy

Table 6. Mexican wolf depredations of livestock documented in Arizona and New Mexico during January 1 – December 31, 2015.

	Confirmed	Probable	Total
Fatal	49	5	54
Injury	8	0	8

Table 7. Investigations of confirmed and probable depredations and injuries caused by Mexican wolves to livestock and dogs during 2015 in New Mexico and Arizona. Depredation incidents are defined as the aggregate number of livestock confirmed killed or mortally wounded by an individual wolf or a single pack of wolves at a single location within a 1-day (24-hour) period, beginning with the first confirmed kill, as documented in the initial IFT incident investigation pursuant to SOP 11.0. Number of depredation incidents on a given wolf at a given point in time is calculated based on the number of incidents in the preceding 365 days.

	Wolves in Area	Investigation Date	Located By IFT	Species	State	# Killed/ # Injured	Call	Wolves Responsible	Depredation Incident	No. of Incidents	Management Action
1	Prieto	1/25/2015	No	Cattle	NM	1 Killed	Confirmed	Prieto	Yes	1	Increased monitoring
2	Prieto	1/25/2015	No	Cattle	NM	1 Killed	Probable		No		Increased monitoring
3	Unknown	2/4/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared (1-2)	Yes	1	Remote cameras deployed in area
4	Uncollared	2/10/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared wolf	Yes	1	Increased monitoring
5	Uncollared	2/12/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared wolf	Yes	1	Increased communications with livestock producer
6	Fox Mountain	2/14/2015	No	Cattle	NM	1 Killed	Confirmed	Fox Mountain mp1384, mp1396, uncollared pup	Yes	1	Increased monitoring
7	Unknown	2/18/2015	No	Dog	NM	1 Injured	Confirmed	Uncollared member of Willow Springs pack	No		No action, interaction took place in unknown area of National Forest
8	Uncollared	2/26/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared	Yes	1	Increased monitoring in area for collared wolves
9	M1161	2/28/2015	No	Cattle	NM	1 Killed	Confirmed	M1161	Yes	1	Increased monitoring and attempted hazing
10	Uncollared	2/28/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared wolves	Yes	1	Increased monitoring of neighboring packs
11	Fox Mountain mp1384 and uncollared pup	2/28/2015	No	Cattle	NM	1 Killed	Confirmed	Fox Mountain mp1384 and uncollared pup	Yes	2	Increased monitoring, attempted hazing, began negotiation for range rider
12	M1161	2/28/2015	Yes	Cattle	NM	1 Killed	Confirmed	M1161	Yes	2	Increased monitoring and attempted hazing
13	Fox Mountain	2/28/2015	Yes	Cattle	NM	1 Killed	Probable	mp1384 and uncollared pup	No		Increased monitoring, attempted hazing, began negotiation for range rider
14	Fox Mountain pups (1384, 1396, 1 uncollared)	3/3/2015	Yes	Cattle	NM	1 Killed	Confirmed	Fox Mountain mp1384, mp1396, uncollared pup	Yes	(3) mp1384 and uncollared pup, (2) mp1396	USFWS removal order issued for either mp1384, mp1396, or an uncollared pup. Trapping efforts began. Range rider arranged but had not started
15	M1161	3/3/2015	Yes	Cattle	NM	1 Killed	Confirmed	m1161	No	Considered same depredation incident as 2-28-15 calf	Increased monitoring and attempted hazing

	Wolves in Area	Investigation Date	Located By IFT	Species	State	# Killed/ # Injured	Call	Wolves Responsible	Depredation Incident	No. of Incidents	Management Action
16	fox mountain uncollared pup	3/6/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared likely associated with the Fox Mountain pack	Yes	4	Trapping continued in association with removal order. Range rider arranged but had not started
17	Fox Mountain pups (1384, 1396, 1 uncollared)	3/8/2015	No	Cattle	NM	1 Killed	Confirmed	Fox Mountain mp1384, mp1396, uncollared pup	Yes	(4) mp1384, (5) uncollared pup, (3) mp1396	Trapping continued in association with removal order. Range rider arranged but had not started
18	Uncollared	3/13/2015	No	Dog	NM	1 Injured	Confirmed	Uncollared	No		No action, unknown where wolf interaction occurred.
19	Uncollared	3/17/2015	No	Cattle	NM	4 Injured	Confirmed, 2 Unknown	Uncollared	No		Remote cameras in area, continued intensive monitoring of neighboring wolf packs
20	Uncollared	3/19/2015	No	Dog	NM	1 Injured	Confirmed	uncollared	No		Remote cameras in area, continued intensive monitoring of neighboring wolf packs
21	Uncollared	3/24/2015	No	Cattle	AZ	1 Killed	Confirmed	uncollared	Yes	1	Investigated area for wolf sign. Found none. Placed one trail camera in area. No pictures.
22	Willow springs	3/27/2015	No	Cattle	NM	1 Killed	Confirmed	AM1185, fp1390	Yes	1	Increased monitoring
23	Fox Mountain	3/30/2015	No	Cattle	NM	1 Killed	Confirmed	Fox Mountain	Yes	(1) 1158, (5) mp1384, (6) uncollared pup, (4) mp1396	No additional action, carcass was old and possibly occurred prior to completion of removal order
24	Uncollared	3/30/2015	No	Cattle	AZ	1 Killed	Confirmed	Uncollared	Yes	1	Train camera placed at carcass. No wolf pictures obtained. Checked area for collared wolves. None found.
25	Uncollared	4/4/2015	No	Cattle	AZ	1 Killed	Confirmed	Uncollared	Yes	1	Sign search of area. No tracks found. No collared wolves in area.
26	Fox Mountain	4/6/2015	No	Cattle	NM	1 Killed	Confirmed	Fox Mountain	Yes	(2)1158, (6) 1384, (7)uncollared pup, (5) mp1396	No additional action, carcass was old and possibly occurred prior to completion of removal order
27	Willow Springs	4/6/2015	No	Cattle	NM	1 Killed	Confirmed	AM1185 or uncollared pup	Yes	(2) AM1185 or (1) uncollared pup	Increased monitoring and hazing
28	Luna	4/11/2015	No	Cattle	NM	1 Killed	Confirmed	Luna juveniles (1-2)	Yes	1	Increased monitoring

	Wolves in Area	Investigation Date	Located By IFT	Species	State	# Killed/ # Injured	Call	Wolves Responsible	Depredation Incident	No. of Incidents	Management Action
29	Uncollared	4/20/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared wolves possibly associated with Fox Mountain pack	Yes	(1) uncollared wolves or (8) uncollared wolf associated with Fox Mountain	Two food caches started with cameras to aid in determination of uncollared pair of wolves in area
30	Uncollared	4/20/2015	No	Cattle	AZ	1 Injured	Confirmed	Uncollared	yes	1	Increased monitoring
31	Uncollared	4/22/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared wolf	Yes	1	Increased monitoring/presence in area
32	Uncollared	5/5/2015	No	Cattle	AZ	1 Killed	Confirmed	Uncollared wolf or wolves	yes	1	Increased monitoring
33	Uncollared	5/8/2015	No	Cattle	AZ	1 Killed	Confirmed	Uncollared	yes	1	Increased monitoring
34	Uncollared	5/10/2015	No	Cattle	NM	2 Killed	Confirmed	Uncollared wolf or wolves	Yes	1	Traps set in area in an effort to collar wolf or wolves responsible
35	Uncollared	5/10/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared wolf	Yes	1	Increased sign search in area
36	Lava	5/17/2015	No	Cattle	NM	1 Killed	Confirmed	Lava M1285	Yes	1	Diversionary food cache set up in effort to reduce potential of future depredations
37		5/20/2015	No	Cattle	AZ	1 Killed	Confirmed	Uncollared	yes	1	Increased monitoring
38	Uncollared	5/21/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared wolf or wolves	Yes	1	Increased sign search in area
39	Uncollared	5/28/2015	No	Cattle	AZ	4 injured	Confirmed	Uncollared	No	1	Increased monitoring
40	Uncollared	6/1/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared	Yes	1	Cameras deployed in area and increased sign search in area
41	Uncollared	6/4/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared wolf or wolves	Yes	2	Increased sign search in area and monitoring of neighboring packs
42	Uncollared	6/4/2015	No	Cattle	NM	1 Killed	Probable	Uncollared wolf or wolves	No		Increased sign search in area and monitoring of neighboring packs
43	Uncollared	6/4/2015	No	Cattle	NM	1 Killed	Probable	Uncollared wolf or wolves	No		Increased sign search in area and monitoring of neighboring packs
44	Iron Creek	6/16/2015	No	Dog	NM	1 Injured	Confirmed	Iron Creek M1240	No		
45	Uncollared	6/16/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared wolf potentially associated with the Luna Pack	Yes	2	Increased monitoring
46	Marble	6/21/2015	No	Cattle	AZ	1 Killed	Confirmed	Marble	Yes	1	Set out food cache and monitored wolves
47	Uncollared	6/27/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared	Yes	2	Additional cameras placed in area and continued sign search

	Wolves in Area	Investigation Date	Located By IFT	Species	State	# Killed/ # Injured	Call	Wolves Responsible	Depredation Incident	No. of Incidents	Management Action
48	Lava	7/12/2015	No	Cattle	NM	1 Killed	Confirmed	Lava pack	Yes	(2)AM1285, (1) AF1295	Additional food cache placed in area of den (bears were monopolizing original food cache)
49	Lava	7/13/2015	No	Cattle	NM	1 Killed	Confirmed	Lava pack	No	Considered same depredation incident as 7-12-15	Additional food cache placed in area of den (bears were monopolizing original food cache)
50	Uncollared	7/29/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared	Yes	3	Additional sign search and continuation of food caches
51	Uncollared	8/23/2015	yes	Cattle	AZ	1 Killed	Confirmed	uncollared		1	Uncollared sign search and trapping effort. No wolves caught or observed.
52	Bluestem	8/31/2015	No	Cattle	AZ	1 Killed	Confirmed	Bluestem	Yes	1	Food cache and monitoring.
53	Bluestem	9/1/2015	yes	Cattle	AZ	1 Killed	Probable	Bluestem	No		Food cache, monitoring and hazing
54	Bluestem	9/4/2015	yes	Cattle	AZ	1 Killed	Confirmed	Bluestem	Yes	1	Food cache, monitor, hazing
55	Uncollared	9/8/2015	no	Cattle	AZ	1 Killed	Confirmed	uncollared	Yes	1	Monitoring
56	Uncollared	10/4/2015	no	Cattle	AZ	1 Killed	Confirmed	Uncollared	Yes	1	Monitoring, uncollared sign search.
57	m1396	10/13/2015	No	Cattle	NM	1 Killed	Confirmed	Fox Mountain m1396	Yes	6	
58	Uncollared	10/23/2015	No	Dog	NM	1 Injured	Confirmed	Unknown Uncollared wolf	No		No action, unknown where wolf interaction occurred.
59	Uncollared	11/8/2015	No	Cattle	NM	1 Killed	Confirmed	Unknown Uncollared wolf	Yes	1	Sign search of area. No tracks found. No collared wolves in area.
60	Uncollared	12/2/2015	No	Cattle	NM	1 Killed	Confirmed	Uncollared	Yes	2	Increased sign search including deployment of remote cameras.
61	Uncollared	12/2/2015	No	Cattle	NM	1 Injured	Confirmed	Uncollared	No		Increased sign search including deployment of remote cameras.
62	Prieto	12/29/2015	No	Cattle	NM	1 Killed	Confirmed	Prieto (not fl392)	Yes	(2) AF1251, AM1387, m1386 and (1) pups of the year	Increased monitoring

	Pack	Wolf ID	Capture Date	Reason for Capture
1	Elk Horn	M1342	January 18	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
2	Bluestem	m1382	January 18	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
3	Panther Creek	M1394	January 18	Helicopter capture. Routine monitoring purposes. Captured, collared, and released on site.
4	Bluestem	AF1042	January 20	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
5	Hawks Nest	AF1280	January 20	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
6	Bluestem	m1331	January 20	Helicopter capture. Veterinary care.
7	Hoodoo	f1395	January 20	Helicopter capture. Routine monitoring purposes. Captured, collared, and released on site.
8	Single	M1161	January 22	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
9	Rim	AF1305	January 22	Helicopter capture. Removed from the wild to prevent sibling breeding. Transported to Sevilleta to facilitate pair bonding.
10	Fox Mountain	mp1384	February 02	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
11	Fox Mountain	mp1396	February 02	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
12	Willow Springs	fp1397	February 02	Helicopter capture. Routine monitoring purposes. Captured, collared, and released on site.
13	Dark Canyon	mp1347	February 03	Helicopter capture. Routine monitoring purposes. Captured, collared, and released on site.
14	Luna	m1398	February 03	Helicopter capture. Routine monitoring purposes. Captured, collared, and released on site.
15	Luna	AF1115	February 04	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
16	Rim	m1336	February 04	Helicopter capture. Removed from the wild to prevent sibling breeding. Transported to Sevilleta to facilitate pair bonding.
17	Luna	M1285	February 05	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
18	Fox Mountain	AM1158	February 06	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
19	Prieto	AF1251	February 06	Helicopter capture. Routine monitoring purposes. Captured, re-collared, and released on site.
20	San Mateo	fp1399	February 06	Helicopter capture. Routine monitoring purposes. Captured, collared, and released on site.
21	Fox Mountain	mp1384	March 12	Management trapping. Removed from the wild in accordance with USFWS Removal Order
22	Elk Horn	AF1294	April 09	Routine monitoring purposes. Captured, re-collared and released on site.
23	Bluestem	m1404	May 19	Routine monitoring purposes. Captured, collared and released on site.
24	Bluestem	f1405	May 22	Routine monitoring purposes. Captured, collared and released on site.
25	Hawks Nest	m1383	May 24	Routine monitoring purposes. Captured, re-collared and released on site.
26	Diamond	f1437	August 06	Routine monitoring purposes. Captured, collared and released on site.
27	Hawks Nest	fp1438	August 21	Routine monitoring purposes. Captured, collared and released on site.
28	Hawks Nest	f1439	August 22	Routine monitoring purposes. Captured, collared and released on site.
29	Marble	mp1440	August 31	Routine monitoring purposes. Captured, collared and released on site.
30	Iron Creek	AF1278	September 23	Routine monitoring purposes. Captured, re-collared and released on site.
31	Iron Creek	AM1240	September 26	Routine monitoring purposes. Captured, re-collared and released on site.
32	Hoodoo	mp1441	September 29	Routine monitoring purposes. Captured, collared and released on site.
33	Marble	fp1442	September 29	Routine monitoring purposes. Captured, collared and released on site.
34	Bluestem	f1443	October 07	Routine monitoring purposes. Captured, collared and released on site.

	Pack	Wolf ID	Capture Date	Reason for Capture
35	Dark Canyon	fp1444	October 10	Routine monitoring purposes. Captured, collared and released on site.
36	Tsay-O-Ah	fp1445	October 11	Routine monitoring purposes. Captured, collared and released on site.
37	Dark Canyon	AF923	October 12	Routine monitoring purposes. Captured, re-collared and released on site.
38	Prieto	f1392	October 18	Routine monitoring purposes. Captured, re-collared and released on site.
39	Lava	mp1446	October 19	Routine monitoring purposes. Captured, collared and released on site.
40	Panther Creek	M1394	October 23	Routine monitoring purposes. Captured, re-collared and released on site.
41	Diamond	m1447	October 30	Routine monitoring purposes. Captured, collared and released on site.
42	Luna	m1398	October 31	Routine monitoring purposes. Captured, re-collared and released on site.

Table 9. IFT management actions resulting from reported cases of potential Mexican wolf nuisance activities in Arizona and New Mexico during 2015.

Date	Wolf ID	General Location	Type of Activity	IFT Response	Management Result
January 18		Datil, NM	Possible wolf tracks near livestock and near buildings.	IFT investigated, scanned for missing and dispersing wolves- no signals heard and determined tracks were not wolf tracks	
January 22	Unknown	Jim Smith Peak, NM	Wolf tracks on private property near building.	IFT investigated and confirmed one set of wolf tracks and scanned for collared wolves. No collared wolves in area.	
February 4		Deadman Allotment, NM	Possible uncollared wolf interaction with dogs and human.	IFT investigated and found dog, coyote and possible wolf tracks and collected biological samples (scat, hair and swabs from knife and coat) at the interaction site. The IFT flew an aerial grid from a helicopter and trail cameras were placed at the interaction site.	DNA evidence at the scene was inconclusive pertaining to the human interaction. Hair and scat samples were confirmed as coyote. Trail camera photos contained no wolves. IFT set up and maintained a remote camera grid in a larger area in efforts to document unknown uncollared wolves, only photos of known wolves and coyotes (1-4) were captured.
March 11		Turner Peak, NM	Two possible uncollared wolves in close proximity to humans on National Forest.	IFT received report from a third party and was unable to speak to reporting party. IFT placed remote cameras in area.	No photos of wolves were obtained.
March 19	Unknown	Collins Park, NM	Two dogs interacting with wolf; one dog injured.	IFT investigated and confirmed wounds on the dog were caused a wolf.	IFT monitored the area and maintained remote cameras.
April 6	Unknown	Blue River, AZ	Wolves reported chasing horses through fence.	IFT investigated and found no sign of wolves in area.	No other incidents or any depredations reported.
April 7		Overgaard, AZ	Possible wolf/wolves in driveway of residence.	IFT talked to reporting party and both concluded animals in driveway were not wolves	
April 8	m1350	Plains of San Augustin, NM	Wolf in close proximity to residence.	IFT talked to reporting party and determined photos were of m1350.	None, wolf had left area on its own.
April 14	m1350	Plains of San Augustin, NM	Wolf in close proximity to residence.	IFT investigated and documented m1350 in area.	IFT set up fladry, monitored and hazed m1350; wolf left the area.
May 17	M1130	Eagle Peak, NM	Wolf in close proximity to residence.	IFT tried to contact reporting party but not successful. Talked and investigated the following day. Tracks in the area. The wolf had apparently been near the camp trailer for some period of time. A dog was also present but the private individual was able to get the dog into the trailer after seeing the wolf.	None, wolf had left area on its own.
May 18	M1130	Centerfire, NM	Wolf in close proximity to people and residence.	Investigated by IFT. IFT initiated hazing and attempted to trap M1130; it stayed with in vicinity of building for 3 days.	USFWS issued a lethal removal order which was carried out on May 20.
May 19	M1130	Centerfire, NM	Wolf in close proximity to people and residence.	M1130 continues presence, IFT continues hazing and trapping.	USFWS issued a lethal removal order which was carried out on May 20.

Date	Wolf ID	General Location	Type of Activity	IFT Response	Management Result
May 20	M1130	Centerfire, NM	Wolf in close proximity to people and residence.	M1130 continues presence, IFT continues hazing and trapping.	USFWS issued a lethal removal order which was carried out on May 20.
July 2	Unknown	Jewet Gap, NM	Collared wolf near occupied residence and chasing livestock on private property.	IFT talked to reporting party but were not granted access to private property to investigate. IFT searched for collared wolves and wolf sign, and placed trail camera on National Forest areas surrounding private property.	
July 27	Unknown	Mimbres, NM	Wolves interacting/harassing dogs while walking with owner on Forest Service trail. Wolves followed group back to private property/house.	IFT investigated incident and documented wolf tracks and scat in area of interaction. Trail cameras were also placed in the area.	Site revisited. No photos of wolves on trail camera and only old wolf sign found. No further incidents occurred or reported.
August 5	Unknown	Murry Basin, AZ	Wolves following person on horseback on Forest Service trail.	IFT investigated and did not locate any collared wolves in area.	

Table 10. IFT proactive management activities in Arizona and New Mexico during 2015.

Proactive Management	Purpose	Date	Location	Wolf ID	Management Result
Hay	Reduce livestock depredations.	Calving season	Blue River, AZ	Uncollared wolves	No confirmed depredations
Supplements	Reduce livestock depredations.	Calving season	Springerville, AZ	Hawks Nest	No known depredations
Range Rider	Reduce depredations on free-ranging livestock	10 months	Greens Peak, AZ	Paradise	No known depredations
Range Rider	Reduce depredations on free-ranging livestock	3 months	Greens Peak, AZ	Paradise	No known depredations
Range Rider	Reduce depredations on free-ranging livestock	5 months	Blue River, AZ	Bluestem, Elk Horn	1 known depredations
Range Rider	Reduce depredations on free-ranging livestock	6 months	Strayhorse, AZ	Unknown	N6 known depredations
Range Rider	Reduce depredations on free-ranging livestock	4 months	Rudd Knoll, AZ	Hawks Nest	No known depredation
Range Rider	Reduce depredations on free-ranging livestock	4 months	Greer, AZ	Hawks Nest/Bluestem	No Known Depredations
Range Rider	Reduce depredations on free-ranging livestock	5 months	O Bar O Canyon West, NM	Canyon Creek	5 confirmed depredations
Range Rider	Reduce depredations on free-ranging livestock	5 months	Aragon, NM	San Mateo	1 known depredations
Range Rider	Reduce depredations on free-ranging livestock	5 months	Slaughter Mesa, NM	San Mateo	No Known Depredations
Range Rider	Reduce depredations on free-ranging livestock	9 months	Centerfire Bog, NM	Fox Mountain, Uncollared wolves	5 confirmed depredations
Range Rider	Reduce depredations on free-ranging livestock	6.5 months	Black Peak, NM	Fox Mountain, Uncollared wolves	2 confirmed depredation
Range Rider	Reduce depredations on free-ranging livestock	5 months	Cruzville, NM	Fox Mountain	No Known Depredations
Range Rider	Reduce depredations on free-ranging livestock	5 months	Cruzville, NM	Fox Mountain	No Known Depredations
Hay	Reduce livestock depredations.	Calving Season	Cruzville, NM	Luna	No Known Depredations
Range Rider	Reduce depredations on free-ranging livestock	5 months	Collins Park, NM	Luna	No known depredation
Range Rider	Reduce depredations on free-ranging livestock	6 months	Govina, NM	Willow Springs	4 confirmed depredations

Table 11. Areas searched and uncollared wolves documented by the IFT in Arizona and New Mexico during 2015.

Area ID	General Area	Effort	State	Number Documented
A	Reynolds Creek south of Young	Searched roads and trails for wolf sign	AZ	0
B	Dry Creek area north of Young	Searched roads and trails for wolf sign	AZ	0
C	Clear Water Creek area northeast of Strawberry	Deployed remote cameras and searched roads and trails for wolf sign	AZ	1
D	Wilkins Creek area northwest of Forest Lakes	Searched roads and trails for wolf sign	AZ	0
E	Chevelon Canyon complex area north of Forest Lakes	Deployed remote cameras and searched roads and trails for wolf sign	AZ	0
F	Canyon Creek complex area south of Forest Lakes	Deployed remote cameras, conducted howling surveys, and searched roads and trails for wolf sign	AZ	0
G	Cotton Ridge area south of Pinedale	Deployed remote cameras and searched roads and trails for wolf sign	AZ	0
H	Mallory Spring area southeast of Vernon	Deployed remote cameras and searched roads and trails for wolf sign	AZ	0
I	Greens Peak area northwest of Greer	Deployed remote cameras and searched roads and trails for wolf sign	AZ	0
J	Strayhorse area south of Blue Vista Scenic Overlook	Deployed remote cameras and searched roads and trails for wolf sign	AZ	0
K	Chimney Rock	Deployed remote cameras and searched roads and trails for wolf sign	NM	4
L	Centerfire Creek/San Francisco Mountains	Deployed remote cameras and searched roads and trails for wolf sign	NM	0
M	Laguna Abel	Survey for wolf sign. IFT followed up on public report and confirmed wolf track.	NM	1
N	Tribal lands	IFT assisted tribal biologist searching roads for wolf sign.	NM	0
O	Datil Mountains	Searched roads and trails for wolf sign	NM	0
P	North San Mateo Mountains	Searched roads and trails for wolf sign	NM	3
Q	South San Mateo Mountains	Searched roads and trails for wolf sign	NM	0
R	Boiler Peak	Searched roads and trails for wolf sign	NM	1

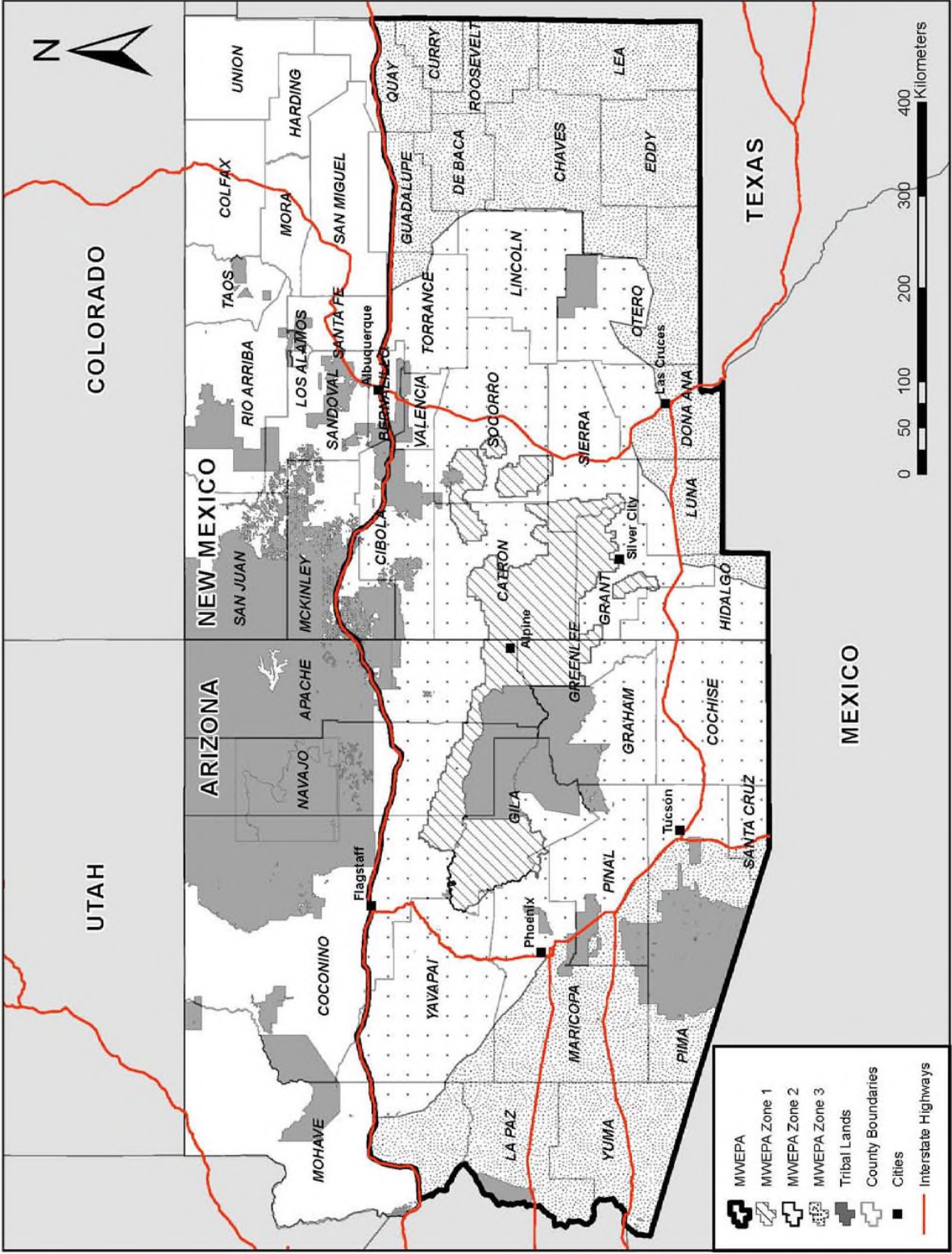


Figure 1. The Mexican Wolf Experimental Population Area (MWEPA) and Zones 1-3 in Arizona and New Mexico as described in the 2015 Final Rule found at http://www.fws.gov/southwest/es/mexicanwolf/pdf/Mx_wolf_10j_final_rule_to_OFR.pdf.

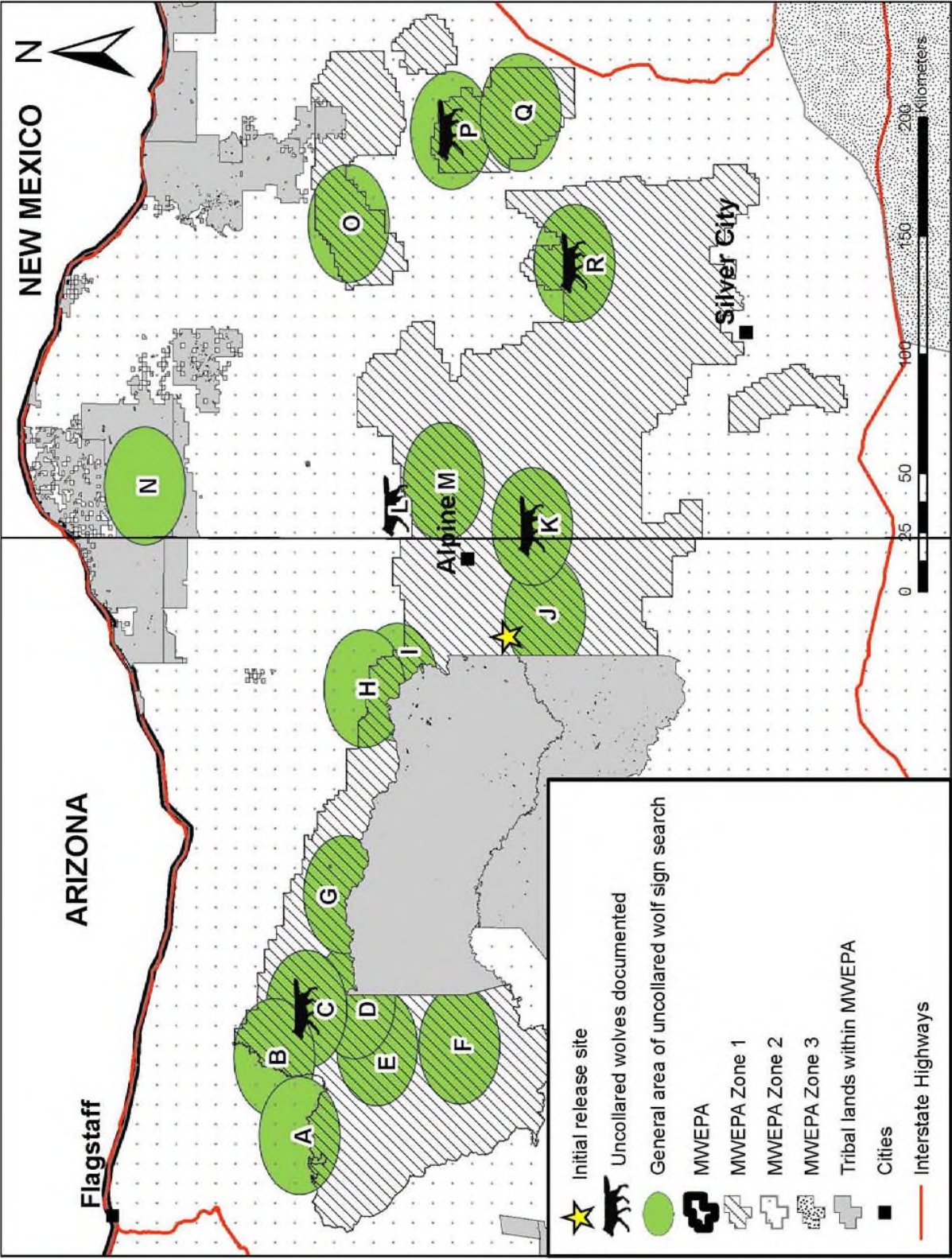


Figure 2. Areas searched for uncollared wolf sign (with uncollared wolves documented and counted in the 2015 wolf population designated) within the Mexican Wolf Experimental Population Area (MWEPA). Search areas correspond with map letters found in Table 11. One initial release site was used during 2015 in Arizona and New Mexico within the MWEPA.

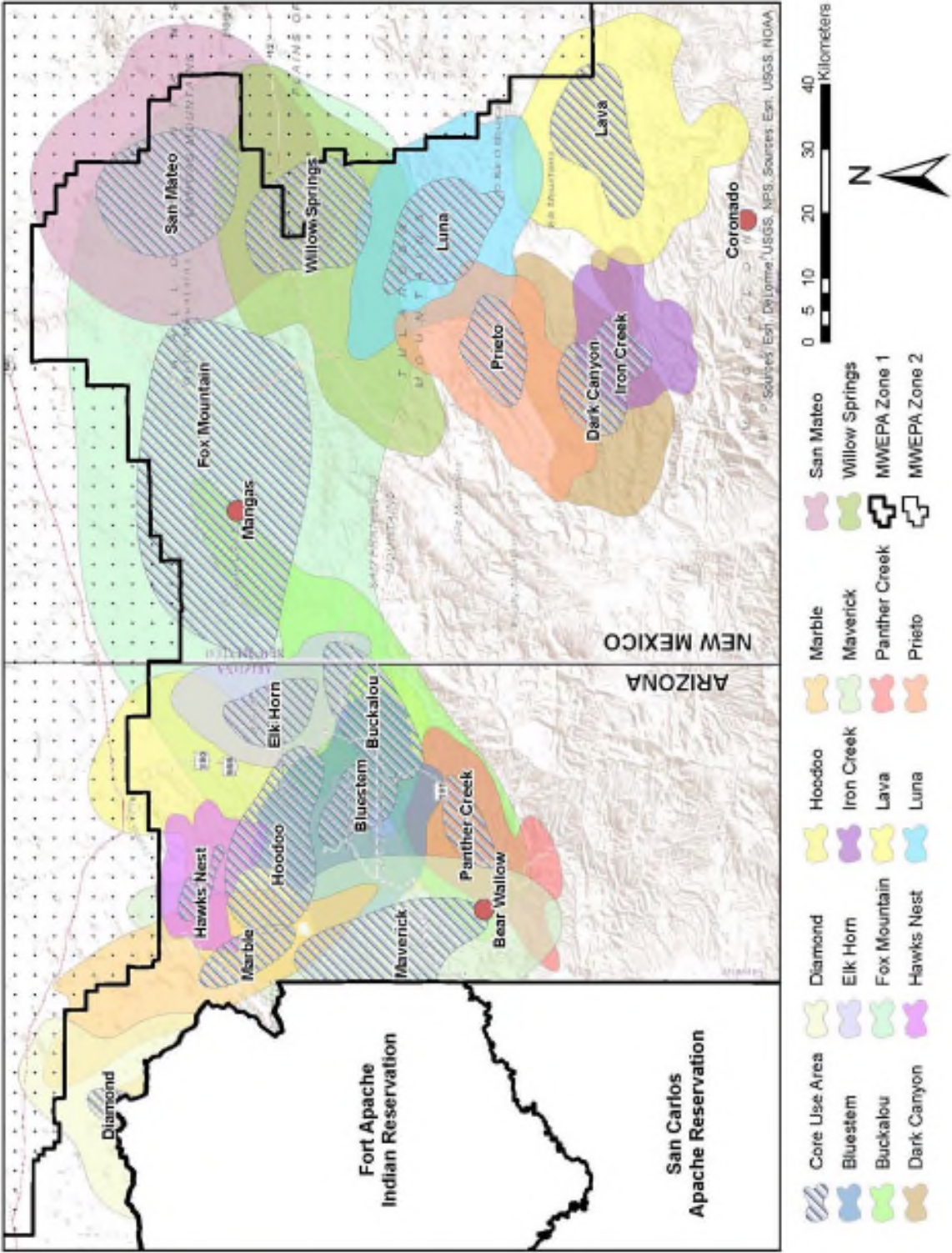


Figure 3. Mexican wolf home ranges for 2015 in Arizona and New Mexico within the Mexican Wolf Experimental Population Area (MWEPA). The shaded polygons on the map represent wolves having a minimum of 25 and a maximum of 366 independent radio locations and exhibiting movement characteristics consistent with a home range during 2015. The Bear Wallow, Coronado, and Mangas packs are represented with red dots because there were not enough locations in 2015 to calculate home ranges for these packs. See the following page for information regarding the wolf packs and home ranges.

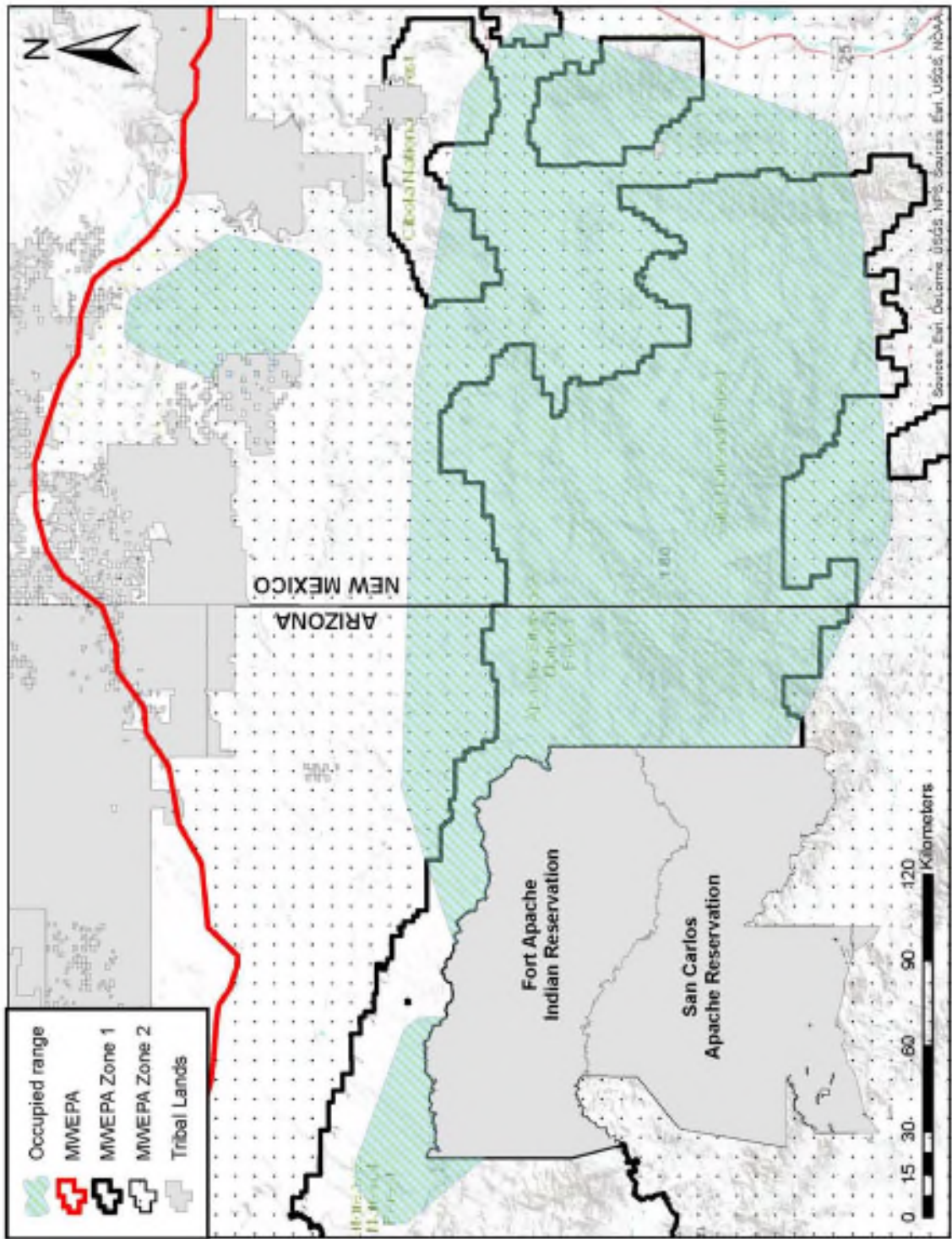


Figure 4. Mexican wolf occupied range in Arizona and New Mexico (2015) within the Mexican Wolf Experimental Population Area (MWEPA).

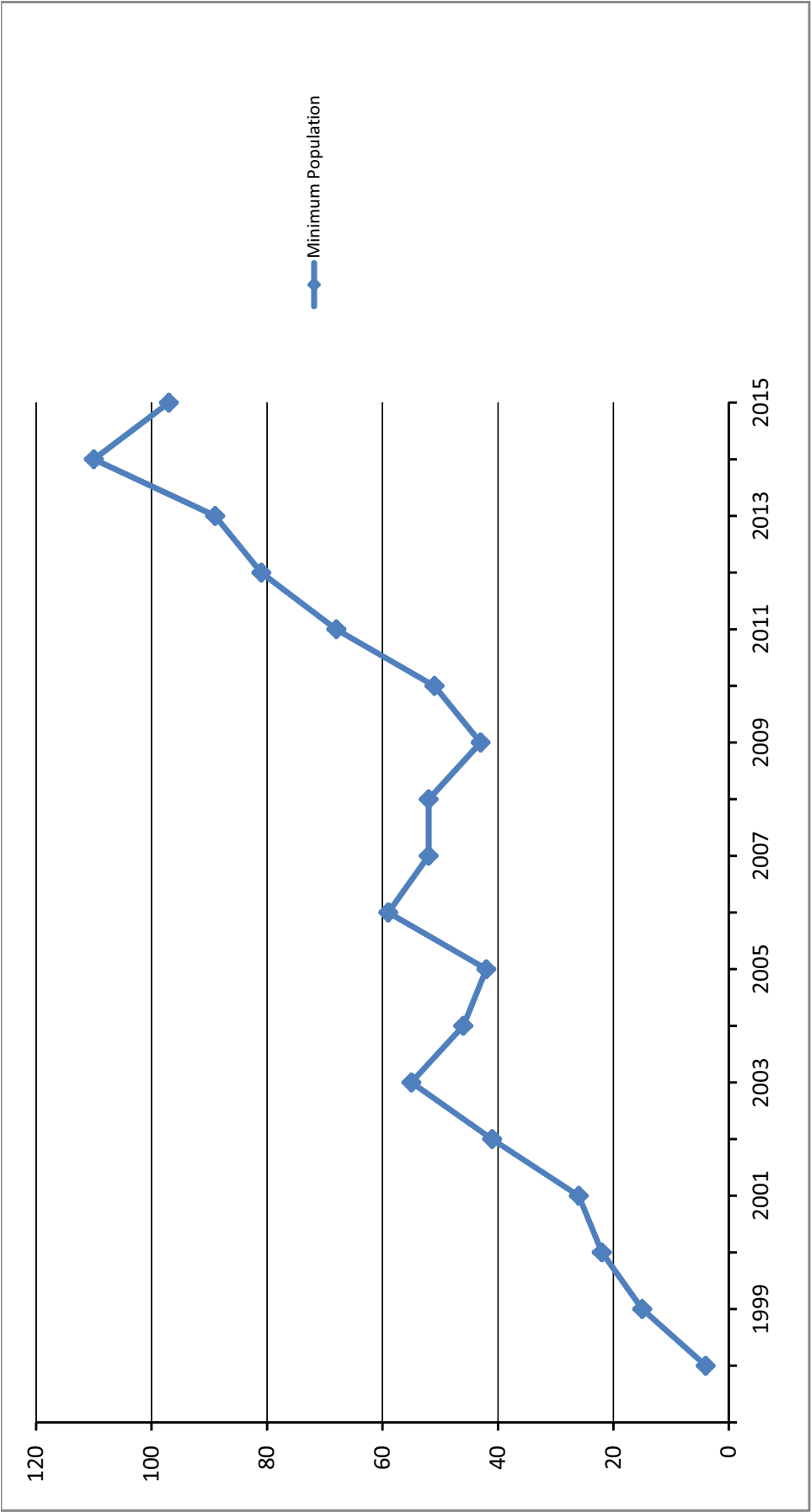


Figure 5. Mexican wolf minimum population estimates from 1998 through 2015 in Arizona and New Mexico.

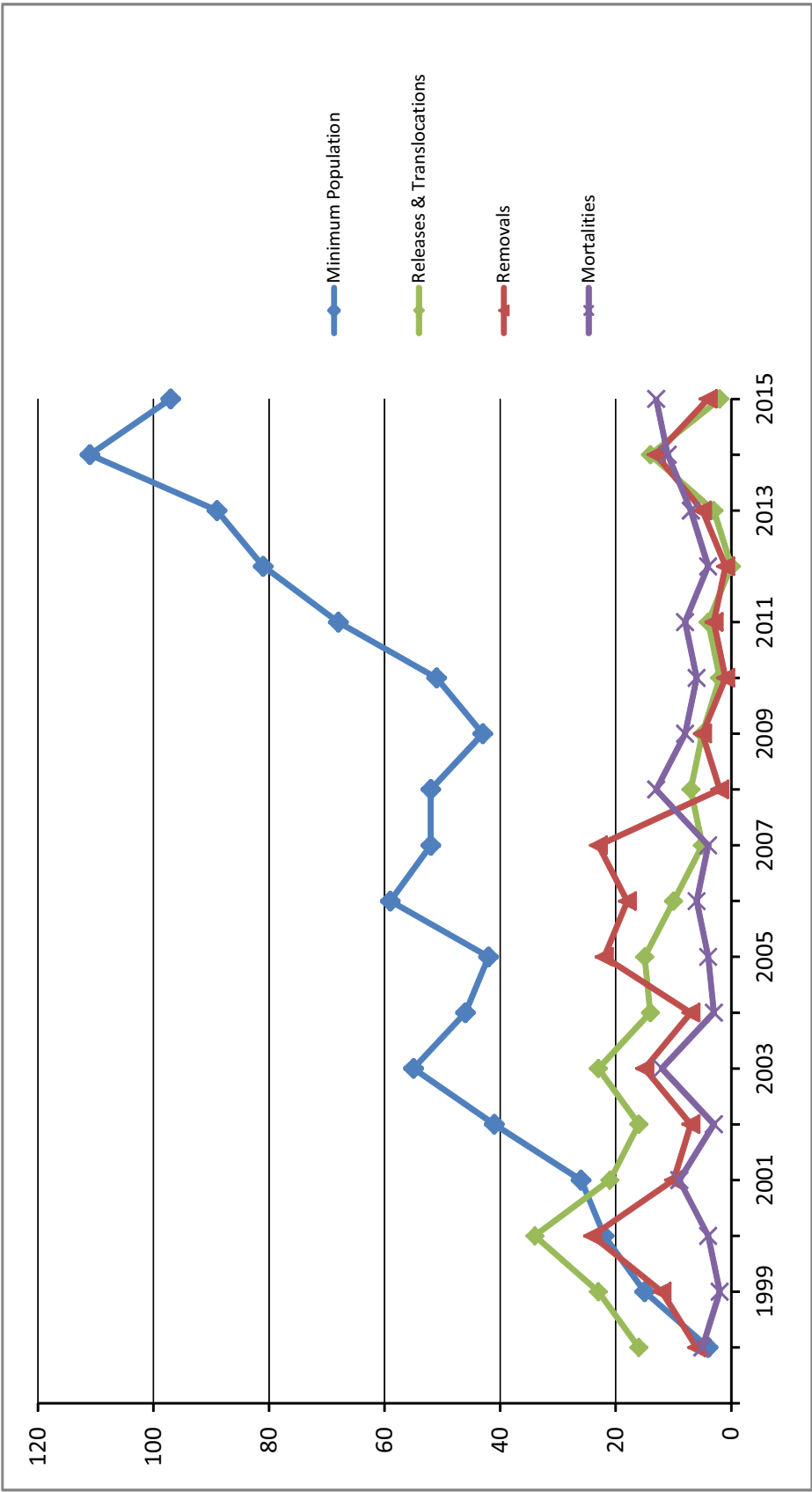


Figure 6. Mexican wolf minimum population estimates and associated population parameters (1998-2015). Releases and translocations included: initial releases (wolves released with no wild experience), translocations (wolves re-released from captivity back into the wild, and free-ranging wolves that were captured and re-released back into the wild for management purposes such as but not limited to boundary issues without having been placed temporarily into captivity). Removals included: wolves permanently removed from the wild (including wolves lethally controlled because they are associated with management actions), wolves temporarily removed from the wild and available for future translocation, and free-ranging wolves temporarily removed for management purposes such as boundary issues but without having been placed temporarily into captivity.

Appendix A. 2015 Pack and Single Wolf Summaries**7. Pack Summaries*****Bluestem (AF1042, AM1341, f1333, m1382, m1404, and f1443)***

In January, Bluestem consisted of eleven wolves (AF1042, AM1341, m1331, f1333, f1339, f1340 and five un-collared wolves). The Bluestem territory is in the central portion of the ASNF. Wolf m1382 and wolf AF1042 were captured and re-collared during the annual helicopter count in January. Wolf m1331 was also captured and temporarily removed from the wild for veterinarian care of an injury. He was released back into the Bluestem territory in February with a new radio collar. Wolf f1339 dispersed into the Panther Creek pack, and f1340 dispersed into the Marble pack. Wolf m1331 and f1405 dispersed and began traveling as single animals. Wolf m1404, wolf f1405, and f1443 were captured and collared on trap lines. AF1042 dened and produced a minimum of eight pups. Bluestem consisted of nine animals (AF1042, AM1341, f1333, m1382, m1404, f1443, and three pups) at the end of the year; however, f1333 began traveling with the Hoodoo pack at this time. Bluestem had 1 probable and 2 confirmed depredations, 6 captures, 0 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Bluestem is a breeding pair.

Bear Wallow (F1335 and M1338)

F1335 from the Maverick pack and m1338 from the Willow Springs pack paired in 2015 and established a territory in the central portion of the ASNF. Bear Wallow had no confirmed depredations, captures, mortalities, fate unknowns, removals, or translocations. The pair formed after the breeding season, and therefore did not reproduce, and is not a breeding pair

Buckalou (M1161 and F1405)

M1161 and F1332 were documented traveling together in the central portion of the ASNF in January. M1161 was captured during the annual population survey and re-collared. F1332 was found dead in February. M1161's collar malfunctioned and was not documented again until he was observed traveling with F1405 of the Bluestem pack. The pair maintained the same territory. Buckalou had 0 confirmed depredations, 1 capture, 1 mortality, 0 fate unknowns, 0 removals, and 0 translocations. Buckalou did not produce pups, and therefore is not a breeding pair.

Canyon Creek (AF1246, AM1252)

In January, Canyon Creek consisted of AF1246, AM1252. In late-March, AM1252 had not been located for three months and was classified fate unknown. In late-April, AF1246 had not been located for three months and was classified fate unknown. Canyon Creek had 0 confirmed depredations, 0 captures, 0 mortalities, 2 fate unknowns, 0 removals, and 0 translocations. Canyon Creek is no longer a pack.

Coronado (M1051)

In January, Coronado consisted of five animals: M1051, fp1348, mp1349, mp1350, and mp1351. Only M1051 and mp1350 were radio collared, and the remaining members were observed during the annual helicopter survey. Wolf mp1350 dispersed in February. M1051's radio collar failed in the fall but was detected on a remote camera at the end of the year. fp1348

and mp1349 could not be documented during the annual population count in January and are classified fate unknown. m1351 was found dead at the end of the year and the cause is under investigation. Coronado pack had 0 confirmed depredations, 0 captures, 1 mortality, 2 fate unknowns, 0 removals, and 0 translocations. Coronado is not a breeding pair.

Dark Canyon (AF923, AM992, M1293, m1354, m1347, and fp1444)

In January, Dark Canyon consisted of seven animals: AF923, AM992, M1293, m1354, m1347, and two uncollared pups. Wolf m1347 was captured and collared during the annual helicopter capture, and was confirmed to be one of two of the cross fostered pups from the summer of 2014. Dark Canyon used its traditional territory in the west-central portion of the Gila National Forest (GNF). Dark Canyon produced a minimum of 3 pups. A diversionary food cache was established in August as an attempt to discourage depredation behavior, and was removed in October when cattle presence declined. AF923 was captured and recollared, and fp1444 was collared in the fall. There were 7 animals in the pack at the end of the year: AM992, AF923, M1293, mp1354, m1347, fp1444, and an uncollared animal. Dark Canyon had 0 confirmed depredations, 3 captures, 0 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Dark Canyon is a breeding pair.

Elk Horn (AF1294, M1342)

In January, Elk Horn consisted of AF1294 and M1342. Although two uncollared Elk Horn pups were documented at the end of 2014, they were not documented during the 2015 annual helicopter operations. M1342 was captured and recollared during the annual helicopter survey, but that collar failed shortly after deployment. The pack's territory is in the northeastern portion of the ASNF in Arizona and the northwestern portion of the GNF in New Mexico. AF1294 was captured and re-collared in April. A blood sample confirmed AF1294 was pregnant. In late April, the pack apparently denned, but by the end of May, Elk Horn began traveling without pups. As of December 31, Elk Horn consisted of two animals: AF1294 and M1342. Elk Horn had 0 confirmed depredations, 2 captures, 0 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Elk Horn is not a breeding pair.

Fox Mountain (AM1158 and m1396)

In January, Fox Mountain consisted of AM1158, AF1212, mp1384, and two uncollared pups. Through the majority of the year, Fox Mountain was located within the northeastern portion of the ANF. AF1212 was found dead in January. Wolf mp1384 was captured and re-collared, and mp1396 was captured and collared; AM1158 was captured and re-collared. In early March, the USFWS issued a removal order for mp1384, mp1396 or an uncollared pup in response to several depredations (Table 7). Wolf mp1384 was captured and removed to captivity. No other wolves were captured and another depredation was assigned to uncollared wolves in the area. Two food caches were created to deter further depredations, and remote cameras were deployed to determine which uncollared wolf or wolves were responsible. In May and August, the IFT attempted to capture and recollar AM1158 but were not successful. In October, m1396 was located with f1397 from the Willow Springs pack. By November AM1158 was also traveling with m1396 and f1397. The IFT made an unsuccessful attempt to capture and recollar AM1158 in November. As of December 31, Fox Mountain consisted of two animals (AM1158 and m1396). Fox Mountain had 6 confirmed depredations, 4 captures, 1 mortality, 0 fate unknowns, 1 removal, and 0 translocations. Two additional confirmed depredations occurred in or adjacent

to the Fox Mountain pack territory and were attributed to uncollared wolf/wolves. Fox Mountain is not a breeding pair.

Hawks Nest (AM1038, AF1280, m1383, fp1438, f1439)

In January, Hawks Nest consisted of AM1038, AF1280, and mp1383. Wolf AF1280 was captured and collared in January. The pack occupied their traditional territory in the ASNF. During March and April, Hawks Nest was used in the annual winter predation study period. In April, AF1280's radio collar failed, but she was documented throughout the year traveling with the pack. Wolf m1383 was captured and collared in May. Hawks Nest was used in the annual summer predation study period. Five pups were documented in the summer. Wolf fp1438 was captured and collared on August 21, and found dead on September 3. The cause of death is assumed capture related. Wolf f1439 was also captured and collared in August. In late October, f1439 dispersed to the western GNF, and by November was traveling with M1296 of the Mangas pack in New Mexico. As of December 31, the Hawks Nest pack consisted of AM1038, AF1280, m1383, f1439, and two uncollared pups. Hawks Nest had 0 confirmed depredations, 4 captures, 1 mortality, 0 fate unknowns, 0 removals, and 0 translocations. Hawks Nest is a breeding pair.

Hoodoo (AM1290, f1395, mp1441)

In January, Hoodoo consisted of M1290. On January 20, an uncollared wolf traveling with M1290 was captured, collared, and designated f1395 during annual helicopter operations. Wolf f1395's collar failed shortly after deployment. Hoodoo was documented throughout the year in the central portion of the ASNF in Arizona. A minimum of one pup was documented in the summer. Wolf mp1441 was captured and collared in September. Wolf f1395 was missing after November, and by the end of December AM1290 was traveling with F1333 of the Bluestem pack. As of December 31, Hoodoo consisted of AM1290 and mp1441. Hoodoo had 0 confirmed depredations, 1 capture, 0 mortalities, 1 fate unknown, 0 removals, and 0 translocations. Hoodoo is not a breeding pair.

Iron Creek (AF1278 and AM1240)

In January, Iron Creek consisted of three animals: F1278, M1240, and one un-collared pup. Throughout the year, Iron Creek was located in the north-central portion of the GNF. Five pups were documented in May. In mid-June, Wildlife Services investigated an injured dog near the Iron Creek den, the investigation was a confirmed wolf injury and assigned to AM1240. In September AF1278 and AM1240 were captured and re-collared. By the end of December, Iron Creek consisted of a minimum of five animals, including AF1278, AM1240, and 3 pups. Iron Creek pack had 1 injury on a domestic dog, 2 captures, 0 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Iron Creek is a breeding pair

Lava (AM1285, AF1295, and mp1446)

In January, Lava consisted of M1285 and F1295. Throughout the year, Lava used their territory in central portions of the GNF. M1285 was captured and recollared in February. In May a confirmed killed calf was assigned to AM1285. In response, the IFT established a diversionary food cache in an effort to reduce potential future depredations. In July, two confirmed killed calves were assigned to AM1285 and AF1295. It was discovered that a bear was excluding the pack from utilizing the food cache, and the IFT established a secondary diversionary food

cache. One pup was documented in the summer. Wolf mp1446 was captured and collared in October. As of December 31, Lava consisted of three animals (AM1285, AF1295, and mp1446). Lava had 2 confirmed depredations, 1 capture, 0 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Lava is a breeding pair

Luna (AF1115, AM1155 and m1398)

In January, Luna consisted of six animals: AF1115, AM1155, M1337, and three uncollared pups. AF1115 and mp1398 were captured and collared in February. The IFT investigated GPS clusters from mid-January through mid-February as part of the winter predation study period. Throughout the year, the IFT located Luna within its traditional territory in the north-central portion of the GNF. In March the IFT documented that AM1155 was missing two toes on a front foot and was not using the injured foot routinely. M1337 became fate unknown in March. AF1115 collar failed in March, but she was still documented with AM1155 throughout the rest of the year. In April, a dead cow was confirmed killed and assigned to 1-2 uncollared Luna juveniles. Although no denning behavior was determined, a possible set of pup tracks were observed; however, pups were never confirmed. In June, a cow was confirmed killed by wolves and assigned to an uncollared wolf potentially associated with Luna. In October, m1398 was captured and re-collared, and began dispersing in mid-December between east-central portion of the Apache-Sitgreaves National Forest and the north-central portion of the GNF. Luna consisted of three wolves by the middle of December which included AF1115, AM1155, and one un-collared sub-adult. Luna had 1-2 confirmed depredations, 3 captures, 0 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Luna is not a breeding pair.

Mangas (M1296)

In January, Mangas consisted of one animal (M1296). Throughout 2015, Mangas M1296 did not stay within its established territory around Mangas Mountain in the northeastern portion of the GNF. Instead, M1296 roamed widely throughout northern portions of the GNF and east to the San Mateo Mountains in NM. In November, Mangas M1296 was located with f1439 from the Hawks Nest pack, and remained together throughout the remainder of 2015 in northwest portions of the GNF. As of December 31, Mangas consisted of one animal (M1296), not clear if f1439 will remain. Mangas had no confirmed depredations, captures, mortalities, fate unknowns, no removals, or translocations. Mangas is not a breeding pair

Marble (AF1340, mp1440, fp1442)

In January, AF1340 was considered a member of the Bluestem pack in Arizona. Early in 2015, AF1340 began making dispersal movements and localized in the north-central portion of the ASNF in Arizona. In April AF1340 was traveling with AM1330. In June a cow was confirmed killed by the Marble pack. The IFT established a diversionary food cache to reduce potential for further depredations. Marble began utilizing the food cache shortly after and did not have further depredations. Five pups were documented in August. Wolf mp1440 and fp1442 were captured and collared August-September. As of December 31, Marble consisted of AF1340, AM1330, mp1440, fp1442, and one uncollared pup. Marble had 1 confirmed depredation, 2 captures, 0 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Marble is a breeding pair.

Maverick (AM1183, AF1291, and f1335)

In January, Maverick consisted of seven wolves (AM1183, AF1291, f1335, and four uncollared wolves). Throughout 2015, Maverick was located within their traditional territory on the FAIR as well as the central portion of the ASNF. As of December 31, the Maverick pack consisted of four wolves (AM1183, AF1291, and two uncollared wolves). Maverick had no confirmed depredations, captures, mortalities, fate unknowns, removals or translocations. Maverick did not reproduce and therefore is not a breeding pair.

Panther Creek (F1339 and M1394)

In January, M1394 was captured and collared. F1339 and M1394 paired and established a territory in central ASNF. A minimum of 1 pup was reproduced but could not be documented to have survived to the end of the year. In October AM1394 was captured and re-collared. As of December 31, Panther Creek consisted of two wolves (AM1394 and AF1339) Panther Creek had 0 confirmed depredations, 1 capture, 0 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Panther Creek is not a breeding pair.

Prieto (AF1251, AM1387, m1386, f1392)

In January, Prieto consisted of five animals: AF1251, AM1387, mp1386, fp1392, and one uncollared pup. Throughout the year, the Prieto pack was located in the north-central portion of the GNF. AF1251 was re-collared during the annual helicopter capture, but the new collar failed soon after. A minimum of six pups were documented in mid-May. A temporary food cache was maintained to reduce the potential for livestock depredations from June through October. Wolf f1392 was re-collared in October. AM1387's collar failed in November. Wolf f1392 was traveling with M1284 in the north-central portion of the GNF in December. By the end of the year, Prieto consisted of a minimum of nine animals which included: AF1251, AM1387, f1392, m1386, and 5 pups. Prieto had 1 confirmed and 1 probable depredation, 1 capture, 0 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Prieto is a breeding pair.

Rim (AF1305)

In January, Rim consisted of M1336 and AF1305. Rim occupied their traditional territory in the center of the ASNF. Both Rim animals were captured and removed from the wild to prevent the breeding of the siblings, and to instead pair them with unrelated wolves in captivity. Wolf AF1305 was paired with M1130 in captivity. The pair was released into the Rim territory after they were observed mating. However the pair did not stay together and a pregnancy test on AF1305 revealed it was not pregnant. M1130 was lethally removed due to habitual nuisance behavior (Table 9). AF1305 continued to travel alone throughout the center of the ASNF until she died in December. Rim had 0 confirmed depredations, 2 captures, 1 mortality, 0 fate unknowns, 1 removal, and 1 translocation. Rim is not a pack at the end of the year.

San Mateo (AF903 and M1345)

In January, San Mateo consisted of three animals (AF903, M1345, and one uncollared pup). San Mateo used their traditional territory in the northern portion of the Apache National Forest (ANF). Wolf fp1399 was captured and collared during the year-end helicopter count, but the collar failed soon after. A minimum of one pup was documented traveling with the pack. Wolf AF903 was killed by other wolves. As of December 31, the San Mateo pack consisted of three

animals (M1345, f1399 and one uncollared pup). San Mateo had 0 confirmed depredations, 1 capture, 1 mortality, 0 fate unknowns, 0 removals, and 0 translocations. San Mateo is not a breeding pair.

Tsay-O-Ah (F1283, M1343, fp1445)

Tsay-O-Ah occupied a territory located on the FAIR. In October, fp1445 was captured and collared. Tsay-O-ah had confirmed depredations, 1 capture, 0 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Tsay-O-Ah is a breeding pair.

Tse ighan lige (Diamond) (AM1249, f1388, fp1389, F1437, mp1447)

Diamond primarily occupied a territory on the FAIR. Wolves F1437 and mp1447 were captured and collared. Diamond had 0 confirmed depredations, 2 capture, mortalities, 0 removals, and 0 translocations. The Diamond pack is a breeding pair.

Willow Springs (f1397)

In January, Willow Springs consisted of nine AM1185, AF1279, m1338, mp1385, fp1390, m1391, and three uncollared pups. The pack held a territory in the north-central portion of the GNF. Wolf fp1397 was captured and collared during the annual helicopter count. Wolves AF1279 and mp1385 died in February. Wolf m1391 went missing in the early part of the year. Wolf m1338 began traveling with f1335 from the Maverick pack and became the Bear Wallow pack in Arizona. Reproduction was not documented. Wolf f1390 began dispersing in the fall. In November, f1397 traveling with AM1158 and m1396 of the Fox Mountain pack. AM1185 died in December. At the end of the year, Willow Springs consisted of f1397. Willow Springs had 0 confirmed depredations, 1 capture, 3 mortalities, 0 fate unknowns, 0 removals, and 0 translocations. Willow Springs is not a breeding pair.

8. Individual Wolf Summaries

M1282

Wolf M1282 was missing since the beginning of the year, but his collar was found at the end of the year. He is therefore documented as fate unknown.

M1284

In January, M1284 was traveling alone year throughout the GNF. At the end of the year M1284 was traveling with Prieto f1392 in the north-central portion of the GNF. He had no depredations.

m1331

Wolf m1331 was captured during helicopter annual survey and temporarily removed from the wild for veterinary attention, and released after a couple of weeks in his natal Bluestem territory. He later dispersed in May traveling between the ASNF and GNF throughout the rest of the year. He had no depredations.

M1350

By mid-February mp1350 had been separated from the Coronado pack and began traveling between the northern Gila Wilderness and the southern GNF. In April, mp1350 was involved in a nuisance incident near a residence in the southern GNF. The IFT successfully hazed him away.

However, he continued to return to the residence. Hazing efforts continued, and mp1350 again left the area. He returned in early May, and fladry was placed around the residence and the wolf was again hazed until he left the area permanently. He continued to travel in the southern GNF until mid-summer when he went fate unknown.

9. Personnel

Arizona Game and Fish Department

Jeff Dolphin, Field Team Leader
Ed Davis, Wolf Biologist
Julia Smith, Wolf Biologist
Brent Wolf, Wolf Biologist
Mike Godwin, Wildlife Manager Supervisor
Joel Weiss, Wildlife Manager
Aaron Hartzell, Wildlife Manager
Chris Bagnoli, Regional Supervisor
Jason Capps, Wildlife Manager
Dave Cagle, Wildlife Program Manager
John Hervert, Wildlife Program Manager
Bill David, Chief Pilot
Pete Applegate, Pilot
Steve Sunde, Pilot
Steve Dubois, Pilot
Preston Hunts, Pilot

New Mexico Department of Game and Fish

Agency cooperation ceased July 1, 2011; however, District officers remain involved in law enforcement issues.

USDA-APHIS Wildlife Services

Sterling Simpson, Wolf Management Specialist
Matt Ellis, Wolf Management Specialist
Chris Carrillo, District Supervisor
Rudolph Fajardo, District Supervisor
Mike Kelly, Wildlife Biological Science Technician
Jedediah Murphy, Wildlife Biological Science Technician
Phillip Hopper, Wildlife Biological Science Technician
Clint Ruppert, Wildlife Biological Science Technician

U.S. Forest Service

Vicente Ordonez – Forest Service Liaison to the Wolf Project

U.S. Fish and Wildlife Service

Sherry Barrett, Mexican Wolf Recovery Coordinator
Maggie Dwire, Assistant Mexican Wolf Recovery Coordinator
John Oakleaf, Senior Wolf Biologist/Interagency Field Projects Coordinator

Tracy Melbihess, Listing, Recovery, and NEPA Coordinator
Elizabeth Jozwiak, Wildlife Biologist
Melissa Kreutzian, Fish and Wildlife Biologist
Colby Gardner, Fish and Wildlife Biologist
Susan Dicks, Fish and Wildlife Biologist/Veterinarian
Kent Laudon, Field Team Leader
Janess Vartanian, Wildlife Biologist
Allison Greenleaf, Wildlife Biologist
Justin Martens, Wildlife Biologist
Dewey Wesley, Biological Technician

AGFD Interns

Mackenzey Kriebs
Dan Tomesceti
Gael Sanchez
Carrie Kyle

USFWS Interns

Kenneth Loonam
Becca Thomas-Kuzilik
Lauren Ross
Mitchell Kern
Shane Brown
Hannah Manninen
Rowan Converse

White Mountain Apache Tribe

Sara Eno, Wolf Biologist/Field Team Leader
Theo Guy, Wolf Technician
Deon Hinton, Wolf Technician
Joseph Perez, Wolf Technician

Project Veterinarians

Dr. Ole Alcumbrac
Dr. Susan Dicks

GOVERNOR
Susana Martinez



DIRECTOR AND SECRETARY
TO THE COMMISSION
Alexandra Sandoval

DEPUTY DIRECTOR
Daniel E. Brooks

**STATE OF NEW MEXICO
DEPARTMENT OF GAME & FISH**

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Las Cruces

BOB RICKLEFS
Cimarron

THOMAS "DICK" SALOPEK
Las Cruces

September 19, 2014

FWS-R2-ES-2013-0056
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N Fairfax Drive, MS 2042- PDM
Arlington, VA 22203

Subject: Comment on Proposed Revision to the Nonessential Experimental Population Rule for the Mexican Wolf

Reply to: Stewart Liley, Big Game Program Manager, New Mexico Department of Game & Fish, 1 Wildlife Way, Santa Fe, New Mexico 87504

To Whom It May Concern:

The New Mexico Department of Game & Fish (Department) has reviewed the July 25, 2014 U.S. Fish and Wildlife Service (Service) proposal to revise the 1998 nonessential experimental population (NEP) rule (i.e. the 1998 Final Rule) for the Mexican wolf (*Canis lupus baileyi*). Based on our review we offer the following perspectives and comments. The new Proposed Rule outlines proposed revisions that would, among other things, allow initial releases of naïve or other wolves over an expanded Blue Range Wolf Recovery Area (BRWRA) and significantly modify existing boundaries for the Mexican Wolf Experimental Population Area (MWEPA) in Arizona (AZ) and New Mexico (NM). The proposed revisions also include other management modifications and alternatives to address proposed expansion of the BRWRA and MWEPA.

The Department continues to be adamantly opposed to any modification or revision to the 1998 nonessential experimental population (NEP) rule for the Mexican wolf (*Canis lupus baileyi*) except those as may be necessary to appropriately reflect the status and maintain protections for the Mexican Wolf, should the U.S. Fish and Wildlife Service (Service) decide to remove the gray wolf from the List of Endangered and Threatened Wildlife (ref. Removing the Gray Wolf (*Canis lupus*) from the List of Endangered and Threatened Wildlife and Maintaining Protections for the Mexican Wolf (*Canis lupus baileyi*) by Listing It as Endangered Docket #FWS-HQ-ES-2013-0073).

Our opposition is based on our continued belief that the Service's proposal is based on unjustified, possibly unlawful, changes in Purpose and Need for reintroduction in AZ-NM, i.e. by proposing to increase (per the proposed actions) the population objective from the 1996 Final Environmental Impact Statement (FEIS) and 1998 Final Rule of "at least 100 wolves in the Blue Range Wolf Recovery Area to an objective of working toward a larger, yet to be defined, population for long term persistence in the wild over a significantly larger area. We again suggest that the Service expeditiously initiate a revision of the bi-national 1982 Mexican Wolf Recovery Plan that uses a public, transparent,

and cooperative process to establish what the realistic contribution the Mexican Wolf's historical range in New Mexico and Arizona is to wolf conservation and a range wide recovery goal.

The New Mexico Department of Game and Fish has made the Service aware of our position in our previous comment letters regarding revisions to the nonessential experimental population rule. Pursuant to various conference calls and conversations over the last year with individuals in the Service including Dan Ashe and Sherry Barrett, it has been made clear to us that the Service has, and will continue, to disregard our fundamental concerns and suggestions about the need for an updated recovery plan before any significant revisions to the 10j rule are warranted. As a result we find ourselves in a position to recommend the Service select the "No Action" alternative. Based on the likelihood that the Service will not accept this recommendation, we submit the following comments on the eight (8) specific revisions the Service is currently seeking comments on to ensure that the record reflects our perspectives and concerns on behalf of the State Wildlife Management Agency and the associated interests of the State of New Mexico.

Proposed Revision 1 - Move southern boundary of the MWEPA to the international border with Mexico in Arizona and New Mexico.

The Department is not opposed to this prospective revision only with respect to ensuring that there is the maximum wolf management flexibility available in this region where the likelihood of significant livestock conflict exists due to extremely limited natural prey base. The area to the south of I-10 in New Mexico has very low native prey densities (and no elk populations) with a majority of the area grazed by cattle year round. This will most likely lead to increases conflicts with livestock if wolves to move into the area. However, if this proposed alternative becomes part of the final rule more latitude of management under 10(j) would be preferred in this area. In addition, because this revision has the potential of more wolves over a larger area, the Department continues to insist that the Service demonstrate the ability to provide more effective and timely management and monitoring capabilities that must be available over a larger MWEPA.

Proposed Revision 2 – Zoned approach to wolf management within the MWEPA.

With regard to zone 1, the Department remains adamantly opposed to any expansion of the current BRWRA and any new releases in New Mexico.

The Service has not adequately accounted for the natural establishment of wolves throughout the secondary recovery zone and saturation of packs across the majority of the current BRWRA. Currently more packs are established in the secondary recovery zone than the primary zone (Mexican Wolf Blue Range Reintroduction Project Interagency Field Team Annual Report 2012) In addition the Service fails to account for the release and subsequent failure of multiple releases of wolves back into the current secondary recovery zone. Releasing additional wolves, especially naïve wolves, into the proposed zone 1 will result in more wolves dispersing into zone 2 and potentially beyond, likely increase depredations on livestock and negatively impact native prey populations. All of these will require significant increases in monitoring and management capabilities, which the Service has not demonstrated that it has the capacity or ability to effectively provide. The Department requests that the Service add language to this proposed revision that explicitly requires State review and approval prior to any release of wolves in New Mexico.

With regard to zone 2 the Department remains adamantly opposed to any expansion of wolves outside of the current BRWRA and any releases or translocations of wolves into the proposed zone 2. Based on the likelihood that the Service will not follow this recommendation, we request that language in this revision be modified to indicate that wolves allowed to disperse outside zone 1 will only be allowed to remain and occupy those areas within zone 2 that provide sufficient and sustainable prey populations as determined by the State. In addition, we request that this allowance also require that the Service have sufficient personnel and fiscal resources in place to immediately respond to and effectively capture and return any wolf that disperses outside the MWEPA.

With regard to zone 3 the Department remains adamantly opposed to any expansion of wolves outside of the current BRWRA or the proposed zone 2.

Proposed Revision 3 - Modified or new definitions.

The Department has no comments on these proposed revisions.

Proposed Revision 4 - Due care criteria with regard to trapping.

The Department requests that the Service:

(1) state affirmatively, as the Service did in the Federal Register when it finalized the current 10(j) Rule applicable to the Mexican gray wolf, that trapping is allowed within the MWEPA: "Selective lethal control of coyotes by traps, calling and shooting, and aerial shooting, as well as a variety of nonlethal techniques are allowed under this rule." 78 Fed. Reg. 1752, at 1760 (1998);

(2) The Department appreciates the amendments to section 5(iii)(A) to add the words "recommendations" and "guidelines" as follows: "Due care includes: (A) Following the regulations, proclamations, recommendations, guidelines and/or laws within the State where the trapping takes place." However the Department again requests that sections 5(iii)(B) through (E) be removed;

(3) affirmatively state that the take of an experimental nonessential Mexican gray wolf does not constitute a violation of ESA Section 9, which deals only with endangered and threatened species and not Rule 10(j) experimental populations;

(4) clarify, by an affirmative statement, that state regulators and other officials cannot be held liable for causing a take of a Mexican gray wolf simply by their regulation of trapping or lack thereof, notwithstanding any other language that may be found in the Proposed Rule; and

(5) the Department supports the proposed definition of "occupied wolf range", as it can be realistically measured in a timely manner and made readily available to the public so that trappers will have more accurate information regarding occupied wolf range and can accordingly exercise extra caution when trapping in those areas. We continue to suggest that the rule reflect that it be updated on a consistent basis of at least once every two weeks.

Continued Concerns:

- The Service correctly included a statement in the Federal Register finalizing the current Rule which made clear that trapping activities are allowed throughout the MWEPA (so long as due care is exercised by the trapper). See 78 Fed. Reg. 1752, at 1760 (1998). This policy statement should be repeated here. As the 2011 USGS report titled "Evaluating Trapping Techniques to Reduce Potential for Injury to Mexican Wolves" noted, "[o]f the varied human impacts, trapping-related injury and mortality to Mexican wolves is relatively minimal." Accordingly, because some parties may read the restrictions on trapping activities in the Proposed Rule too broadly, the Department requests that the Service repeat in any future Federal Register publishing a new Final Rule the same affirmative statement, as above, found in the 1998 Federal Register notice.
- The Service's proposed guidelines for exercising "due care" (i.e., sections 5(iii)(A)-(E)) are substantially similar to, yet somewhat broader than, the Department's "Trapping and Hunting in Wolf Country" Guidelines, available at: www.wildlife.state.nm.us/recreation/hunting/documents/Wolfcountry.pdf. Accordingly, the Department suggests removing sections 5(iii)(B) through (E) because the state laws and guidelines encompass standards for minimizing any harm or fatalities that might occur once a wolf becomes

incidentally trapped. If the additional provisions in sections 5(iii)(B)-(E) are implemented, trapping activities across more than half the State of New Mexico will be impacted (especially if the Service also implements its proposal to enable wolves to disperse and occupy areas throughout the MWEPA). At the same time, the Department suggests that a trapper should be found to have exercised "due care" to avoid harming or killing a wolf when the trapper follows applicable state laws, recommendations and/or guidelines.

- Mexican gray wolves currently are listed as an experimental, nonessential population. See FWS' Listed Animals (available at http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp) (designating some protected species as "E" [endangered], others as "T" [threatened], and Mexican gray wolves as "EXPN" [experimental population]). [This is consistent with the Service's proposal to list the Mexican gray wolf in Arizona and New Mexico as "XN." See 78 Fed. Reg. 35664, at 35719 (June 13, 2013)]. Consequently, ESA Section 9, which covers only endangered and threatened species, does not apply to Mexican gray wolves (– at least in Arizona and New Mexico under the Service's pending proposal). The Service should so state to avoid any doubt.
- The Department requests that the Service clarify in the Proposed Rule that state regulators cannot be found to have "caused" (or otherwise be held liable for) any "take" of a Mexican gray wolf under ESA Section 9 or the Proposed Rule simply by their regulation of trapping or lack thereof. Section 10(j) rules are designed to accommodate private and public concerns regarding re-introduction of experimental populations. Holding regulators liable by virtue of their regulatory activities and decisions (whether affirmative or not) would undermine the purpose of 10(j) rules.

Proposed Revision 5 - Take on non-federal lands.

The Department has no comments on this proposed revision.

Proposed Revision 6 - Permitted take on non-federal land.

The Department has no comment on this proposed revision.

Proposed Revision 7 - Removal action authorized on federal land.

The Department again suggests that the language in (7) (v) (A) be modified to allow for owners of livestock on public lands allotted for livestock grazing the same ability that livestock owners or their agents have on private or tribal lands to take any Mexican wolf in the act of killing, wounding, or biting livestock. We are concerned that this provision challenges an individual's constitutional right to protect private property.

Proposed Revision 8 – Impacts to wild ungulates.

As the Department has repeatedly stated, we feel the Service efforts to modify the current rule are premature and the entire EIS process must be questioned due to the absence of a properly developed and approved wolf recovery plan that establishes realistic goals for wolf numbers and distribution without which no meaningful evaluation of economic, social, or biological impacts can be determined or evaluated. As a result the Department cannot support the proposed language regarding this revision.

Comments to draft 10(a)(1)(A) permit.

The Department requests that language in section S, paragraph 2, be modified to ensure that as soon as it has been determined that any wolf has left the MWEPA, immediate action will be taken to capture and/or remove. Currently language suggests that a wolf or wolves would be allowed to establish outside the MWEPA before capture and removal actions would take place.

Additional recommendation.

As a result of our perspective that the Service has demonstrated a lack of commitment to various aspects of the Mexican wolf program we suggest that the new Final Rule include a provision that rescinds the new NEP Rule and immediately reinstates the 1998 Final Rule, to include using all means necessary to return the population to the 1998 objective of at least 100 wolves but no more than the number of wolves that are present within the current BRWRA if the Service initiates any federal process to change the NEP status of Mexican wolves or designate critical habitat for the NEP.

We appreciate the opportunity to give you our perspectives and ask that you contact us if we can answer any questions about our comments.

Sincerely,

A handwritten signature in blue ink that reads "Alexandra Sandoval". The signature is fluid and cursive, with the first name being more prominent.

Alexandra Sandoval
Director

CC: Honorable Susana Martinez, Governor, State of New Mexico
Larry D. Voyles, Director, Arizona Game and Fish Department
Daniel M. Ashe, Director, U.S. Fish and Wildlife Service
Benjamin Tuggle, Region 2 Director, U.S. Fish and Wildlife Service
Jeff Witte, Director, New Mexico Department of Agriculture
Paul Kienzie III, Chairman New Mexico State Game Commission

GOVERNOR
Susana Martinez



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DEPARTMENT OF GAME & FISH

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FWS-R2-ES-2013-0056
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N Fairfax Drive, MS 2042- PDM
Arlington, VA 22203

RECEIVED
JAN 06 2015
Div. of Policy & Dir. Mgt.

December 24, 2014

Subject: Comment on Final EIS on Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf

Reply to: Stewart Liley, Big Game Program Manager, New Mexico Department of Game & Fish, 1 Wildlife Way, Santa Fe, New Mexico 87504

To Whom It May Concern:

The New Mexico Department of Game & Fish (Department) has reviewed the November 25, 2014 U.S. Fish and Wildlife Service (Service) Final Environmental Impact Statement (EIS) for the proposed revisions to the regulations for the nonessential experimental population (NEP) of the Mexican wolf (*Canis lupus baileyi*) and the Draft Record of Decision (ROD). Based on our review we offer the following perspectives and comments. The Final EIS and ROD outlines revisions that would, among other things, allow initial releases of naïve or other wolves over an expanded Wolf Recovery Area and significantly modify existing boundaries for the Mexican Wolf Experimental Population Area (MWEPA) in Arizona (AZ) and New Mexico (NM). The proposed revisions also include other management modifications and alternatives to address proposed expansion of the BRWRA and MWEPA.

The Department continues to be adamantly opposed to any modification or revision to the 1998 nonessential experimental population (NEP) rule for the Mexican wolf (*Canis lupus baileyi*) except those as may be necessary to appropriately reflect the status and maintain protections for the Mexican Wolf, should the U.S. Fish and Wildlife Service (Service) decide to remove the gray wolf from the List of Endangered and Threatened Wildlife (ref. Removing the Gray Wolf (*Canis lupus*) from the List of Endangered and Threatened Wildlife and Maintaining Protections for the Mexican Wolf (*Canis lupus baileyi*) by Listing It as Endangered Docket #FWS-HQ-ES-2013-0073).

Our opposition is based on our continued belief that the Service's proposal is based on unsubstantiated changes in Purpose and Need for reintroduction in AZ-NM, i.e. by proposing to

NMDGF letter to U.S. Fish and Wildlife Service - December 24, 2014

Subject: Comment on Final EIS on Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf

increase (per the proposed actions) the population objective from the 1996 Final Environmental Impact Statement (FEIS) and 1998 Final Rule of “at least 100 wolves in the Blue Range Wolf Recovery Area to “achieving an Experimental Population Objective of 300 to 325 wolves”. We do not believe that making such a change adheres to certain NEPA and APA procedures. We again suggest that the Service expeditiously initiate a revision of the bi-national 1982 Mexican Wolf Recovery Plan that uses a public, transparent, and cooperative process to establish what the realistic contribution the Mexican Wolf’s historical range in New Mexico and Arizona is to wolf conservation and a range wide recovery goal.

The New Mexico Department of Game and Fish has made the Service aware of our position in our previous comment letters regarding revisions to the nonessential experimental population rule. Pursuant to various conference calls and conversations over the last year with individuals in the Service including Dan Ashe and Sherry Barrett, it has been made clear to us that the Service has, and will continue, to disregard our fundamental concerns and suggestions about the need for an updated recovery plan before any significant revisions to the 10j rule are warranted. As a result we find ourselves in opposition with the Services Draft ROD to implement Alternative One (the Proposed Action and Preferred Alternative). Until such time that revised Mexican Wolf Recovery Plan has been finalized it is the Departments recommendation that the Service select the “No Action” alternative. Based on the likelihood that the Service will not accept this recommendation, and will select the “Preferred Alternative” in the final ROD, the Department has included specific comments to aspects of the “Preferred Alternative” below.

Achieve an Experimental Population Objective of 300 to 325 wolves

The Department believes the Services decision to include a population objective in the Final EIS, while refusing to discuss population numbers while developing the Draft EIS is outside the intent of NEPA. During the EIS development and rule revision process the Department continually asked the Services for a population objective/goal and was told on every occasion that this number would not be presented until a new recovery plan was finalized. The Department was not able to adequately analyze all “proposed alternatives” and “proposed revisions” during review of the Draft EIS or proposed rule revisions without knowledge of a population objective (as stated in previous comments submitted to the Service). This reaffirms the Departments position that a revision of the bi-national 1982 Mexican Wolf Recovery Plan that uses a public, transparent, and cooperative process to establish what the realistic contribution the Mexican Wolf’s historical range in New Mexico and Arizona is before any rule revision be proposed or implemented.

Zoned approach to wolf management within the MWEPA

With regard to zone 1, the Department remains adamantly opposed to any expansion of the current BRWRA and any new releases in New Mexico. The Service has not adequately accounted for the natural establishment of wolves throughout the secondary recovery zone and saturation of packs across the majority of the current BRWRA. Currently more packs are established in the secondary recovery zone than the primary zone (Mexican Wolf Blue Range Reintroduction Project Interagency Field Team Annual Report 2012). In addition the Service fails to account for the release and subsequent failure of multiple releases of wolves back into the current secondary recovery zone. Releasing additional wolves, especially naïve wolves, into the

Page 2 of 5

NMDGF letter to U.S. Fish and Wildlife Service - December 24, 2014

Subject: Comment on Final EIS on Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf

proposed zone 1 will result in more wolves dispersing into zone 2 and potentially beyond, likely increase depredations on livestock and negatively impact native prey populations. All of these will require significant increases in monitoring and management capabilities, which the Service has not demonstrated that it has the capacity or ability to effectively provide. **The Department requests that the Service add language to this proposed revision that explicitly requires State review and approval prior to any release of wolves in New Mexico (on public or private lands).**

With regard to zone 2 the Department remains adamantly opposed to any expansion of wolves outside of the current BRWRA and any releases or translocations of wolves into the proposed zone 2. Based on the likelihood that the Service will not follow this recommendation, we request that language in this revision be modified to indicate that wolves allowed to disperse outside zone 1 will only be allowed to remain and occupy those areas within zone 2 that provide sufficient and sustainable prey populations as determined by the State. In addition, we request that this allowance also require that the Service have sufficient personnel and fiscal resources in place to immediately respond to and effectively capture and return any wolf that disperses outside the MWEPA.

With regard to zone 3 the Department remains adamantly opposed to any expansion of wolves outside of the current BRWRA or the proposed zone 2.

Due care criteria with regard to trapping

The Department requests that the Service:

(1) state affirmatively, as the Service did in the Federal Register when it finalized the current 10(j) Rule applicable to the Mexican gray wolf, that trapping is allowed within the MWEPA: "Selective lethal control of coyotes by traps, calling and shooting, and aerial shooting, as well as a variety of nonlethal techniques are allowed under this rule." 78 Fed. Reg. 1752, at 1760 (1998);

(2) The Department appreciates the amendments to section 5(iii)(A) to add the words "recommendations" and "guidelines" as follows: "Due care includes: (A) Following the regulations, proclamations, recommendations, guidelines and/or laws within the State where the trapping takes place." However the Department again requests that sections 5(iii)(B) through (E) be removed;

(3) affirmatively state that the take of an experimental nonessential Mexican gray wolf does not constitute a violation of ESA Section 9, which deals only with endangered and threatened species and not Rule 10(j) experimental populations;

(4) clarify, by an affirmative statement, that state regulators and other officials cannot be held liable for causing a take of a Mexican gray wolf simply by their regulation of trapping or lack thereof, notwithstanding any other language that may be found in the Proposed Rule; and

(5) the Department supports the proposed definition of "occupied wolf range", as it can be realistically measured in a timely manner and made readily available to the public so that trappers will have more accurate information regarding occupied wolf range and can accordingly exercise extra caution when trapping in those areas. We continue to suggest that the rule reflect that it be updated on a consistent basis of at least once every two weeks.

Continued Concerns:

Page 3 of 5

NMDGF letter to U.S. Fish and Wildlife Service - December 24, 2014

Subject: Comment on Final EIS on Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf

- The Service correctly included a statement in the Federal Register finalizing the current Rule which made clear that trapping activities *are* allowed throughout the MWEPA (so long as due care is exercised by the trapper). *See* 78 Fed. Reg. 1752, at 1760 (1998). This policy statement should be repeated here. As the 2011 USGS report titled “Evaluating Trapping Techniques to Reduce Potential for Injury to Mexican Wolves” noted, “[o]f the varied human impacts, trapping-related injury and mortality to Mexican wolves is relatively minimal.” Accordingly, because some parties may read the restrictions on trapping activities in the Proposed Rule too broadly, the Department requests that the Service repeat in any future Federal Register publishing a new Final Rule the same affirmative statement, as above, found in the 1998 Federal Register notice.
- The Service’s proposed guidelines for exercising “due care” (*i.e.*, sections 5(iii)(A)-(E)) are substantially similar to, yet somewhat broader than, the Departments “Trapping and Hunting in Wolf Country” Guidelines, available at: www.wildlife.state.nm.us/recreation/hunting/documents/Wolfcountry.pdf. Accordingly, the Department suggests removing sections 5(iii)(B) through (E) because the state laws and guidelines encompass standards for minimizing any harm or fatalities that might occur once a wolf becomes incidentally trapped. If the additional provisions in sections 5(iii)(B)-(E) are implemented, trapping activities across more than half the State of New Mexico will be impacted (especially if the Service also implements its proposal to enable wolves to disperse and occupy areas throughout the MWEPA). At the same time, the Department suggests that a trapper should be found to have exercised “due care” to avoid harming or killing a wolf when the trapper follows applicable state laws, recommendations and/or guidelines.
- Mexican gray wolves currently are listed as an experimental, nonessential population. *See* FWS’ Listed Animals (available at http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp) (designating some protected species as “E” [endangered], others as “T” [threatened], and Mexican gray wolves as “EXPN” [experimental population]). [This is consistent with the Service’s proposal to list the Mexican gray wolf in Arizona and New Mexico as “XN.” *See* 78 Fed. Reg. 35664, at 35719 (June 13, 2013)]. Consequently, ESA Section 9, which covers only endangered and threatened species, does not apply to Mexican gray wolves (– at least in Arizona and New Mexico under the Service’s pending proposal). The Service should so state to avoid any doubt.
- The Department requests that the Service clarify in the Proposed Rule that state regulators cannot be found to have “caused” (or otherwise be held liable for) any “take” of a Mexican gray wolf under ESA Section 9 or the Proposed Rule simply by their regulation of trapping or lack thereof. Section 10(j) rules are designed to accommodate private and public concerns regarding re-introduction of experimental populations.

NMDGF letter to U.S. Fish and Wildlife Service - December 24, 2014

Subject: Comment on Final EIS on Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf

Holding regulators liable by virtue of their regulatory activities and decisions (whether affirmative or not) would undermine the purpose of 10(j) rules.

Removal action authorized on federal land

The Department again suggests that the language in (7) (v) (A) be modified to allow for owners of livestock on public lands allotted for livestock grazing the same ability that livestock owners or their agents have on private or tribal lands to take any Mexican wolf in the act of killing, wounding, or biting livestock. We are concerned that this provision challenges an individual's constitutional right to protect private property.

Impacts to wild ungulates

As the Department has repeatedly stated, we feel the Service efforts to modify the current rule are premature and the entire EIS process must be questioned due to the absence of a properly developed and approved wolf recovery plan that establishes realistic goals for wolf numbers and distribution without which no meaningful evaluation of economic, social, or biological impacts can be determined or evaluated. As a result the Department cannot support the proposed language regarding this revision.

Additional recommendation

As a result of our perspective that the Service has demonstrated a lack of commitment to various aspects of the Mexican wolf program we suggest that the new Final Rule include a provision that rescinds the new NEP Rule and immediately reinstates the 1998 Final Rule, to include using all means necessary to return the population to the 1998 objective of at least 100 wolves but no more than the number of wolves that are present within the current BRWRA if the Service initiates any federal process to change the NEP status of Mexican wolves or designate critical habitat for the NEP.

We appreciate the opportunity to give you our perspectives and ask that you contact us if we can answer any questions about our comments.

Sincerely,


Alexandra Sandoval
Director

CC: Honorable Susana Martinez, Governor, State of New Mexico
Larry D. Voyles, Director, Arizona Game and Fish Department
Daniel M. Ashe, Director, U.S. Fish and Wildlife Service
Benjamin Tuggle, Region 2 Director, U.S. Fish and Wildlife Service
Jeff Witte, Director, New Mexico Department of Agriculture
Paul Kienzle III, Chairman New Mexico State Game Commission

**House Committee on Natural Resources
1324 Longworth House Office Building
Tuesday, April 19, 2016
10:00am**

Oversight Hearing on

“Recent Changes to Endangered Species Critical Habitat Designation and Implementation.”

Questions from Chairman Rob Bishop to Director Ashe

- 1. In the preamble to the final rule, frequent references are made to “range” in discussing critical habitat. Section 3 of the Endangered Species Act defines critical habitat relative to “specific areas” and sets a general prohibition against including an “entire geographical area” in a critical habitat designation (except in those circumstances determined by the Secretary). 16 U.S.C. § 1532(5)(A)(i)-(ii), (5)(C). Would the new rules allow a designation of critical habitat that encompasses the full range of a species, such as widespread avian or bat species, if the entire area is determined to be essential to the species’ conservation? If so, how would such a broad designation of critical habitat comport with the statutory limitations in Section 3 of the Act?**

Response: The definition of "critical habitat" in the Act recognizes two types of habitat, distinguished from one another according to whether or not the species was present in the area at the time the species was listed under the Act: (1) specific areas within the geographical area occupied by the species *at the time it is listed* on which are found those physical and biological features essential to the conservation of the species and which may require special management considerations or protection, (2) specific areas outside the geographical area occupied by the species *at the time it is listed* that are essential for the conservation of the species (emphasis added). The general prohibition of Section 3(5)(C) refers to “the entire geographical area which *can* be occupied” (emphasis added) and clearly applies to a broader area than that occupied at the time a species is listed.

Our revised regulations governing designation of critical habitat at 50 CFR Part 424, like the previous regulations they replace, allow for a critical habitat designation of specific areas that in total encompass most or all the entire geographical area occupied by the species at the time it is listed (i.e., the range). This may be the case for many species that have been reduced to occupying only a small subset of their historical range at the time of listing. Such a designation would be consistent with both the definition in Section 3(5)(A) and the limitation in Section 3(5)(C).

- 2. Similarly, the final rule mentions migratory corridors, breeding grounds, and foraging grounds. Would the new rules allow for designation of the entire migratory corridor, breeding grounds, and foraging grounds as critical habitat for a bat or avian species, such as the whooping crane, under any circumstance?**

Response: We would limit any designation to those specific areas that satisfy the definition at Section 3(5)(A), as either occupied or unoccupied areas, when designating critical habitat in migratory corridors, breeding grounds, and foraging grounds. We will continue to use the best scientific data available to determine if any such specific areas exist for a species. Each species' life cycle is different and the details of such areas, if they exist, would be explained in the proposed and final rules designating critical habitat for a particular species.

3. **In the preamble to the final rule, the Service asserts that it can designate critical habitat in anticipation of changes in habitat use “in response to the effects of climate change.” 81 Fed. Reg. at 7,426. For example, the Service states that it “may find that an unoccupied area is currently ‘essential for the conservation’ even though the functions the habitat is expected to provide may not be used by the species until a point in the foreseeable future.” Id. What is the Service’s legal authority for this approach to designating critical habitat on the basis of anticipated climate effects? What data would the Service rely upon for purposes of identifying these future effects? How does the Service intend to implement designation of critical habitat in unoccupied areas in advance of climate change in a manner that is not speculative and is not arbitrary or capricious?**

Response: The Act expressly allows for the consideration and inclusion of unoccupied habitat (i.e., “specific areas outside the geographical area occupied by the species at the time it is listed,” Section 3(5)(A)(ii) of the Act) in a critical habitat designation if such habitat is determined to be essential for the conservation of the species. We determine whether areas unoccupied at the time of listing are essential for the conservation of the species by considering the best available scientific data regarding the life history, status, and conservation needs of the species. Although an area must be determined essential for the conservation, this could be based on reliable scientific projections of suitability or use of the habitat in the future.

There have been specific circumstances, as discussed in our final rule, where data show or predict a shift in habitat availability or use by a species in response to the effects of climate change. An example would be a landward shift in tidal marsh habitat as a result of predicted sea level rise. In cases where the best scientific data available indicate that specific areas not currently occupied by a species are essential for its recovery because of the functions it is reasonably expected to provide in the future, it is permissible and appropriate to include such specific areas in a designation, provided that the Services can explain why the areas meet the definition of “critical habitat.” The data and rationale on which such a designation is based will be clearly articulated in our proposed rule designating critical habitat, which will be available for public comment.

4. **How has the Service adequately acknowledged and explained the rules’ marked deviation from the Service’s longstanding position—that unoccupied habitat should only be designated after occupied habitat is exhausted—such that the agency’s change in its interpretation of the ESA would be afforded deference by the courts? Where does the Service find such authority in the ESA or in legislative history?**

Response: Section 3(5)(A)(ii) of the ESA expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the species. This rule does not expand Service's authority or discretion. Rather, it clarifies the existing process by which we designate critical habitat based on lessons learned over many years of implementing critical habitat and case law. The prior regulation in section 424.12(e) provided that the Secretary shall designate areas outside the "geographical area presently occupied by a species" only when "a designation limited to its present range would be inadequate to ensure the conservation of the species." Although this provision represented one reasonable approach to giving meaning to the term "essential" as it relates to unoccupied areas, the Services have found,, that this provision is both unnecessary and unintentionally limiting. While Congress supplied two different standards to govern the Secretary's designation of these two types of habitat, there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied area may be essential. In addition, although section 3(5)(C) of the Act reflects Congressional intent that a designation generally should not include every area that the species can occupy, this does not translate into a mandate to avoid designation of any unoccupied areas unless relying on occupied areas alone would be insufficient. Indeed, there may be instances in which particular unoccupied habitat is more important to the conservation of the species than some occupied habitat. The Services have thus used their discretion to update the regulations and have explained the basis for their interpretation.

We expect that the concurrent evaluation of occupied and unoccupied areas for a critical habitat designation will allow us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary.

5. How does a designation of critical habitat impact ESA section 10 permit requirements, as well as section 7 consultation on the issuance of permits, and how are Service field staff trained regarding the relationship between critical habitat, species presence, and likelihood of "take"?

Response: Under section 7 of the Act, Federal agencies consult with the Services to insure that the actions they carry out, fund, or authorize are not likely to destroy or adversely modify critical habitat. This requirement extends to our issuance of section 10 permits. As is the current practice, the Service will continue to conduct intra-Service consultations on the issuance of our permits, including consulting on effects to designated critical habitat. Service field staff have been conducting consultation on critical habitat under guidance issued in 2004, which is now captured in the new regulations regarding the new definition of adverse modification. In addition, our section 7 courses delivered by the National Consultation Training Center all incorporate instruction on the relationship between critical habitat, species presence, and the likelihood of "take." All section 7 consultations are subject to a rigorous review process within the Ecological Services field offices before they are finalized.

6. **How does the designation of areas “at a scale determined by the Secretary to be appropriate” ensure that such designation fulfills the ESA requirement that “specific areas” be designated?**

Response: The purpose of this language is to clarify that the Secretary cannot and need not make determinations at an infinitely fine scale. Thus, the Secretary need not determine that each square inch, square yard, acre, or even square mile independently meets the definition of “critical habitat.” Nor will the Secretary necessarily consider legal property lines in making a scientific judgment about what areas meet the definition of “critical habitat.” Instead, the Secretary has discretion to determine at what scale to do the analysis. In making this determination, the Secretary may consider, among other things, the life history of the species, the scales at which data are available, and biological or geophysical boundaries (such as watersheds), and any draft conservation strategy that may have been developed for the species. Since the Act does not specify at what scale a “specific area” is to be measured, the Services have discretion to interpret and apply the requirement in a reasonable way.

7. **The rule represents that where “several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, the Secretary may designate an inclusive area as critical habitat.” How does designation of areas that fail to include the elements required for designation as critical habitat, and are only “proximate to” areas that include the elements for designation, satisfy the ESA’s requirements?**

Response: Our rule continues this provision from the prior rule (at 50 CFR 424.14(d)) and merely recognizes that where several individual areas satisfy the definition of critical habitat and are located close together, an entire, inclusive area may be designated instead of the many smaller areas, for greater clarity. This is not a novel interpretation and is not intended to authorize designation of large areas that do not meet the definition of critical habitat. The rule recognizes the Secretary’s authority to provide connectivity between and among several smaller habitats with important habitat characteristics.

8. **The rule expands the definition of adverse modification to include alterations that would “preclude or significantly delay development” of physical or biological features. How is this expansion of adverse modification—to now encompass the preclusion or delay of features’ development—a permissible construction of the ESA’s language, which appears to require designated critical habitat to consist only of habitat in existence at the time of designation?**

Response: The second sentence of the revised regulatory definition indicating that activities which preclude or significantly delay development of physical or biological features may result in destruction or adverse modification does not represent a new concept or an expansion of authority. In fact, the Service has been applying this concept since, at least, the issuance of the 2004 and 2005 documents that provided guidance on the Services’ “destruction or adverse modification” analyses. This approach is necessary to effectuate the

statute's and courts' direction that critical habitat must be protected for the contributions it is expected to make to the species' conservation over time.

The Services also believe this forward-looking assessment is consistent with the ESA. The ESA defines critical habitat to include both areas occupied at the time of listing that contain features "essential to the conservation" of listed species, as well as unoccupied areas that are "essential for the conservation" of listed species. Thus, unoccupied habitat by definition is not required to contain essential physical or biological features to qualify for designation, and even occupied habitat is not required to contain all features throughout the area designated as critical habitat. The conservation value of designated habitat that exists at the time of designation may depend in part on the inherent ability of the habitat to support the essential features over time. Thus, the Services will generally conclude that a Federal action is likely to "destroy or adversely modify" designated critical habitat if it precludes or significantly delays the development of physical and biological features such that the action appreciably diminishes the value of critical habitat for the conservation of the species.

- 9. You stated in the hearing that these rules maintain the status quo regarding designation of critical habitat. If that is the case, then why was this rulemaking conducted or necessary? Should the regulated public truly expect no change in practice, outcome, or project requirements to arise in future consultations? If not, what are the types of situations in which these rules would impose new or additional requirements on entities engaged in section 7 consultations that would differ from what those entities are accustomed to seeing?**

Response: The two recent regulations and recent policy clarify the interpretations and practices the Services have developed and applied over many years of experience implementing the Act. The Services revised the definition of "destruction or adverse modification," because two federal Courts of Appeals determined in 2001 and 2004 that the 1986 regulatory definition set too high of threshold for triggering destruction or adverse modification. The revised definition, which is consistent with the ESA, its legislative history and circuit court opinions, codifies the approach the Services have employed since 2004.

The other rule clarifies the procedures and standards used for designating critical habitat, making minor changes to the regulations to better describe the scope and purpose of critical habitat, add and remove some definitions, and clarify the criteria and procedures for designating critical habitat. This rule also revises the Services' regulations to be consistent with statutory amendments made in 2004 through the National Defense Authorization Act (Public Law number 108-136) that make certain lands managed by the Department of Defense ineligible for designation as critical habitat.

Finally, the new policy is intended to provide greater predictability, transparency and consistency regarding how the Services consider exclusion of areas from critical habitat designations. Under the ESA, the Services evaluate the economic, national security and other impacts of a designation and may exclude particular areas if the benefits of doing so are greater than the benefits of including the area in the designation, so long as the exclusion will not result in the extinction of the species. This final, non-binding policy describes the general

position of the Services for considering different situations relative to the exclusion process (e.g., voluntary conservation agreements, national security, and economics).

- 10. Please put a finer point on whether, where, and how critical habitat under the final rules would impose additional, tangible effects on a regulated entity over and above what is likely to already be imposed due to the species listing itself. Is designating critical habitat the only way species habitat is protected within a section 7 consultation? Your statement in the hearing that “the juice is not worth the squeeze” raises questions regarding whether the concerted effort to designate critical habitat is worthwhile for the species.**

Response: Designating critical habitat is not the only way species habitat is protected within a section 7 consultation. Every formal consultation, even in the absence of a critical habitat designation, serves to provide the Service’s opinion of whether an action is likely to jeopardize the continued existence of a listed species. The jeopardy analysis focuses on the effects on an action to the species, specifically whether the action reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. Often those effects to the species are caused by effects to its habitat. Accordingly, reasonable and prudent alternatives to avoid the likelihood of jeopardy, or reasonable and prudent measures to minimize take of the species, may both involve aspects of habitat protection that reduce the effect of the action on the species. However, the additional requirement of the statute to consider whether an action is likely to destroy or adversely modify designated “critical habitat” requires the Services to consider impacts to the value of the designated critical habitat itself. Unlike with the jeopardy determination, there is no requirement to demonstrate that there are ultimately impacts on the species via impacts to the habitat.

Designation of critical habitat may impose additional, tangible effects on a regulated entity over and above what is likely to already be imposed due to the species listing itself in situations where the designated critical habitat is not occupied and a section 7 consultation would not otherwise be triggered. However, this has always been the case, and we do not expect the final rules to have significant additional impacts to regulated entities when compared to the prior regulations and policies, but rather codify practices that have been the status quo for many years. We expect that these final rules will provide greater certainty to regulated entities about how critical habitat may affect them.

Questions from Congresswoman Norma Torres to Director Ashe

- 1. Mr. Ashe: If the critical habitat designation does not necessarily restrict further land development, than what is done by the Fish & Wildlife Service and National Marine Fisheries Service to dispel that notion to the public?**

Response: We include the following language on all proposed and final critical habitat rules and shorter summaries of this language in our outreach materials for all designations:

“Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.”

Additionally, we have testified on numerous occasions that critical habitat does not necessarily preclude further land development. Finally, our field staff, who work with local landowners on a regular basis, provide guidance on Endangered Species Act requirements, including providing clarification that critical habitat designations do not restrict private land development that does not involve federal permits or other authorizations.

2. **Mr. Ashe: On November, 3rd, 2015 the President issued a memorandum, “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment”, what role does that play into this discussion about critical habitat designations? What impact has the issuance of that new guidance had, if any?**

Response: The Presidential Memorandum, Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, encourages private investment in restoration, including through public-private partnerships, and helps foster opportunities for businesses or non-profit organizations with relevant expertise to successfully achieve restoration and conservation objectives across all lands.

The Service published on March 8, 2016, a draft revision of the Service’s Mitigation Policy, which has guided agency recommendations to address these issues since 1981. This new policy is intended to provide a broad and flexible framework to facilitate conservation that addresses the potential negative effects of development, while allowing economic activity to continue.

The primary intent of the draft policy is to apply mitigation in a strategic manner that ensures an effective link with conservation strategies at appropriate landscape scales, consistent with the Presidential Memorandum, the Secretary of the Interior’s Order 3330 entitled “Improving Mitigation Policies and Practices of the Department of the Interior” (October 31, 2013), and the Departmental Manual Chapter (600 DM 6) on Implementing Mitigation at the Landscape-scale (October 23, 2015).

The draft revised policy will serve as an overarching guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats, including those covered by the ESA. We intend to adapt Service program-specific policies, handbooks, and guidance documents, consistent with applicable statutes, to integrate the spirit and intent of this policy.

Questions from Congressman Paul Gosar to Director Ashe

- 1. Director Ashe, have you studied up on the draft recreational boating Compatibility Determination (CD) for Havasu National Wildlife Refuge announced by the Service April 12th that aims to close significant areas to motorized boating activities on Lake Havasu? Your Deputy Director, Jim Kurth, knew detailed information about this proposal when I questioned him on March 22nd, yet you claimed to know nothing about this pressing matter when I questioned you at the hearing.**

Response: Yes, I have been made aware of the draft recreational boating Compatibility Determination for Havasu National Wildlife Refuge.

- 2. How many new acres will restrict horsepower or prohibit waterskiing, wakeboarding, fishing and other recreational boating if the CD is implemented?**

Response: Fluctuating water levels affect the width of the river and varies throughout the seasons, dam releases, and other environmental factors making it difficult to provide consistent acreage. We are providing the estimated acreages based on January 2015 water levels. Below are the total acres that were proposed motorized boating restrictions in the withdrawn draft CD:

In total approximately 4,500 acres¹ were proposed to have restriction changes.
~4,000 acres (proposed 30hp motor limit and no-wake allowed) in Topock Marsh.
~500 acres were in the proposed ~2-mile expansion of the existing ~17.5-mile regulations. No-wake restrictions were also proposed in this same ~2-mile area.

- 3. Does that figure include all areas within the main channel of the lower Colorado River, in the backwaters of the lower Colorado River, within the 4,000 acre Topock Marsh, within the ½ mile no-wake zone from May 2015, the no-wake restrictions in the Topock Marsh, the horsepower restrictions in the Topock Marsh, and the proposed area from the no-wake zone down to Mesquite Bay?**

Response: The numbers in the previous response included all areas within Havasu National Wildlife Refuge (Refuge) jurisdiction. No new restrictions were proposed in the existing

¹ Acres refers to acres of water surface from January 2015 and is subject to change throughout the year.

~17.5 mile stretch on the main River channel (which includes the ½ mile no-wake zone designated in 2015). The total number of restricted acres described in question 1 included all proposed restrictions in Topock Marsh and the proposed ~2-mile area from the no-wake zone down to Mesquite Bay.

4. How many total acres within the Refuge, including the Havasu Wilderness Area, already restrict horsepower or prohibit waterskiing, wakeboarding, fishing and other recreational-towed devices?

Response: The following are existing restrictions on the Refuge:

- Approximately 4,400 acres of the ~17.5-miles (within the main River channel and its backwaters) prohibit water-skiing, tubing, wake boarding or other recreational towed devices as well as wake and personal watercraft as indicated by signs and buoys. This includes:
 - Approximately 150 acres of Devil's Elbow are designated no-wake.
 - Approximately 26 acres near the I-40 bridge and Topock 66 Marina are designated no-wake.
- Approximately 100 acres of Mesquite Bay are closed to motorized watercraft.

5. How many total acres on Lake Havasu already restrict horsepower, have no-wake zones or prohibit certain motorized boating activities, including restrictions by BLM and other government agencies?

Response: The Service does not know how many acres are impacted by boating restrictions imposed by other government agencies including the BLM. Within Refuge jurisdiction, approximately 100 acres of Mesquite Bay are closed to motorized watercraft. North of Mesquite Bay is the ~100 acre no-wake restriction of 2015.

6. Of the 700 acres of the Havasu reservoir on the Refuge, how many acres will have restricted horsepower or prohibit waterskiing, wakeboarding, fishing and other recreational boating if the CD is implemented?

Response: Approximately 700 acres within the Refuge portion of the ~19,300 acre Lake Havasu Reservoir will have restricted uses.

It is important to note that at the southern end of the Refuge, the Refuge boundary is defined by the state line bisecting the river. Therefore, the California side of the river channel is not within the Refuge boundary and is not included in these ~700 acres. As such, applicable California regulations will remain unchanged.

7. In a July 10th response from your agency to my letter objecting to the May 2015 boating restrictions for the Havasu Refuge which were made two days before Memorial Day and without public comment, the Service stated that these arbitrary restrictions were lawful under its regulations in the form of 50 CFR 32.22. That particular regulation deals with regulations for hunting and fishing within the Refuge. The Service is now

citing a different regulation to justify these restrictions. Was that a mistake or did your agency fail to identify the proper authority prior to making the May 2015 closure?

Response: The no-wake zone was established in May 2015 based on the following facts as identified by Refuge staff and visitors: (1) wake-causing motorized boating in the area impacts crucial riparian and wetland habitat needed for foraging, breeding, loafing and nesting for a wide variety of residential and migrating birds including the Clarks and Western grebe and endangered Ridgeway's rail; (2) wake-causing motorized boating in the area posed threats to non-motorized boaters because wakes generated by high speed motorized boats in narrow channels and backwaters cannot readily dissipate resulting in unsafe conditions and potential to capsize or swamp non-motorized users; (3) wake-causing motorized boating in the area is impacting refuge-dependent wildlife in the area causing shoreline erosion of their habitat, bird strikes, vegetation destruction and floating nest disturbance. The Service takes all concerns regarding risks to visitor and natural resource safety seriously and is committed to being responsive when conflicts arise. Safety concerns regarding wake speeds and water depth brought to the attention of refuge management prompted further evaluation of uses impacting refuge resources.

Although the header for 50 CFR 32.22 relates to Sport Fishing, all boating regulations for the Refuge fall under this category. It was appropriate to have boating restrictions under 50 CFR Part 32 when making fishing compatible with the refuge-specific mission, Service mission, and to ensure public safety. On September 13, 2005 the Refuge regulations were revised in the Code of Federal Regulations and 50 CFR 32.22 paragraph D incorporated subparagraphs 1 through 6 to include regulations on Topock Marsh, 17 miles of the main river channel and Mesquite Bay. The May 2015 ½ mile backwater no-wake designation was an extension of the 17-mile existing regulations.

The regulatory guidelines used to make this designation is present not only in the Code of Federal Regulations (50 CFR 32.22 and 25.21), but also in the guiding legislation for the National Wildlife Refuge System and The National Wildlife Refuge System Improvement Act of 1997 (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966. The Improvement Act states, "Wildlife-dependent recreational uses may be authorized on a refuge when they are compatible and not inconsistent with public safety." The threshold to determine compatibility is outlined in the Improvement Act and Service policy. The threshold is high and the Refuge Manager has the authority to impose restrictions to make an activity compatible. Wildlife-dependent recreational opportunities, such as fishing, get precedence over non-wildlife uses.

8. **The Service has since changed its justification for the May 2015 restrictions as the CD states these restrictions were lawful under 50 CFR 25.21 (e). This regulation allows temporary closures in the "event of a threat or emergency endangering the health of the general public or Refuge resources." This isn't the EPA Animas spill and there is no pending threat or emergency. Further, the CD states that a NEPA categorical exclusion was allowed for the May 2015 restrictions "due to the absence of controversy related to environmental impacts." There was plenty of controversy and the Service knew about it as documented in multiple Freedom of Information Act requests. I will ask you again,**

what legal authority does your agency cite to go around arbitrarily closing motorized boating activities in areas utilized by recreational enthusiasts for decades?

Response: No areas have been or are proposed to be closed to motorized boating.

The Service believes the May 2015 decision met the considerations discussed in 50 CFR 25.21. The regulation states, “In the event of a threat or emergency endangering the health and safety of the public or property or to protect the resources of the area, the Refuge Manager may close or curtail refuge uses of all or any part of an opened area to public access and use in accordance with the provisions in § 25.31, without advance notice.” The threat may relate to the endangerment of refuge users as well as to protect the resources of an area.

The Service takes all concerns regarding risks to visitor and natural resource safety seriously and is committed to being responsive when conflicts arise. Because this area is shallow and narrow, high-speed boats may not be able to safely share the waterway with non-motorized craft thereby creating a threat to users. Safety concerns regarding wake speeds and water depth were brought to the Service’s attention. The Service investigated the matter and found that there were conflicts in uses posing safety concerns and impacts to resources. This review prompted further evaluation of all boating uses impacting refuge resources. The Refuge found the no-wake designation in the backwater, known to some visitors as “speed alley,” to be a necessary action for the continued safety of the public and the protection of area resources.

The now withdrawn draft CD stated that a National Environmental Policy Act (NEPA) categorical exclusion was allowed for the May 2015 restrictions “**due to the absence of controversy related to environmental impacts.**” This allowance specifically states controversy related to environmental impacts, not recreation. The Service is aware of little to no controversy regarding the effects that boating restrictions will have on natural resources.

9. **I appreciate you granting our request to hold a public meeting in Lake Havasu City. Why wasn’t a meeting scheduled here in the first place? Why did the Service only schedule two public meetings on this matter, both on the same Tuesday at the same location in Laughlin, Nevada?**

Response: The Service’s compatibility policy 603 FW 2, section 2.12A(9) provides guidance on public review and comment. The Service is required to provide an opportunity for public review for a minimum of 14 days. No public meetings are required. In this case, however, we believed it was important to hear from the community directly, so we initially committed to holding two public meetings at a venue in Laughlin, Nevada because it could accommodate a large group and was easily accessible to interested parties in three states. Due to significant community interest in Lake Havasu City, the Service agreed to hold a third public meeting in Lake Havasu City. We secured a venue in Lake Havasu City, however there was concern the location would be unable to accommodate the expected number of participants. After our public announcement of the Lake Havasu City meeting, the Mayor of Lake Havasu City and others offered use of the Aquatic Center, which could hold a large

capacity of people. We were pleased to accommodate that request once we became aware of the availability.

- 10. On April 29th, 21 bipartisan members of the House expressed concern about the CD and requested a 60-day extension of the comment period. This same request has been made by Lake Havasu City Mayor Mark Nexsen, the Arizona Game and Fish Department and the Lake Havasu Area Chamber of Commerce. Will the Service adhere to these requests for a 60-day extension of the public comment period? If not, why not?**

Response: The Service is committed to better understanding the concerns raised by local stakeholders and encourages public participation. As such, a public meeting was held on May 2, 2016 in Lake Havasu City and two additional meetings were held in the surrounding area of Laughlin on May 3, 2016. Due to the level of interest in recreational boating on the Refuge, the Service decided to expand the public comment period from 30 days to 60 days making the new closing date June 13, 2016. For ease of access, the Draft CD was made available for review and comment at the following website: www.fws.gov/refuge/havasu

- 11. Is the agency intent on seeking to impose the CD prior to Memorial Day Weekend?**

Response: The Service did not impose any new restrictions prior to Memorial Day weekend, 2016. The draft CD was withdrawn following the close of the comment period.

- 12. Will you scrap the CD announced April 12, 2016?**

Response: The CD released on April 12, 2016 was a draft proposal. It was not finalized. The Service intends to work with local community leaders and others before moving forward with any revised proposal.

- 13. The current refuge manager has demonstrated a clear conflict of interest and disregard for public involvement in this process. If the Service chooses to move forward with the CD, will you encourage Regional Director Tuggle to make the final decision as to whether or not to implement the CD and remove that decision from the current refuge manager?**

Response: The Service is unaware of a conflict of interest. The Refuge Manager is an employee of the Service and was acting within the scope of her position and authorities when she designated the no-wake zone to ensure visitor safety and initiated the draft CD.

As directed by the Improvement Act, the Service promulgated regulations establishing the process for determining whether the use of a refuge is a compatible use (50 Code of Federal Regulations Part 26.41). The regulations direct the Refuge Manager to only permit a new use, or expand or renew an existing use, if it is determined the use is a compatible with the Refuge's purpose. These regulations outline the procedures for documenting compatibility determinations including what a compatibility determination must contain and who has the

authority to make the final decision. The regulations give the authority for making the decision to the Refuge Manager and Regional Refuge Chief.

All decisions on final determination are made after close coordination with Regional Director, Dr. Benjamin Tuggle.

14. What is the primary justification for the expanded boating restrictions found in the CD?

Response: Wildlife-dependent recreational uses may be authorized on a refuge when they are compatible and consistent with public safety and the purpose of the Refuge. The provisions to determine compatibility is outlined in the Improvement Act and Service policy. The Refuge Manager has the authority to impose restrictions to make an activity, such as boating, compatible with the purpose of the Refuge.

The Refuge Improvement Act of 1997 states the following:

“3) With respect to the System, it is the policy of the United States that— (A) each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established; (B) compatible wildlife-dependent recreation is a legitimate and appropriate general public use of the System, directly related to the mission of the System and the purposes of many refuges, and which generally fosters refuge management and through which the American public can develop an appreciation for fish and wildlife;

(4) In administering the System, the Secretary shall— ‘(A) provide for the conservation of fish, wildlife, and plants, and their habitats within the System; (B) ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;”

In 1990, the U.S. Fish and Wildlife Service (Service) began a Comprehensive Management Plan (CMP) for the lower Colorado River refuges (U.S. Fish and Wildlife Service 1994). The CMP specifically addressed boating in the following goals and objectives:

“Goal #12 is to reduce levels of non-wildlife oriented recreation on the River channel that runs through the lower Colorado River refuges, to eliminate all non-wildlife oriented recreation that is not compatible, to increase the quality experience related to natural values by all River visitors, and to raise public awareness of the lower Colorado River ecosystem values.

Objective #2 under Goal #12 is to protect wildlife resources by implementing the appropriate zoning policy for sensitive areas of the Refuges, especially those pertaining to endangered species. Each Refuge Manager will review existing refuge zoning regulations and implement zones that take into account refuge purposes and the proximity to other jurisdictions that are more

conducive to the non-wildlife oriented uses (i.e., water-skiing areas, jet skiing areas).

The CMP provided a list of secondary uses not planned to occur at any of the lower Colorado River National Wildlife Refuges because they do not conform to uses, which could be, in a regulated manner, “compatible” with the purposes of the Refuge, or they have been determined to be harmful to refuge resources. The CMP underwent close coordination with a number of entities, as well as public comment and the NEPA process.

Additionally, the Fish and Wildlife Service Manual 603 FW2 states the Service will “...reevaluate compatibility determinations for all existing uses other than wildlife-dependent recreational uses when conditions under which the use is permitted change significantly, or if there is significant new information regarding the effects of the use, or at least every 10 years, whichever is earlier. Additionally, a Refuge Manager always may reevaluate the compatibility of a use at any time.”

To comply with the Improvement Act and Service Manual standards, the Service proposed several restrictions in the draft CD.

15. What objective analysis, science and statistics do you have to support the CD?

Response: The purpose of a CD is to determine if a use is compatible or not compatible with the Service mission and Refuge purpose(s). Per the Service Manual 603 FW 2, “A proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purposes of the national wildlife refuge.”

The Refuge is required to maintain biological integrity, diversity, and environmental health for the benefit of migratory birds and all other species that feed, breed, and shelter on the Refuge. Recreational high-speed boating can adversely impact Refuge habitats and wildlife. Refuge staff and visitors have witnessed the flushing of birds, nest disturbance, bird strikes, and habitat destruction from wake-causing motorized boating. Because boats produce emissions, turbulence from propulsion, wakes, pollution and noise, the Refuge Manager must evaluate where these specific uses may occur as these factors may affect wildlife use patterns, use of particular habitats, feeding behavior and early departure of migratory birds dependent on the Refuge as a resting ground. As the land management agency responsible for the protection of endangered species and other wildlife, all potential impacts must continue to be evaluated for their compatibility with the refuge purpose.

The withdrawn draft CD found that boating is compatible with the National Wildlife Refuge System mission and the Refuge purpose with proposed restrictions. The Service is committed to working collaboratively with local community leaders to find a path forward that both meets the needs of the community and the purpose of the Refuge as well as supports the Service’s mission.

16. What alternatives, if any, were considered prior to releasing the CD?

Response: The Service is responsible for reviewing existing refuge zoning regulations and implementing zones that take into account refuge purposes and the proximity to other jurisdictions that are more conducive to the non-wildlife oriented uses (i.e., open water for high-speed uses, like Lake Havasu). Based on sound professional judgment, refuge management evaluated area locations and uses to determine potential negative impact to refuge resources and visitors participating in priority public uses. The Service considered several alternatives, including a “no action” alternative when developing the draft CD, before pursuing the alternative with proposed restrictions identified in the draft CD.

17. Other than employees within the Service, who was consulted prior to releasing the CD and what is your record of consultation?

Response: The Service believes the draft Compatibility Determination was consistent with the principles outlined in the Comprehensive Management Plan of 1994, the current guiding document for Havasu National Wildlife Refuge management. The CMP underwent public comment in 1991 and NEPA prior to its completion in 1994.

During the CMP planning process, meetings were held with the following agencies and organizations: Arizona Game and Fish Department; California Department of Fish and Game; Nevada Department of Wildlife; California Department of Parks and Recreation; Arizona State Parks; BLM; Bureau of Indian Affairs; Department of the Air Force; Chemehuevi Indian Tribe; Fort Mojave Indian Tribe; Colorado River Indian Tribe; City of Lake Havasu, Arizona; City of Blythe, California; City of Needles, California; Colorado River Environmental and Wildlife Society (Martinez Lake, Arizona); Sierra Club; Audubon Society; Yuma Rod and Gun Club; Palo Verde Rod and Gun Club; Lake Havasu City Chamber of Commerce; Parker Arizona Chamber of Commerce; Golden Shores/Topock Chamber of Commerce; Arizona Wildlife Federation; Arizona Department of Environmental Quality; Arizona Department of Water Resources; Arizona State Lands Department; Arizona Nature Conservancy; Lake Havasu City Bass Club; and Arizona Trappers Association. The U.S. Bureau of Reclamation was also a cooperating agency in this project.

Public meetings were held as follows:

August 28, 1991, Yuma, Arizona
August 29, 1991, Blythe, California
August 30, 1991, Lake Havasu City, Arizona
August 31, 1991, Needles, California

18. According to the Service’s own estimates, nearly three million visitors vacation at Lake Havasu each year and a typical holiday weekend draws nearly 50,000 boaters to the area. According to a 2008 Lake Havasu City Tourism Survey, nearly 75% of tourists are interested in water skiing, wakeboarding or boating while visiting Lake Havasu. The survey also revealed tourists spend more than \$200 million and support nearly 4,000 full-time equivalent jobs. Did the Service carefully consider the economic impacts

that could result from the CD? If so, what specific actions did the Service take to mitigate any economic harm?

Response: Currently, 17.5 miles of the Colorado River on the Refuge restrict certain uses.

It is important to note that significant numbers of visitors participate in several priority public uses including hunting, fishing, wildlife observation and photography, environmental education and interpretation on the Refuge. Due to the number of uses on the Refuge, the Service anticipates visitors would continue to visit the Refuge in large numbers and bring commerce to the local area. To highlight one of the many user communities that visit the Refuge, anglers and fishing groups are some of the highest users of Lake Havasu. High-grossing fishing tournaments continue to bring these wildlife-dependent users to the area. According to Lake Havasu City's Convention and Visitors Bureau, fishing tournaments on Lake Havasu can require up to \$200 solely for team admission. We also expect the fishing community will continue to use boating vendors in the Havasu area and fishing continues to be allowed in all areas of proposed restrictions. As another example of tourist activities, the Refuge is part of a major migratory bird migration route along the western coast of the United States making the Refuge a birding hotspot with 318 bird species drawing in bird enthusiasts and wildlife photographers, all of whom will continue to add to the local economy.

- 19. In November 2013, the Fish and Wildlife Service inflated costs for fixing a broken water supply line by millions of dollars and attempted to terminate the rainbow trout stocking program at Willow Beach, threatening 1,700 jobs and \$75 million in associated economic output. It took significant efforts from myself, Senator McCain, and others to reverse that terrible decision. Why does the Service continue to ignore important associated economic impacts for Mohave County prior to implementing new restrictions and unilaterally changing programs?**

Response: The U.S. Fish and Wildlife Service (Service) has completed construction of a long-term water supply system for the Willow Beach National Fish Hatchery. With recognition of your support, the Service announced the successful completion of the floating pipeline project on August 5, 2016.

The Service understands that the fish supplied by our National Fish hatcheries provide important economic and recreational opportunities to the states, tribes, and recreational communities. Since its construction, the Willow Beach National Fish Hatchery has long helped provide economic benefits to Arizona. It was devastating to the Service, Tribes, the local community and many others when, due to age and wear, the hatchery experienced a significant water supply system failure, leading to the loss of 40,000 fish in 2013. Tremendous efforts were made to save as many fish as possible and to look at potential alternatives to repair the system.

Early cost estimates to completely revamp the system and implement safeguards against a future failure were very high. For more than a year, the Service met with the Arizona Game and Fish Department, Mohave County of Arizona, and the National Park Service to develop

viable, less costly solutions. The team agreed on a project proposal (Floating Pump) that provides a sufficient and reliable water supply system at an estimated cost is \$776,448. In a partnership agreement, the Arizona Game and Fish Department (AZG&FD) and the Service agreed to share costs, with AZG&FD providing \$389,000.

Following a competitive bid process, Performance Systems, Inc. was selected to complete the project for \$801,506. Modifications were made to take additional precautionary measures, including installation of safety measures for regular maintenance and creation of a barrier to prevent invasive quagga mussels from entering the pipeline. This increased costs by an additional \$211,704. The Service is covering these additional costs through its operations and maintenance accounts.

Now that testing of the new water conveyance system is completed, trout production will recommence at Willow Beach NFH. To better meet the needs of anglers, the Service will continue to work with AZG&FD to expedite initial production of trout and shorten the timeframe for catchable size trout to be available. The Service will also work on a stocking schedule with the AZG&FD to ensure that the fishing experience can be enjoyed the entire season.

20. I want to now turn my attention to the Mexican Wolf, an issue that is very important to the Southwestern States. On November 13, 2015, the four Governors from the states of Arizona, Colorado, New Mexico and Utah sent a bipartisan letter expressing serious concerns and a unified position in opposition to the “Service’s [new] planned approach to recovery plan development” for the Mexican gray wolf. On December 11, 2015, House Committee on Oversight and Government Reform Chairman Chaffetz, Subcommittee of Interior Chairman Cynthia Lummis, House Natural Resources Committee Chairman Rob Bishop and several of our colleagues reiterated those very valid concerns in a letter to you and Secretary Jewell. In a February 3, 2016 response to that letter, you stated, “The Service has initiated recovery planning discussions with the States of Arizona, Colorado, New Mexico and Utah; Federal agencies in Mexico; and independent and objective scientists from the United States and Mexico.”

21. Why exactly is the Service having planning discussions with Colorado and Utah?

Response: The Service has a unique relationship with the states in recovery and management of threatened and endangered species, as laid out in the Endangered Species Act. The states of Colorado and Utah have been involved in recovery planning for the Mexican wolf since 2003, when our recovery planning efforts were focused on a Distinct Population Segment that included those states up to Interstate 70. Subsequently, they were invited to participate in the Mexican Wolf Recovery Team that was appointed in 2010, which focused on the Mexican wolf subspecies rather than a Distinct Population Segment. During that recovery planning effort, some scientific experts on the Science and Planning Subcommittee of the recovery team considered habitat north of I-40 in Arizona and New Mexico as potentially suitable habitat for recovery efforts. More recently, Colorado and Utah have also been participating in the recovery planning workshops that commenced in December 2015 to assist the Service in the development of our revised Mexican wolf

recovery plan which is due to be published in November 2017.

22. The wolf has had no presence in these states historically. Are you all looking at expanding the habitat of the Mexican wolf to include territories in Colorado and Utah?

Response: The Service has no current plans to reintroduce Mexican wolves into either Utah or Colorado. The Service, the states of Arizona, Colorado, New Mexico, and Utah; the Mexican government, and scientists from both countries are currently assessing the amount of suitable habitat and prey in Mexico that could contribute to recovery. We will consider this information in combination with our population objective of 300 to 325 wolves in the Mexican Wolf Experimental Population Area to determine whether recovery is possible south of I-40 in the southwestern United States and in Mexico. If, based on this information, we are not successful in identifying sufficient habitat to support recovery, we will look elsewhere for additional suitable habitat to achieve Mexican wolf recovery. Recent genetic evidence in published scientific literature indicates that gene flow occurred between Mexican wolves and other gray wolf subspecies as far north as Utah.

23. Despite the fact that 90% of the Mexican wolf's historic range is in Mexico, the Service seems committed to restoring Mexican wolves only in the United States. Why?

Response: The Service has demonstrated a commitment to binational collaboration with Mexico in Mexican wolf recovery since the inception of the binational Mexican wolf captive breeding program in the early 1980's. We continue to have an active relationship with federal agencies in Mexico to implement field activities for the reintroduction efforts in both countries. In addition, Mexico federal agencies have participated in our recovery plan revision processes in 2003 and 2010, as well as our current series of workshops. In April, we held a recovery planning workshop in Mexico City (following December 2015 and March 2015 meetings in Arizona) to ensure robust participation by Mexico federal agencies and independent scientists. In addition to gathering and assessing scientific information at the workshop, we also discussed avenues for binational collaboration in the recovery of the Mexican wolf. The Service and federal agencies in Mexico will continue to explore mechanisms for a binational recovery effort.

Applicable information for determining areas suitable for Mexican wolf recovery includes suitable habitat features, adequate prey, and low human density. As is our standard, the Service will use the best available scientific information to evaluate appropriate areas for Mexican wolf recovery. We expect to complete the recovery plan by November 2017.

24. You also stated in your February 3, 2016 response "The revised recovery plan will also provide estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal." Do you have any preliminary estimates of those costs and time that you can share with the Committee today?

Response: No. The information on costs and time will depend on the actions needed to recover the Mexican wolf. This information will be provided in the draft recovery plan,

which is currently under development and is expected to be completed by the end of 2016.

- 25. On January 16, 2015 the United States Fish and Wildlife Service announced its decision to list the Mexican wolf as an endangered subspecies and arbitrarily expanded the range the wolves can roam in Arizona and New Mexico under Section 10(j) of the ESA.**

Why did your agency violate the Anti-Deficiency Act and fail to secure funding for the 10(j) nonessential experimental Mexican wolf population program before implementing this new program? Regional Director Tuggle admitted this fact on a conference call with stakeholders announcing the program.

Response: The Service did not arbitrarily expand the range into which Mexican wolves can be released and disperse in New Mexico and Arizona in the revised 10(j) Rule. The revised 10(j) Rule thoroughly analyzed the expansion of the Mexican Wolf Experimental Population Area (MWEPA). This expanded area will promote Mexican wolf population growth, genetic diversity, and management flexibility. The regulatory flexibility provided by our revisions to the 1998 Final Rule, including expansion of the MWEPA, will allow the Service to take management actions within the MWEPA that further the conservation of the Mexican wolf while being responsive to needs of the local community in cases of problem wolf behavior. There is no basis for the allegation that the Service has in any way violated the Anti-Deficiency Act in its implementation of the revised 10(j) Rule.

- 26. The Service has been producing genetically modified wolves ever since the January 2015 announcement and 45% of those died last year. On your watch the population of the Mexican wolves in the wild actually declined by 12.5% last year. Why is the Service doing such a terrible job managing Mexican wolf populations?**

Response: The experimental population has demonstrated several years of strong growth in recent years (2011-2014). The Mexican wolf pups that were documented in the wild in 2015 were all born in the wild to wild parents, which demonstrate that the population continues to self-perpetuate and is not demographically reliant on releases from captivity. In the 2014 Environmental Impact Statement for the Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, we projected a 10 percent average annual growth of the population, which anticipates that there will be years with less than and greater than that projected growth rate. It is normal for population growth of any species to fluctuate over time.

Recovering the Mexican wolf into its historic landscape has unique challenges unlike other gray wolf recovery programs. In the Northern Rocky Mountains, gray wolves were captured in Canada and released directly into Yellowstone National Park and the Central Idaho Wilderness. In contrast, the reintroduction of the Mexican wolf has been reliant on the release of captive bred Mexican wolves because Mexican wolves were completely eliminated from the wild by the 1980s. We captured seven of the last remaining wolves and developed a binational captive breeding program. From this captive population of 7 founder wolves, we began releasing wolves back into the wild in the Apache National Forest in 1998. In addition, unlike Yellowstone National Park, which was a large swath of protected lands to

reintroduce wolves into, the Apache National Forest is a working landscape, and thus we need to address effects of wolves on livestock production, hunting, and recreation.

- 27. I have heard serious concerns from cattleman and ranchers in my district since you made that arbitrary decision in January 2015. How many Mexican wolf attacks have occurred since that January 16, 2015 decision? How many attacks have occurred since the wolf was first listed in 1976 and been under your agency's care?**

Response: There have been no Mexican wolf attacks on humans since the reintroduction program began in 1998. Any person has the right to take a Mexican wolf in self-defense or the defense of another person.

We recognize that livestock depredation occasionally occurs. Between 1998, when our reintroduction effort began, and 2013, we documented 184 confirmed cattle depredations by Mexican wolves. More recently, in 2014, we documented 30 cattle mortalities from wolves; in 2015, we documented 52 cattle mortalities and 8 cattle injuries, and so far in 2016 we have documented 8 cattle mortalities.

- 28. Has the service done genetic testing on Mexican wolves? If so, how many? What were the results?**

Response: Yes, we conduct genetic testing. We monitor the genetics of the wild population by taking blood samples from every canid handled, as well as through the collection and testing of scat in some areas. All samples are sent to the University of Idaho for species confirmation, meaning the samples are determined to be from a pure Mexican wolf, pure coyote, pure dog, etc. Since reintroduction of Mexican wolves began in 1998, the Fish and Wildlife Service has detected three instances of hybridization between Mexican wolves and domestic dogs. In all three cases the offspring were removed and euthanized. We have not detected other evidence of Mexican wolves hybridizing with dogs or coyotes.

- 29. Mr. Ashe, we know that the Endangered Species Act requires Fish and Wildlife Service (FWS) to consult with and receive input from counties affected by petition listings and regulations written as a result of ESA listings. And in your testimony you talked about the successful partnerships the Service has engaged in over the years to carry out your work. However, this committee, the Natural Resources Committee, and dozens of Members offices are flooded with complaints about how the Service blatantly disregards state and local input when formulating new regulations and policy. I am not sure we can even count how many law suits you have pending against your agency from states who clearly feel that they were not involved in the decision making process. Just this week New Mexico state officials notified your agency regarding their intent to sue over your new plan to release captive Mexican wolves into New Mexico to "cross-foster" with wild packs in an attempt to infuse some DNA diversity into the wild population. I don't know how you choose to define collaboration, but all these law suits don't really sound like the rosy kumbaya cooperation your agency tries to depict to this committee. Why is New Mexico planning to sue you from your perspective?**

Response: The Service values the partnership we have with the New Mexico Department of Game and Fish, and it remains our policy to consult with the States and others in our joint efforts to recover species. Recovery of the Mexican wolf remains the Service's goal. We have a statutory responsibility and the authority to recover the Mexican wolf and strive to do so in a collaborative manner with our partners. We continue to engage the State of New Mexico in the Mexican Wolf Recovery Program, even though they have withdrawn as a partner agency. We are also involved in meetings with them regarding their recent notice of intent to sue regarding the Service's continued activities to recover the Mexican wolf so that it can be delisted and returned to state management. The remaining lead agencies have primary regulatory jurisdiction and management authority of the Mexican wolf in Arizona and New Mexico. Graham, Greenlee, Gila, and Navajo counties in Arizona, and the Eastern Arizona Counties Organization are designated as cooperators to the reintroduction project with an interest in Mexican wolf management. The MOU, which expired in 2008, was revised and signed by the cooperators in and subsequent to 2010. The Service remains committed to involving all partners and vested parties in managing Mexican wolves.

30. The Mexican wolf has lingered on the Endangered Species list for more 40 years. The Service has utilized the same flawed recovery plan for the Mexican wolf since the early 1980s. This plan does not comply with federal law as it does not contain objective and measurable recovery data for delisting as required by 4(f)(1) of the ESA. Why has you agency failed to comply with those requirements of law? How much longer do you expect the Mexican wolf to linger on the Endangered Species Act?

Response: The Service intends to publish a final revised recovery plan by November 2017 that incorporates the best available scientific information. The revised recovery plan will, to the maximum extent practicable, provide measurable and objective criteria which, when met, will enable the Service to remove the Mexican wolf from the list of endangered species and turn its management over to the appropriate states and tribes. The revised recovery plan will also provide estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal.

Our greatest conservation need at the current time is to improve the genetic health of the experimental population, which has a high level of relatedness and is experiencing inbreeding. We will improve the experimental population's genetic health by releasing additional Mexican wolves from the captive population, which is more genetically diverse because we are able to actively manage breeding pairs to maintain gene diversity. The experimental population is expected to contribute toward the recovery of the Mexican wolf; however, the establishment of additional populations of Mexican wolves in Mexico or the US is likely to be necessary to achieve recovery based on our current scientific understanding, though that cannot be confirmed until the recovery plan is developed. Expediency in improving the genetic health of the experimental population is critical to moving the Mexican wolf toward recovery.



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The Mexican wolf is the rarest subspecies of gray wolf in North America. Once common throughout portions of the southwestern United States, the Mexican wolf was all but eliminated from the wild by the 1970s. In 1977, the U.S. Fish and Wildlife Service initiated efforts to conserve the species. In 1998, Mexican wolves were released to the wild for the first time in the Blue Range Wolf Recovery Area within the Mexican Wolf Experimental Population Area. Missing from the landscape for more than 30 years, the howl of the Mexican wolf can once again be heard in the mountains of the southwestern United States.



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News Release: 2015 Mexican Wolf Population Survey Results

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Recovery Planning

Follow along as we revise the recovery plan on our Mexican Wolf Recovery Planning Page

Final Rules for Listing and 10j Revision

News Release: Service Completes Changes to Mexican Wolf Experimental Population Rules - Lists Mexican Wolf as Endangered Species
- **January 12, 2015**

Final Revised Experimental Population Rule

- **January 2015**

Final Listing Rule

- **January 2015**

View Information regarding Listing and Experimental Population Rules

- **Updated January 12, 2015**

NEPA Planning

Final EIS - November 2014

Final Record of Decision (ROD)

- **January 7, 2015**

View information regarding NEPA planning pertaining to the Mexican wolf

- **Updated January 13, 2015**

Mexican Wolf Recovery Area Update

2016 Denning Packs and wolf pups

July 2016

This summer, members of the IFT have documented denning behavior in at least 11 Mexican wolf packs in the Mexican Wolf Recovery Area. As of mid-July, a minimum of



Mexican wolf pups in the Prieto Pack in June 2016
Photo Courtesy of the Mexican Wolf Interagency Field Team

42 pups in 9 packs (Bluestem, Elk Horn, Hoodoo, Iron Creek, Luna, Panther Creek, Prieto, SBP, and Tsay O Ah) have been documented. Six of the 42 pups in the count are a result of cross foster events. Throughout the summer and into the fall, the IFT will continue to monitor and document wolf pup numbers. As the pups get older, the IFT will attempt to capture pups, administer vaccines, and affix pup size radio collars to monitor survival.

Last updated: May 5, 2015

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Analysis of Inbreeding Effects on Maximum Pup Count and Recruitment in Wild Mexican Wolves

Prepared By: Matthew Clement (AZGFD) and Mason Cline (NMDGF)

Date: June 22, 2016

Introduction: The U.S. Fish and Wildlife Service's recovery efforts for the Mexican wolf have been premised to a degree on the assertion that inbreeding depression effects key demographic parameters, such as litter size and pup recruitment (U.S. Fish and Wildlife Service 2010, 2014). A previous analysis by Fredrickson et al. (2007) indicated a negative relationship between pup Inbreeding Coefficient (F) and Maximum Pup Count (which the authors referred to as "litter size"). Inbreeding Coefficient is a metric that measures an individual's level of inbreeding on a scale from 0 (no inbreeding) to 1 as inbreeding increases. Although Fredrickson et al. (2007) used all data available at the time, their sample size was limited because releases to the wild were only initiated in 1998. We now have an additional eight years of data from wild-born pups available, which offer the opportunity to more than double our sample size and, therefore, increase the robustness of our analytical results. We first investigated whether levels of inbreeding have increased in the wild population since recovery efforts began in 1998. We estimated the temporal trend in pup inbreeding using logistic regression, and we found no significant change in the Inbreeding Coefficient of wild pups over time (1998-2014).

We investigated the relationship between the level of inbreeding and the maximum number of pups counted in each litter April through December (Maximum Pup Count) of wild Mexican wolves in Arizona and New Mexico. Using Poisson mixed models, we analyzed this relationship several ways using a variety of datasets:

1.) data from the same years (1998-2006) available to Fredrickson et al. (2007), 2.) data from the full time period now available (1998-2014), 3.) data from recent years only (2009-2014) when pup counts were conducted in a more reliable manner, 4.) data from litters counted soon (<6 weeks) after whelping thus representing the most accurate estimate of actual litter size, and 5.) data on pups surviving to the end of the calendar year (Dec 31) as an index to successful recruitment into the population.

When using the same span of years (1998-2006) as Frederickson et al. (2007) we found a significant negative relationship between Inbreeding Coefficient and Maximum Pup Count, like the authors of the earlier study. However, when all available data were used, we did not find a significant relationship between pup Inbreeding Coefficient and Maximum Pup Count over the entire study period (1998-2014), in recent years of more reliable data (2009-2014), in the litters counted shortly after whelping, or in pups surviving to December 31.

Because several environmental factors could potentially affect pup recruitment independent of inbreeding, we also used Poisson mixed models to evaluate the relationship between inbreeding and Maximum Pup Count, while controlling for other biologically relevant variables, including age of dam, number of previous litters from that dam, number of years in territory, and presence of helpers in addition to breeding adults. None of these factors significantly influenced the number of pups counted in the wild, however, we found some evidence that having access to supplemental food affected Maximum Pup Counts.

Data Used: USFWS provided compiled data to AZGFD and NMDGF. Data on Maximum Pup Counts were based on information contained in annual USFWS Progress Reports. Estimates of F were generated by the Species Survival Plan (SSP) based on studbook pedigree records using the program PMx. The latest Mexican wolf Population Viability Analysis includes a Vortex model that calculates wolf fecundity as a function of “percent of females breeding” and “litter size.” The model does not allow females in the breeding pool to have no litter (litter size = 0). Females with no documented pups are included in the percent of nonbreeding females and thus not part of any model calculations using litter size. To be consistent with, and meaningfully inform, the Vortex model, pairings that did not result in any detected pups were not used in this analysis of inbreeding effects on Maximum Pup Counts except in analyses designed specifically as a comparison with the results of Fredrickson et al. (2007).

Trend in F : There were 160 pack-years during the 17-year study period. A pack-year indicates that a pack (two or more wolves that maintain a territory) is active during a given year, so that a pack active during 1998 and 1999 would represent two pack-years. F for pups is calculated from the known lineages of the parents, and thus is known for a pair even when the adults do not produce pups. However, the lineage of some adults is not known, and therefore F is unknown for their pups. Furthermore, in the early years, some newly established packs included pups that were born in captivity. After removing pairs with unknown F or pups born in captivity, and retaining pairs without pups, the data include pup F for 115 pack-years. We plotted all F data by year and used logistic regression to estimate the change in F through time. F decreased by 0.02 points per year, although a likelihood ratio test indicated that this trend was not significant ($\chi^2(1) = 0.25$, $p=0.63$; Figure 1). Results (not shown) were nearly identical, and also not significant, when excluding data points for when two wolves paired but pups were not detected.

Pup F and Maximum Pup Count: Previous analysis with a more limited data set (1998 to 2006) indicated that a high F was associated with a lower Maximum Pup Count (Fredrickson et al. 2007). In this analysis, we attempted to recreate the previous analysis. We also extended the analysis to include more recent data (1998 to 2014) and another measure of pup recruitment, while excluding pack-years not resulting in a documented litter. We further extended the analysis by considering additional covariates and by excluding less reliable pup counts.

Recreation of Fredrickson et al. (2007) analysis – Fredrickson et al. (2007) defined “litter size” (Maximum Pup Count) in wild wolves as the highest number of pups counted during April – November each year. These counts undoubtedly underrepresent actual litter size due to mortality between whelping and the time of the counts. Fredrickson et al. (2007) used a pup count of zero if no pups were detected in a given year. Accordingly, their metric combined three elements of reproductive success: probability of successful whelping, size of litter, and survival until a count was obtained. Fredrickson et al. excluded litters that were born in captivity, prior to releasing a pack into the wild. Fredrickson analyzed 39 litters produced by 19 pairs (number of pairs visually estimated from their Figure 4). The current data set provided by USFWS included 40 litters produced by 20 pairs between 1998 and 2006, with several discrepancies with the Fredrickson data (Figure 2). In particular, the current values for Middle Fork, Paradise, Rim II, Hon-Dah II, and San Mateo packs do not correspond to values in the Fredrickson data (Figure 2). Nonetheless, a linear mixed model analysis of the early data (1998-2006) estimated a similar and significant (likelihood ratio test, $\chi^2(1) = 4.89$, $p=0.03$) effect of F on Maximum Pup Counts, with a 0.1 increase in F corresponding to a 0.73 decrease in Maximum Pup Count, compared to a 0.82 pup decrease estimated by Fredrickson et al. (2007), using a General Estimating Equation model.

Analysis of full time period – We extended the analysis to cover the period 1998 to 2014. We used a Poisson mixed model, which is more appropriate than a linear model when the data consist of non-negative integers. Although Fredrickson et al. (2007) included litters of size zero, a parameter of interest for recovery planning is litter size of packs that reproduced. Therefore, we analyzed the relationship between pup F and Maximum Pup Count considering only packs that reproduced. For the 89 packs with documented pups (i.e., litter size ≥ 1), there was no significant relationship between pup F and Maximum Pup Count ($\chi^2(1) = 0.70$, $p=0.40$; Figure 3A).

To provide a comparison with the previous analysis by Fredrickson et al. (2007), we also analyzed all 114 active wild packs with F data and included packs with no pups detected for comparison. For these data, pup F was associated with lower Maximum Pup Counts, although a likelihood ratio test fell just short of the traditional significance level of 0.05 ($\chi^2(1) = 3.66$, $p=0.056$). For this model, an increase in F from 0.2 to 0.3 was associated with a 0.54 pup decrease (Figure 3A).

We considered an alternative metric as an index for annual pup recruitment, number of pups surviving to Dec 31. This is the best estimate of the number of pups recruited to the end of the calendar year. This metric places more emphasis on the survival of pups after whelping, relative to Maximum Pup Counts. Furthermore, this metric might be less sensitive to the date of counting, relative to the Maximum Pup Count. Limiting the analysis to the 84 packs with documented pups, the estimated relationship with pup F was insignificant ($\chi^2(1) = 0.09$, $p=0.76$; Figure 3B). Alternatively, we analyzed all 109 packs with data for Dec 31 but included packs with no detected pups and the relationship between pup F and pups surviving to Dec 31 was again not significant ($\chi^2(1) = 1.41$, $p=0.24$; Figure 3B).

Covariates – We also considered additional relevant covariates that might affect pup production or recruitment, including supplemental feeding, age of the dam, the presence of helpers, and the number of years in a territory. We analyzed 89 pack-years, excluding those for which no pups were detected. A likelihood ratio test indicated that a model including an interaction between pup F and Supplemental Feeding was significantly better than a model including only pup F ($\chi^2(2) = 25.41$, $p<0.001$). Under this model, pup F for pack-years that did not receive supplemental feeding was associated with a decrease in Maximum Pup Count (Figure 4) although this was not significant ($z=-1.62$, $p=0.11$). However, for packs that did receive supplemental feeding, increased pup F was associated with a significant *increase* in Maximum Pup Count ($z=2.85$, $p=0.004$; Figure 4A). Accordingly, the model also indicated that, for pup $F > 0.12$, more inbred animals benefited more from supplemental feeding than less inbred animals. All other covariates tested did not improve the fit of this model and thus do not appear to be contributing significantly to number of pups counted.

Considering an alternative metric, pups surviving to December 31 (excluding pack-years with no detected pups), a likelihood ratio test indicated that a model including an interaction between pup F and Supplemental Feeding was significantly better than a model including only pup F ($\chi^2(2) = 6.33$, $p=0.04$). As with Maximum Pup Count, pup F for packs that did not receive supplemental feeding was associated with a decrease in Maximum Pup Count (Figure 4B) although this was not significant ($z=-1.05$, $p=0.29$). However, for packs that did receive supplemental feeding, increased pup F was associated with a significant *increase* in Maximum Pup Count ($z=2.28$, $p=0.02$; Figure 4B). Accordingly, the model also indicated that, for pup $F > 0.17$, more inbred animals benefited more from supplemental feeding than less inbred animals. All other covariates tested did not improve the fit of this model and thus are not likely to be influencing the number of pups that survive to the end of the year.

Analysis of more-reliable counts – It is typically difficult to count wildlife, with undercounts common. If detection probability is constant through time, counts may serve as an index to true abundance. However, as program experience develops and methods are refined, detection probability may change through time, so that an analysis of counts may partially reflect changes in methodology, rather than the biological process of interest. To deal with this issue, we analyzed subsets of the data that might include more reliable counts of pups. First, we analyzed data from 2009 to 2014, a period with relatively constant survey methods (J. Oakleaf, USFWS, Pers. Comm., 2016). Second, we analyzed counts from 1998 to 2014 that were obtained within six weeks of whelping, so that the count was presumably closer to the true litter size. These data contained no repeated measures, so we excluded random effects from the model.

For the 42 litters (≥ 1 pups) from 2009 to 2014, the relationship between pup F and Maximum Pup Count was positive, but not significant ($\chi^2(1) = 0.44, p=0.51$; Figure 5A). After adding 15 pack-years where no pups were detected to the data (2009 to 2014), the relationship between pup F and Maximum Pup Count was still not significant ($\chi^2(1) = 0.005, p=0.94$; Figure 5A).

Considering just the 17 litters counted shortly after whelping (all litters were ≥ 1), there was a strong, but not significant, *positive* association between F and Maximum Pup Count ($\chi^2(1) = 2.30, p=0.13$; Figure 5B).

Supplemental feeding discussion – Using Supplemental Feeding as a covariate frequently improved the fit of models, suggesting that supplemental feeding affects litter size. However, we note that supplemental feeding was not applied in an experimental framework, with random assignment of treatment and controls. We lack information on the criteria used to select packs for supplemental feeding. However, if the presence or size of a litter affected the decision to offer supplemental food, then causation might run in reverse: a larger litter size might cause supplemental feeding. Furthermore, supplemental feeding might affect the detection of pups by bringing wolves to a known feeding location. The fact that 88% of packs counted shortly after whelping received supplemental food suggests a relationship between food and obtaining counts near whelping. It is possible that higher counts associated with supplemental feeding reflect a difference in detection, rather than a difference in litter size. Therefore, although supplemental feeding was statistically significant, care should be taken in interpreting the results.

References

Fredrickson RJ, Siminski P, Woolf M, and Hedrick PW (2007) Genetic rescue and inbreeding depression in Mexican wolves. *Proceedings of the Royal Society B* 274:2365-2371.

U.S. Fish and Wildlife Service (2010) Mexican Wolf Conservation Assessment.

U.S. Fish and Wildlife Service (2014) Environmental Impact Statement for the Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*).

Figure 1: Pup F through time for wild Mexican wolves in the US, 1998 to 2014.

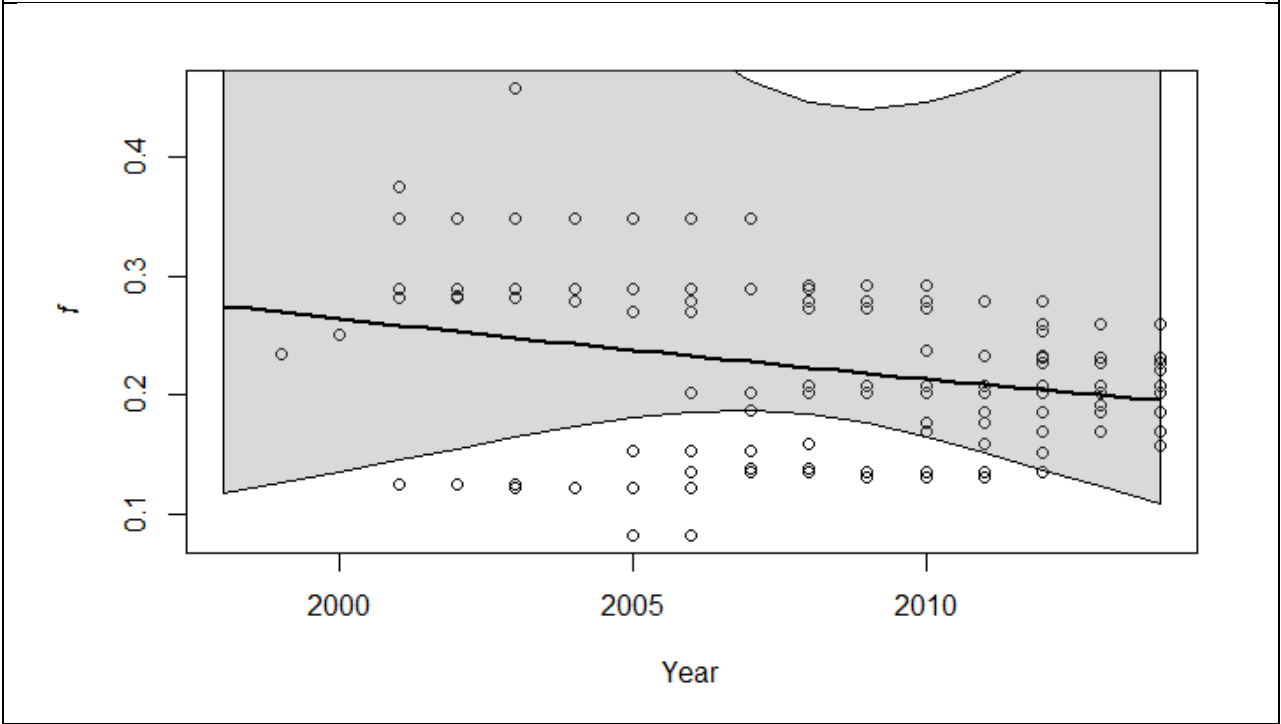


Figure 2: Comparison of Maximum Pup Count (i.e., “litter size”) analysis in Fredrickson et al. (2007) to the same years in the current data, 1998 to 2006. A: Fredrickson data. B: FWS compiled data.

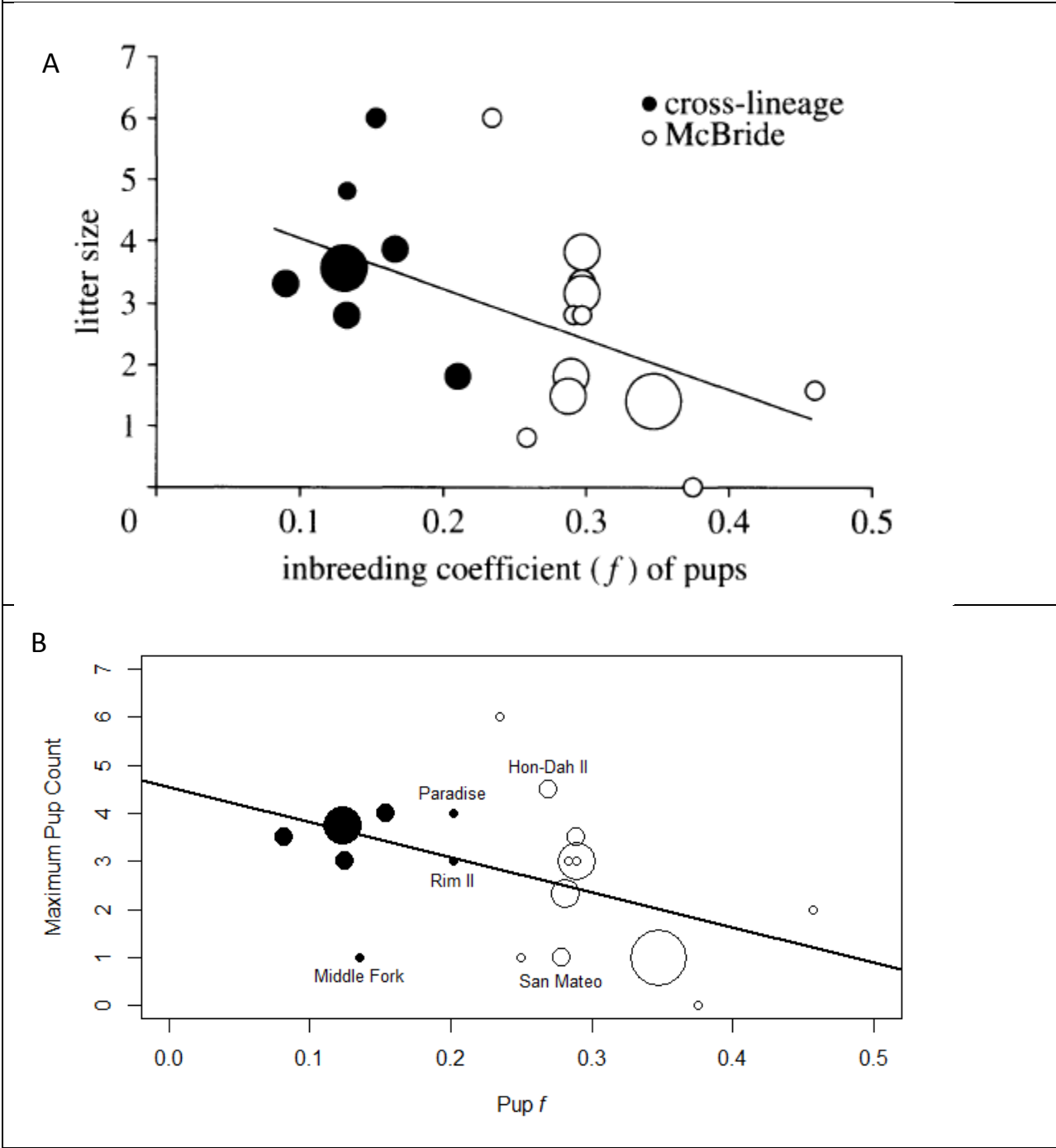


Figure 3: Relation between pup F and pup counts, 1998 to 2014. Red dots: highlight packs with no documented pups. Red line, relation between pup F and pup counts, including packs with no documented pups. Black line: relation between pup F and pup counts, excluding packs with no documented pups. A: Maximum Pup Count. B: Pups surviving to Dec 31.

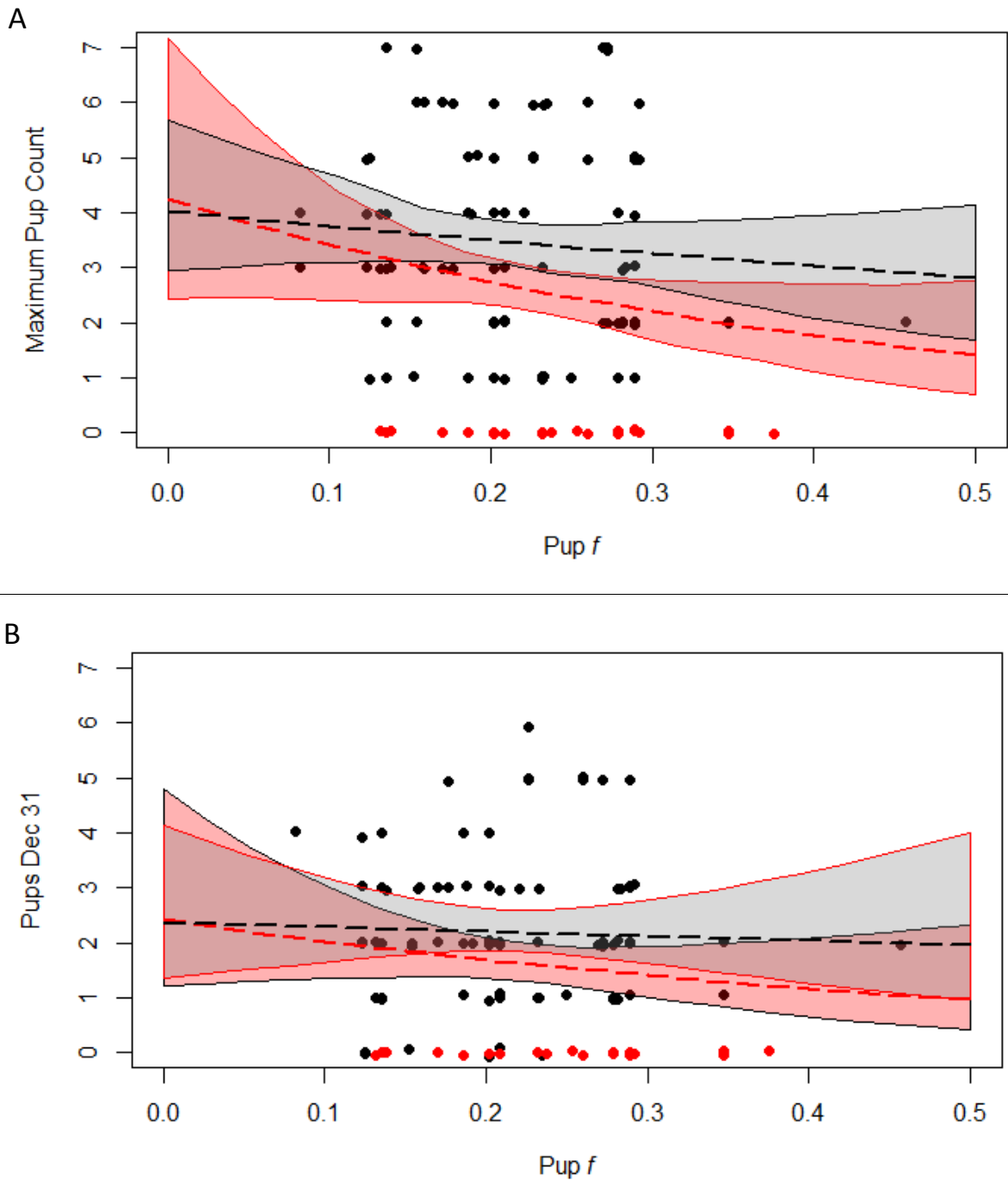


Figure 4: Relation between pup F and pup counts, 1998 to 2014 for packs with documented pups. Blue dots: packs that received supplemental feeding. Green dots: packs that did not receive supplemental feeding. Blue line, relation between pup F and Max Pup Count for packs that received supplemental feeding. Green line: relation between pup F and Max Pup Count for packs that did not receive supplemental feeding. A: Maximum Pup Count. B: Pups surviving to Dec 31.

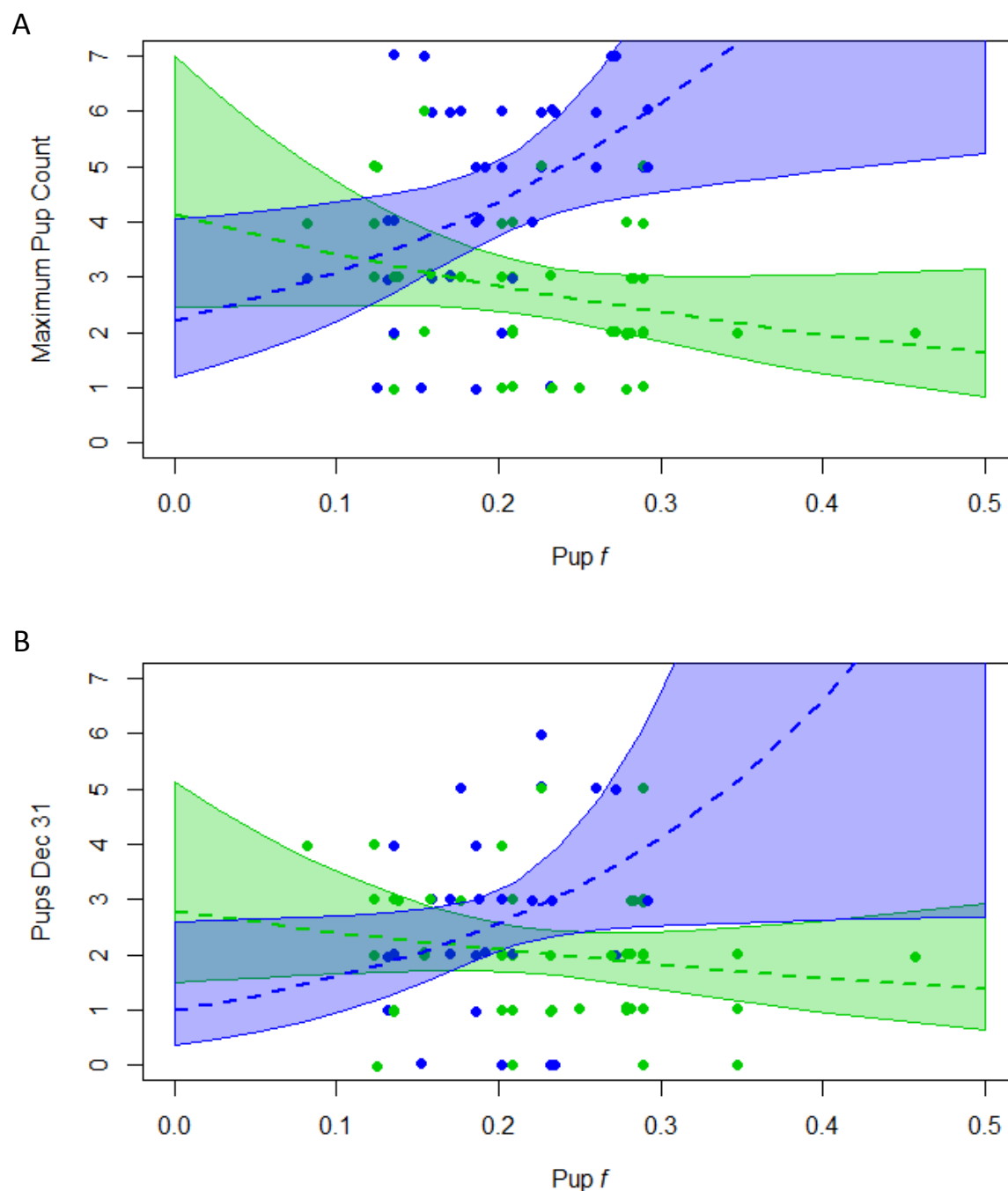
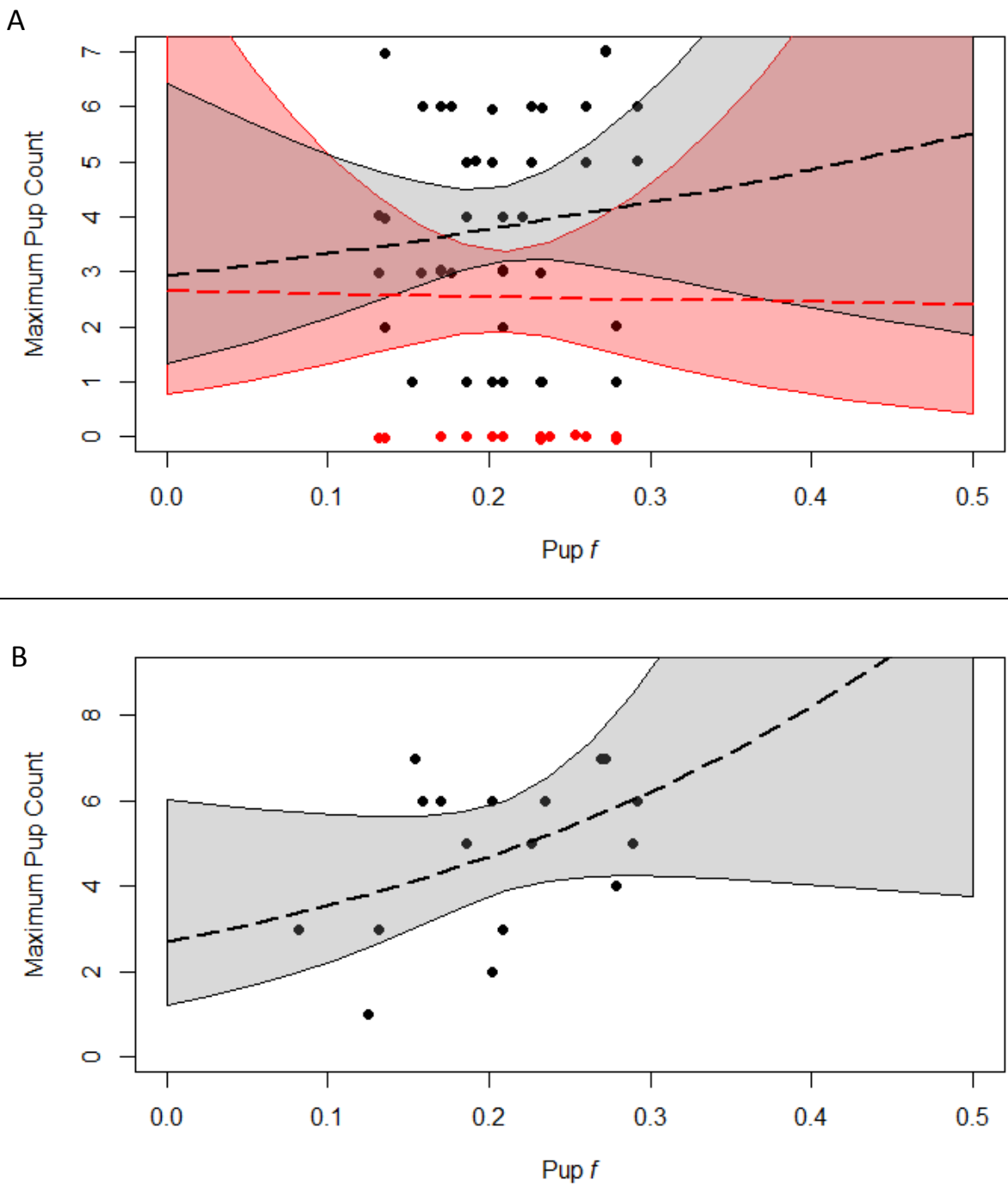


Figure 5: Relationship between F and Maximum Pup Count for a period of more reliable counts (2009-2014) and those near whelping. Red dots highlight packs with zero pups. Red line, relation between pup F and pup counts, including packs with no documented pups. Black line: relation between pup F and pup counts, excluding packs with no documented pups. A: Counts during April – December from 2009 to 2014. B: Counts shortly after whelping from 1998 to 2014.





Wyoming Game and Fish Department

Chapter 10 Permit**PERMIT TO IMPORT, POSSESS, CONFINED,
TRANSPORT, SELL, AND/OR DISPOSE OF
LIVE WILDLIFE**

Permit ID: 1000

John Hughes
USFWS
P.O. Box 190
Wellington, CO 80549

SPECIES	NUMBER	REGION	VALID
Prairie dog, Black-tailed - (Cynomys ludovicianus)	300	Laramie	1/1/2004 - 12/31/2004
CONDITIONS:	Food for black-footed ferrets.		
PURPOSE:	Food,		
Prairie dog, White-tailed - (Cynomys leucocrossuromys)	200	Laramie	1/1/2004 - 12/31/2004
CONDITIONS:	Food for black-footed ferrets.		
PURPOSE:	Food,		
Black-Footed Ferret - (Mustela nigripes)	300	Laramie	1/1/2004 - 12/31/2004
CONDITIONS:	Permittee and employees (USFWS National Black-footed Ferret Conservation Center -Sybille) possess Black-footed Ferrets for captive breeding and preconditioning for transfer to release sites as well as educational and research purposes. Black-footed Ferrets may be transferred to and from out-of-state breeding/education facilities as permitted by the US Fish and Wildlife Service.		
PURPOSE:	Breeding,		

The permit holder shall adhere to all conditions of the application and permit, Wyoming statutes and Commission regulations. This permit is valid only for the permit holder named above and in accordance with the specified requirements. Disposition of live wildlife will be in accordance with Chapter 10 regulation. A new Chapter 10 application form must be submitted and approved PRIOR to obtaining any new wildlife. Permittee shall obtain the permission of the owner of private property or the person in charge of the property before entering upon or conducting any activities within the private property; this includes crossing private property to access public lands when no public road access is available.

In accordance with Chapter 10 commission regulation, the permittee shall maintain current records for the term of the permit on forms prescribed by the Department. Such records shall be completed accurately and legibly. Original records shall be kept at the holding facility. Any person issued a permit under this regulation to import, possess, confine, or transport live wildlife shall allow immediate inspection upon request by Department personnel of records, holding facility(ies), and permitted wildlife during the term of the permit.



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SPECIES	NUMBER	REGION	VALID
Black-footed Ferret - (<i>Mustela nigripes</i>)	300	Laramie	1/1/2005 - 12/31/2005
CONDITIONS:	Permittee and employees (USFWS National Black-footed Ferret Conservation Center -Sybille) possess Black-footed Ferrets for captive breeding and preconditioning for transfer to release sites as well as educational and research purposes. Black-footed Ferrets may be transferred to and from out-of-state breeding/education facilities as permitted by the US Fish and Wildlife Service.		
PURPOSE:	Breeding,		
Prairie dog, Black-tailed - (<i>Cynomys ludovicianus</i>)	300	Laramie	1/1/2005 - 12/31/2005
CONDITIONS:	Food for black-footed ferrets.		
PURPOSE:	Food,		
Prairie dog, White-tailed - (<i>Cynomys leucocrossuromys</i>)	200	Laramie	1/1/2005 - 12/31/2005
CONDITIONS:	Food for black-footed ferrets.		
PURPOSE:	Food,		

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SPECIES	NUMBER	REGION	VALID
Prairie Dog - (Cynomys sp.)	200	Laramie	1/1/2007 - 12/31/2007
CONDITIONS:	Food for black-footed ferrets.		
PURPOSE:	Food,		
Black-Footed Ferret - (Mustela nigripes)	40	Laramie	1/1/2007 - 12/31/2007
CONDITIONS:	Permittee may possess/transfer up to 40 Black-footed Ferrets to and from preconditioning pens located at F.E. Warren AFB and the Tom Thorn/Beth Williams Wildlife Research Center.		
PURPOSE:	Recreation,		

The permit holder shall adhere to all conditions of the application and permit, Wyoming statutes and Commission regulations. This permit is valid only for the permit holder named above and in accordance with the specified requirements. Disposition of live wildlife will be in accordance with Chapter 10 regulation. A new Chapter 10 application form must be submitted and approved PRIOR to obtaining any new wildlife. Permittee shall obtain the permission of the owner of private property or the person in charge of the property before entering upon or conducting any activities within the private property; this includes crossing private property to access public lands when no public road access is available.

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SPECIES	NUMBER	REGION	VALID
Ferret, Black-Footed - (<i>Mustela nigripes</i>)	15	Laramie	1/1/2008 - 12/31/2008
CONDITIONS:	Permittee may possess/transfer up to fifteen (15) black-footed ferrets to and from preconditioning pens located at F.E. Warren AFB and the Tom Thorn/Beth Williams Wildlife Research Center at Sybille.		
PURPOSE:	Preconditioning		
Prairie Dog - (<i>Cynomys</i> sp.)	30	Laramie	1/1/2008 - 12/31/2008
CONDITIONS:	Prairie dogs shall be used as food resource for the black-footed ferrets. No prairie dog shall be released outside of the above-mentioned preconditioning pens. See additional permit 33-540.		
PURPOSE:	Food,		

The permit holder shall adhere to all conditions of the application and permit, Wyoming statutes and Commission regulations. This permit is valid only for the permit holder named above and in accordance with the specified requirements. Disposition of live wildlife will be in accordance with Chapter 10 regulation. A new Chapter 10 application form must be submitted and approved PRIOR to obtaining any new wildlife. Permittee shall obtain the permission of the owner of private property or the person in charge of the property before entering upon or conducting any activities within the private property; this includes crossing private property to access public lands when no public road access is available.

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SPECIES	NUMBER	REGION	VALID
Ferret, Black-Footed - (<i>Mustela nigripes</i>)	15	Laramie	1/1/2008 - 12/31/2008
CONDITIONS:	Permittee may possess/transfer up to fifteen (15) black-footed ferrets to and from preconditioning pens located at F.E. Warren AFB and the Tom Thorn/Beth Williams Wildlife Research Center at Sybille.		
PURPOSE:	Preconditioning		
Prairie Dog - (<i>Cynomys</i> sp.)	30	Laramie	1/1/2008 - 12/31/2008
CONDITIONS:	Prairie dogs shall be used as food resource for the black-footed ferrets. No prairie dog shall be released outside of the above-mentioned preconditioning pens. See additional permit 33-540.		
PURPOSE:	Food,		

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SPECIES	NUMBER	REGION	VALID
Black-footed Ferret - (<i>Mustela nigripes</i>)	50	Laramie	1/1/2009 - 12/31/2009
CONDITIONS:	Permittee may possess/transfer up to fifteen (15) black-footed ferrets to and from preconditioning pens located at F.E. Warren AFB and the Tom Thorne/Beth Williams Wildlife Research Center at Sybille.		
PURPOSE:	Preconditioning		
Prairie dog, Black-tailed - (<i>Cynomys ludovicianus</i>)	100	Laramie	1/1/2009 - 12/31/2009
CONDITIONS:	Prairie dogs shall be used as food resource for the black-footed ferrets. No prairie dog shall be released outside of the above-mentioned preconditioning pens. See additional permit 33-540.		
PURPOSE:	Food,		

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SPECIES	NUMBER	REGION	VALID
Prairie dog, Black-tailed - (Cynomys ludovicianus)	150	Laramie	1/1/2010 - 12/31/2010
CONDITIONS:	Prairie dogs shall be used as food resource for the black-footed ferrets. No prairie dog shall be released outside of the above-mentioned preconditioning pens. See additional permit 33-540.		
PURPOSE:	Food,		
Black-Footed Ferret - (Mustela nigripes)	50	Statewide	1/1/2010 - 12/31/2010
CONDITIONS:	Permittee may possess/transfer up to fifty (50) black-footed ferrets to preconditioning pens located at F.E. Warren AFB. In addition, one (1) live, neutered black-footed ferret from USFWS captive facility may be used for educational purposes throughout the state. Educational ferret shall not be released to the wild and shall not come in direct contact with the public.		
PURPOSE:	Preconditioning		

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SPECIES	NUMBER	REGION	VALID
Black-Footed Ferret - (Mustela nigripes)	12	Statewide	1/1/2011 - 12/31/2011
CONDITIONS:	Permittee may possess/transfer up to twelve (12) black-footed ferrets to preconditioning pens located at F.E. Warren AFB. In addition, one (1) live, neutered black-footed ferret from USFWS captive facility may be used for educational purposes throughout the state. Educational ferret shall not be released to the wild and shall not come in direct contact with the public.		
PURPOSE:	Preconditioning		
Prairie dog, Black-tailed - (Cynomys ludovicianus)	50	Laramie	1/1/2011 - 12/31/2011
CONDITIONS:	Prairie dogs shall be used as food resource for the black-footed ferrets. No prairie dog shall be released outside of the above-mentioned preconditioning pens. See additional permit 33-540.		
PURPOSE:	Food,		

The permit holder shall adhere to all conditions of the application and permit, Wyoming statutes and Commission regulations. This permit is valid only for the permit holder named above and in accordance with the specified requirements. Disposition of live wildlife will be in accordance with Chapter 10 regulation. A new Chapter 10 application form must be submitted and approved PRIOR to obtaining any new wildlife. Permittee shall obtain the permission of the owner of private property or the person in charge of the property before entering upon or conducting any activities within the private property; this includes crossing private property to access public lands when no public road access is available.

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CONDITIONS:	Permittee may possess/transfer up to twelve (12) black-footed ferrets to preconditioning pens located at F.E. Warren AFB. In addition, one (1) live, neutered black-footed ferret from USFWS captive facility may be used for educational purposes throughout the state. Educational ferret shall not be released to the wild and shall not come in direct contact with the public.		
PURPOSE:	Preconditioning		
Prairie dog, Black-tailed - (<i>Cynomys ludovicianus</i>)	50	Laramie	1/1/2012 - 12/31/2012
CONDITIONS:	Prairie dogs shall be used as food resource for the black-footed ferrets. No prairie dog shall be released outside of the above-mentioned preconditioning pens. See additional permit 33-540.		
PURPOSE:	Food,		

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SPECIES	NUMBER	REGION	VALID
Prairie dog, Black-tailed - (Cynomys ludovicianus)	50	Laramie	1/1/2013 - 12/31/2013
CONDITIONS:	Prairie dogs shall be used as food resource for the black-footed ferrets. No prairie dog shall be released outside of the above-mentioned preconditioning pens. See additional permit 33-540.		
PURPOSE:	Food,		
Black-Footed Ferret - (Mustela nigripes)	12	Statewide	1/1/2013 - 12/31/2013
CONDITIONS:	Permittee may possess/transfer up to twelve (12) black-footed ferrets to preconditioning pens located at F.E. Warren AFB. In addition, one (1) live, neutered black-footed ferret from USFWS captive facility may be used for educational purposes throughout the state. Educational ferret shall not be released to the wild and shall not come in direct contact with the public.		
PURPOSE:	Educational, Preconditioning		

The permit holder shall adhere to all conditions of the application and permit, Wyoming statutes and Commission regulations. This permit is valid only for the permit holder named above and in accordance with the specified requirements. Disposition of live wildlife will be in accordance with Chapter 10 regulation. A new Chapter 10 application form must be submitted and approved PRIOR to obtaining any new wildlife. Permittee shall obtain the permission of the owner of private property or the person in charge of the property before entering upon or conducting any activities within the private property; this includes crossing private property to access public lands when no public road access is available.

In accordance with Chapter 10 commission regulation, the permittee shall maintain current records for the term of the permit on forms prescribed by the Department. Such records shall be completed accurately and legibly. Original records shall be kept at the holding facility. Any person issued a permit under this regulation to import, possess, confine, or transport live wildlife shall allow immediate inspection upon request by Department personnel of records, holding facility(ies), and permitted wildlife during the term of the permit.



Mark Nelson, Permitting Officer

Copies: Shawn Blajszczak
Rick King
WGFD File

10/4/2016



Permit ID: 1000

John Hughes
USFWS
P.O. Box 190
Wellington, CO 80549

Wyoming Game and Fish Department

Chapter 10 Permit

**PERMIT TO IMPORT, POSSESS, CONFINED,
TRANSPORT, SELL, AND/OR DISPOSE OF
LIVE WILDLIFE**

SPECIES	NUMBER	REGION	VALID
Prairie dog, Black-tailed - (Cynomys ludovicianus)	50	Laramie	7/16/2014 - 12/31/2014
CONDITIONS:	Prairie dogs shall be retained at the F.E. Warren AFB black-footed ferret preconditioning pens and used as a food resource for black-footed ferrets. All prairie dogs shall have undergone a 21-day quarantine in Colorado prior to importation to ensure they are free from sylvatic plague and tularemia. No prairie dog shall be released outside of the preconditioning pens. See additional permit 33-540.		
PURPOSE:	Food, Food for black-footed ferrets		
Black-Footed Ferret - (Mustela nigripes)	12	Statewide	7/16/2014 - 12/31/2014
CONDITIONS:	Permittee may possess/transfer up to twelve (12) black-footed ferrets (obtained from the USFWS National Black-Footed Ferret Conservation Center, Wellington, CO captive facility) to the F.E. Warren AFB black-footed ferret preconditioning pens. Any escaped black-footed ferrets shall be immediately taken (to include capture and/or lethal removal) by authorized individuals of the state of Wyoming or the United States Fish and Wildlife Service. Any dead black-footed ferrets shall be retained by the USFWS for disposal/use. See additional permit 33-540.		
PURPOSE:	Educational, Preconditioning		

The permit holder shall adhere to all conditions of the application and permit, Wyoming statutes and Commission regulations. This permit is valid only for the permit holder named above and in accordance with the specified requirements. Disposition of live wildlife will be in accordance with Chapter 10 regulation. A new Chapter 10 application form must be submitted and approved PRIOR to obtaining any new wildlife. Permittee shall obtain the permission of the owner of private property or the person in charge of the property before entering upon or conducting any activities within the private property; this includes crossing private property to access public lands when no public road access is available.

In accordance with Chapter 10 commission regulation, the permittee shall maintain current records for the term of the permit on forms prescribed by the Department. Such records shall be completed accurately and legibly. Original records shall be kept at the holding facility. Any person issued a permit under this regulation to import, possess, confine, or transport live wildlife shall allow immediate inspection upon request by Department personnel of records, holding facility(ies), and permitted wildlife during the term of the permit.



Mark Nelson, Permitting Officer

Copies: Shawn Blajszczak
Rick King
WGFD File

10/4/2016



Wyoming Game and Fish Department

Chapter 10 Permit**PERMIT TO IMPORT, POSSESS, CONFINED,
TRANSPORT, SELL, AND/OR DISPOSE OF
LIVE WILDLIFE**

Permit ID: 2000

John Hughes
USFWS
P.O. Box 190
Wellington, Colorado 80549

SPECIES	NUMBER	REGION	VALID
Ferret, Black-footed - (<i>Mustela nigripes</i>)	1	Statewide	7/16/2014 - 12/31/2014

CONDITIONS: One (1) live, neutered black-footed ferret from the USFWS National Black-Footed Ferret Conservation Center, Wellington, CO captive facility may be used for educational purposes throughout the state. Educational ferret shall not be released to the wild and shall not come in direct contact with the public. The black-footed ferret, if escaped, shall be immediately taken (to include capture and/or lethal removal) by authorized individuals of the state of Wyoming or the United States Fish and Wildlife Service. Any dead black-footed ferrets shall be retained by the USFWS for disposal/use. See permit 33-964.

PURPOSE: Educational,

The permit holder shall adhere to all conditions of the application and permit, Wyoming statutes and Commission regulations. This permit is valid only for the permit holder named above and in accordance with the specified requirements. Disposition of live wildlife will be in accordance with Chapter 10 regulation. A new Chapter 10 application form must be submitted and approved PRIOR to obtaining any new wildlife. Permittee shall obtain the permission of the owner of private property or the person in charge of the property before entering upon or conducting any activities within the private property; this includes crossing private property to access public lands when no public road access is available.

In accordance with Chapter 10 commission regulation, the permittee shall maintain current records for the term of the permit on forms prescribed by the Department. Such records shall be completed accurately and legibly. Original records shall be kept at the holding facility. Any person issued a permit under this regulation to import, possess, confine, or transport live wildlife shall allow immediate inspection upon request by Department personnel of records, holding facility(ies), and permitted wildlife during the term of the permit.

Mark Nelson, Permitting Officer

Copies: Statewide
Statewide
WGFD File

10/4/2016



Wyoming Game and Fish Department
Chapter 10 Permit
 PERMIT TO IMPORT, POSSESS, CONFINED,
 TRANSPORT, SELL, AND/OR DISPOSE OF
 LIVE WILDLIFE

Permit ID: 2000

John Hughes
 USFWS
 P.O. Box 190
 Wellington, Colorado 80549

SPECIES	NUMBER	REGION	VALID
Ferret, Black-footed - (<i>Mustela nigripes</i>)	1	Statewide	1/1/2015 - 12/31/2015

CONDITIONS: One (1) live, neutered black-footed ferret from the USFWS National Black-Footed Ferret Conservation Center, Wellington, CO captive facility may be used for educational purposes throughout the state. Educational ferret shall not be released to the wild and shall not come in direct contact with the public. The black-footed ferret, if escaped, shall be immediately taken (to include capture and/or lethal removal) by authorized individuals of the state of Wyoming or the United States Fish and Wildlife Service. Any dead black-footed ferrets shall be retained by the USFWS for disposal/use. See permit 33-964.

PURPOSE: Educational,

The permit holder shall adhere to all conditions of the application and permit, Wyoming statutes and Commission regulations. This permit is valid only for the permit holder named above and in accordance with the specified requirements. Disposition of live wildlife will be in accordance with Chapter 10 regulation. A new Chapter 10 application form must be submitted and approved PRIOR to obtaining any new wildlife. Permittee shall obtain the permission of the owner of private property or the person in charge of the property before entering upon or conducting any activities within the private property; this includes crossing private property to access public lands when no public road access is available.

In accordance with Chapter 10 commission regulation, the permittee shall maintain current records for the term of the permit on forms prescribed by the Department. Such records shall be completed accurately and legibly. Original records shall be kept at the holding facility. Any person issued a permit under this regulation to import, possess, confine, or transport live wildlife shall allow immediate inspection upon request by Department personnel of records, holding facility(ies), and permitted wildlife during the term of the permit.

Mark Nelson, Permitting Officer

Copies: Statewide
 Statewide
 WGFD File

10/4/2016



Permit ID: 2062

Nichole Bjornlie
WGFD
260 Buena Vista
Lander, WY 82520

Wyoming Game and Fish Department

Chapter 10 Permit

**PERMIT TO IMPORT, POSSESS, CONFINED,
TRANSPORT, SELL, AND/OR DISPOSE OF
LIVE WILDLIFE**

SPECIES	NUMBER	REGION	VALID
Ferret, Black-footed - (<i>Mustela nigripes</i>)	40	Lander	7/1/2016 - 8/31/2016

CONDITIONS: Permittee, and those under permittee's direction, may receive black-footed ferrets (BFF) from the USFWS National Black-footed Ferret Conservation Center (Center) for release on private and state trust lands near Meeteetse, Wyoming. The BFFs shall be received from the Center on the day of release and shall have all proper health certificates and appropriate USFWS permits.

All BFFs may be implanted with PIT-tags, and shall not be held in any facilities after transportation to the release site.

All permissions from private landowners and the Office of State Lands and Investments shall be secured prior to release.

An annual report summarizing permit activities shall be submitted electronically to the permitting officer in Cheyenne no later than January 31 of the following year for which this permit is valid (send report(s) to wgf.permitting@wyo.gov).

PURPOSE: Release,

The permit holder shall adhere to all conditions of the application and permit, Wyoming statutes and Commission regulations. This permit is valid only for the permit holder named above and in accordance with the specified requirements. Disposition of live wildlife will be in accordance with Chapter 10 regulation. A new Chapter 10 application form must be submitted and approved PRIOR to obtaining any new wildlife. Permittee shall obtain the permission of the owner of private property or the person in charge of the property before entering upon or conducting any activities within the private property; this includes crossing private property to access public lands when no public road access is available.

In accordance with Chapter 10 commission regulation, the permittee shall maintain current records for the term of the permit on forms prescribed by the Department. Such records shall be completed accurately and legibly. Original records shall be kept at the holding facility. Any person issued a permit under this regulation to import, possess, confine, or transport live wildlife shall allow immediate inspection upon request by Department personnel of records, holding facility(ies), and permitted wildlife during the term of the permit.



Mark Nelson, Permitting Officer

Copies: Jim Olson
Alan Osterland
WGFD File

10/4/2016



Permit ID: 1000

John Hughes
USFWS
P.O. Box 190
Wellington, CO 80549

Wyoming Game and Fish Department

Chapter 10 Permit

**PERMIT TO IMPORT, POSSESS, CONFINE,
TRANSPORT, SELL, AND/OR DISPOSE OF
LIVE WILDLIFE**

SPECIES	NUMBER	REGION	VALID
Prairie dog, Black-tailed - (Cynomys ludovicianus)	20	Laramie	9/14/2016 - 12/31/2016

CONDITIONS: Prairie dogs may be imported and retained at the F.E. Warren AFB black-footed ferret preconditioning pens and used as a food resource for the BFFs. All prairie dogs shall have undergone a 21-day quarantine in Colorado prior to importation to ensure they are free from sylvatic plague and tularemia. No prairie dog shall be released outside of the preconditioning pens.

Prairie dogs may be temporarily transported by USFWS National Black-Footed Conservation Center employees from FEWAFB to their residences in Cheyenne if the prairie dogs are retained in secure transport containers.

Other conditions the same as for black-footed ferrets.

PURPOSE: Food, Food for black-footed ferrets

Black-Footed Ferret - (Mustela nigripes)	10	Laramie	9/14/2016 - 12/31/2016
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CONDITIONS: Permittee, and those under permittee's direction, may possess/transfer up to ten (10) black-footed ferrets (obtained from the USFWS National Black-Footed Ferret Conservation Center, Wellington, CO captive facility) to the F.E. Warren AFB black-footed ferret preconditioning pens. Prior to importation, all ferrets shall be vaccinated for canine distemper, sylvatic plague, rabies, and clostridium, and shall be marked with passive integrated transponder tags. Any progeny born at the preconditioning facility shall be covered under this permit.

Any escaped black-footed ferrets shall be immediately taken (to include capture and/or lethal removal) by authorized individuals of the state of Wyoming or the United States Fish and Wildlife Service.

See the "Management Plan For the Black-footed Ferret, Preconditioning Facility at F.E. Warren Air Force Base" for specifics.

Where practical, any salvageable mortalities shall be donated to the University of Wyoming Vertebrate Zoology Museum.

Methods of euthanasia shall be in accordance with the "AVMA Guidelines for the Euthanasia of Animals: 2013 Edition", or, if applicable, according to the protocols established by the permittee's Institutional Animal Care and Use Committee (IACUC).

The Department may require a portion of blood from each animal captured be submitted to the Department's Wildlife Disease Laboratory for disease monitoring purposes. At least ten (10) days prior to the capture/handling event, the permittee shall contact the Laboratory (307-745-5865) between 8 am - 5 pm Monday-Friday to determine if blood collection is required.

If submission is required, for animals under 20 pounds, a portion of clotted blood not to exceed 10% of the animal's blood volume shall be submitted. Necessary blood sampling/collection supplies shall be provided to the permittee.

An annual report (electronic) summarizing permit activities is REQUIRED, even if the permit was not utilized. The annual report(s) shall be submitted to the permitting officer in Cheyenne no later than January 31 of the following year for which this permit is valid. Send report(s) to wgf.permitting@wyo.gov.

PURPOSE: Preconditioning

The permit holder shall adhere to all conditions of the application and permit, Wyoming statutes and Commission regulations. This permit is valid only for the permit holder named above and in accordance with the specified requirements. Disposition of live wildlife will be in accordance with Chapter 10 regulation. A new Chapter 10 application form must be submitted and approved PRIOR to obtaining any new wildlife. Permittee shall obtain the permission of the owner of private property or the person in charge of the property before entering upon or conducting any activities within the private property; this includes crossing private property to access public lands when no public road access is available.

In accordance with Chapter 10 commission regulation, the permittee shall maintain current records for the term of the permit on forms prescribed by the Department. Such records shall be completed accurately and legibly. Original records shall be kept at the holding facility. Any person issued a permit under this regulation to import, possess, confine, or transport live wildlife shall allow immediate inspection upon request by Department personnel of records, holding facility(ies), and permitted wildlife during the term of the permit.



Mark Nelson, Permitting Officer

Copies: Shawn Blajszczak
Rick King
WGFD File

10/4/2016



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Press Release

Science leads Fish and Wildlife Service to significant changes for red wolf recovery

September 12, 2016

Contact(s):

Jeff Fleming (mailto:jeffrey_m_fleming@fws.gov?subject=Re%3A%20Science%20leads%20Fish%20and%20Wildlife%20Service%20to%20significant%20changes%20for%20red%20wolf%20recovery),
404-679-7287

USFWS External Affairs

Assistant Regional Director

Recovery of the red wolf in the wild is feasible with significant changes that must be implemented to secure the captive and wild populations.

The U.S. Fish and Wildlife Service said today it will begin implementing a series of actions based on the best and latest scientific information gathered over the past 21 months. Today's announcement comes after a two-year, two-step evaluation of the entire red wolf recovery program, including the evaluation of the captive population and the non-essential, experimental population in Eastern North Carolina, that began in 2014 with a peer-reviewed program assessment by the Wildlife Management Institute. This review was expanded last June to include the recommendations of a red wolf recovery team that examined feasibility of recovery in the wild, population viability, red wolf taxonomy, the historical range, and human dimensions.



Red wolf at Point Defiance Zoo and Aquarium. Credit: John Froschauer/PDZA
Higher Quality Version of Image
(<https://flic.kr/p/dPuMyV>)

This team completed a report with a series of options earlier this month. The steps announced today by the Service are guided by that work.

“The Service commissioned these numerous studies, and the updated research and information coming from a diverse group of experts was invaluable to us in making the management decisions we’re announcing today,” said Cindy Dohner, the Service’s Southeast Regional Director.

Here are the steps the Service will begin implementing:

First, the Service will move quickly to secure the captive population of red wolves, which we now know is not sustainable in its current configuration.

Second, the Service will determine where potential new sites exist for additional experimental wild populations by October 2017. The Service will ensure these determinations will comply with all environmental rules and include public engagement.

Third, the Service will propose to revise the existing experimental population rule to apply only to the Dare County Bombing Range and Alligator River National Wildlife Refuge, where stable packs

exist on federal lands. This proposed action will change the scope of and goals for the experimental population and is expected to be completed by December 2017. These proposed changes will go through appropriate environmental review and public comment.

Finally, by October 2017 the Service working with others will complete a comprehensive Species Status Assessment and five-year status review for the red wolf, building on the foundation of work accomplished over the past two years and past history. This will guide the Service’s recovery planning in the future.

Many of these actions will be pursued on a parallel time line rather than sequentially.

“We believe the actions we’ve outlined today chart the correct path to achieve success,” Dohner added. “We need everyone’s help ensure this species is around for future generations. We’re on the right road, but we have a great deal of work to do with our state partners, landowners, conservation groups and others. We are looking forward to the collective effort and everyone’s engagement.”

The best science now available to the Service shows the captive population is not secure for the foreseeable future. Under current conditions, with only 29 breeding pairs in captivity, the captive population is not large enough to sustain itself and will decline over time. The recovery team identified

this as a priority. To secure the captive population, we must essentially double it to at least 400 wolves. Currently, there are slightly more than 200 in captivity. The number of breeding pairs must increase to a minimum of 52.

The Service recognizes questions remain about the validity of the red wolf as a listable species under the ESA. The five-year status review the Service will examine whether the red wolf is a valid, listable entity and whether it is appropriately classified as an endangered species.

he red wolf's historical range has been a relatively consistent source of debate given different interpretations and limited historical specimens. The Wildlife Management Institute concluded that an accurate depiction of the red wolf's range includes North Carolina along with all or parts of a significant part of the Southeast United States, which is larger than originally identified. The recovery team generally agrees with WMI's conclusion.

To learn more about today's announcement, download the Service's decision memorandum (<https://fws.gov/redwolf/docs/recommended-decisions-in-response-to-red-wolf-recovery-program-evaluation.pdf>), the recovery team's report (<https://fws.gov/redwolf/docs/red-wolf-recovery-team-recommendations-facilitated-by-group-solutions-inc.pdf>), the population viability assessment (<https://fws.gov/redwolf/docs/red-wolf-population-viability-analysis-faust-et-al-2016.pdf>) and other background on the program's evaluation page (<https://www.fws.gov/redwolf/evaluation.html>).

Listen to the Media Conference Call

Download the transcript (<https://fws.gov/southeast/audio/transcripts/red-wolf-announcement-09122016.pdf>).

The mission of the U.S. Fish and Wildlife Service is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. We are both a leader and trusted partner in fish and wildlife conservation, known for our scientific excellence, stewardship of lands and natural resources, dedicated professionals, and commitment to public service. For more information on our work and the people who make it happen, visit www.fws.gov (<https://www.fws.gov/>).

For more information on our work and the people who make it happen, visit <http://www.fws.gov/> (<https://www.fws.gov/>). Connect with our Facebook page (<https://www.facebook.com/usfws>), follow our tweets (<https://twitter.com/usfws>), watch our YouTube Channel (<https://www.youtube.com/usfws>) and download photos from our Flickr page (<http://www.flickr.com/photos/usfws/hq/>).

Last updated: May 10, 2016

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

NEW MEXICO DEPARTMENT OF
GAME AND FISH,

Petitioner,

v.

No. CV 16-00462 WJ/KBM

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

Respondents.

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

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

BACKGROUND

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

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

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

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

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

LEGAL STANDARD

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

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

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

DISCUSSION

I. Standing and Judicial Review

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

A. Article III Standing

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

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

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

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

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

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

B. Final Agency Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Preliminary Injunction

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

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

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

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

A. Likelihood of Success

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

Petitioner notes that in the same letter, the Service argues that it intended to proceed in violation of State law because complying with State law would prevent the Service from carrying out its statutory responsibilities. However, Petitioner argues that the fact that the State has denied a permit for the release of two wolves in New Mexico does not prevent the Secretary from carrying out his statutory responsibility. Petitioner notes that the statutory language regarding experimental populations is not a specific statutory directive but rather is a statutory grant of authority. 16 U.S.C. § 1539(j)(2)(A) states that the “Secretary *may* authorize the release (and the related transportation) of any population . . . of an endangered species.” (emphasis added). By contrast, the language requiring the Service to comply with State permitting processes is mandatory: “Federal agencies of the Department of the Interior *shall*: . . . Consult with the States and comply with State permit requirements” (emphasis added). Petitioner therefore argues that the denial of two State permits does not prevent the Secretary from carrying out his statutory responsibilities involving the reintroduction of fish and wildlife.

Respondents raise several arguments regarding Petitioner’s likelihood of success on the merits of both the state law and federal law claims.

1. The Service is in Compliance with the Federal Regulation

Respondents argue that Petitioner cannot show a likelihood of success on the federal law claims as Respondents have acted in compliance with 43 C.F.R. § 24.4(i)(5)(i). The Service has determined that reintroduction of wolves is necessary to further the conservation of the species and additional releases in New Mexico and Arizona are critical to improve the genetic make-up of the Mexican wolf population. Therefore, Petitioner’s attempted veto through denial of State permits conflicts with the Service’s ESA conservation duties and justifies the Service’s determination that obtaining the permits “would prevent [the Service] from carrying out [its]

statutory responsibilities.” 43 C.F.R. § 24.4(i)(5). Respondents also take issue with Petitioner’s suggestion that, without a revised recovery plan, the Director of the Service could not reasonably determine that the Service’s statutory responsibilities included releasing additional wolves. Respondents argue that the Service is not precluded from taking action to further the recovery of the wolf until the revised recovery plan is complete, and regardless, such recovery plans are non-binding.

2. Petitioner’s Denial of Permits Violates the Intergovernmental Immunity Doctrine

Respondents additionally argue that Petitioner’s state law claims violate the intergovernmental immunity doctrine, which prohibits states from regulating or otherwise impeding constitutionally-provided activities of the federal government, except to the extent clearly and specifically authorized by Congress. *See Hancock v. Train*, 426 U.S. 167, 178–81 (1976). Respondents contend that Petitioner’s application of New Mexico State law to prohibit the Service from releasing wolves it has deemed necessary therefore violates the intergovernmental immunity doctrine.

3. Application of State Law is Preempted by the ESA

Similarly, Respondents argue that the New Mexico permit requirements relied upon by Petitioner are preempted by the ESA, which Congress intended to be far-reaching and afford endangered species “the highest of priorities.” *Tenn. Valley Authority v. Hill*, 437 U.S. 163, 174 (1978). Respondents also argue that Petitioner can claim no reservation of power under the Tenth Amendment because it is “apparent that the Tenth Amendment does not reserve to the [State] the right to manage wildlife on [federal land], regardless of the circumstances.” *Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002). Similarly, Respondents conclude that Petitioner cannot claim that the Service’s release of wolves on federal land violates state law requirements.

4. The Court's Finding

The Court finds that Petitioner has shown a substantial likelihood of prevailing on the merits. First, under a plain reading of 43 C.F.R. § 24.4(i)(5), Respondents must comply with State permit requirements except in instances where the Secretary determines that such compliance would prevent him from carrying out his statutory duties. While Respondents have previously indicated that they may comply with State permit requirements by simply applying for a State permit, even if it is denied, the Court does not credit this argument and finds that the clear meaning of compliance with State permit requirements requires actually receiving a permit and not merely applying for one.

The crux of Respondents' argument is that New Mexico's denial of two permits to release wolves in New Mexico prevents the Secretary from carrying out his statutory duties, and thus they may decline to comply with the State permitting process. Examining the statutory language regarding experimental populations, the language states that "[t]he Secretary *may* authorize the release (and related transportation) of any population . . . of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species." 16 U.S.C. § 1539(j)(2)(A) (emphasis added). The Court finds a significant difference between a statutory grant of authority, such as stating that the Secretary *may* take an action, and a specific statutory directive requiring the Secretary to take an action. The Court reads 16 U.S.C. § 1539(j)(2)(A) to permit, or allow, the Secretary to authorize the release of a threatened or endangered species, but not to require, or obligate, the Secretary do so. The Court thus finds that the permissive language contained in the statute does not constitute a statutory responsibility of the Secretary. Therefore, compliance with State permit requirements and 43 C.F.R. § 24.4(i)(5)(i) does not prevent the Secretary from

carrying out his statutory responsibilities within the context of the ESA. Respondents argue at length regarding the importance of the reintroduction of the Mexican wolf population. However, it is Respondents' own regulation that places the burden on them to comply with State permit requirements.

Similarly, Respondents argue that New Mexico's permit requirements are preempted by the ESA and Petitioner can claim no reservation of power under the Tenth Amendment, citing to *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002). In *Wyoming*, the State sued on the basis of impingement on state sovereignty and Tenth Amendment infringement. *See id.* at 1223. While Petitioner has raised state law claims regarding state sovereignty, Petitioner has additionally raised federal law claims, which the Court finds compelling. Unlike in *Wyoming*, based entirely on powers reserved to the state, it is Respondents' own federal regulation that curtails their power and requires them to release wolves in compliance with State permit requirements.

Respondents arguments concerning the intergovernmental immunity doctrine fare no better. Respondents cite to *Hancock v. Train*, 426 U.S. 167 (1976) for the proposition that even where the Clean Air Act obligated federal installations to comply with certain State air pollution requirements, a State may not forbid a federal facility from operating without a State permit on the basis of the intergovernmental immunity doctrine. *See id.* at 180. However, the Court reads *Hancock* to represent a more limited holding. The Supreme Court read the relevant provision of the Clean Air Act to mean that "Congress has fashioned a compromise which, while requiring federal installations to abate their pollution . . . under standards which the States have prescribed, stopped short of subjecting federal installations to state control." *Id.* at 198–199. Thus, while the federal installations were to abate their pollution under State standards, the EPA, not the State,

maintained the authority to ensure conformity with the standards. By contrast, in this case, 43 C.F.R. § 24.4(i)(5) makes clear that the regulation requires federal agencies to “comply with State permit requirements,” which necessarily subjects the Service to New Mexico’s permit process. Therefore, the Court finds that Petitioner’s denial of permits does not violate the intergovernmental immunity doctrine.

B. Irreparable Injury

To satisfy the irreparable injury requirement, Petitioner must show “a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (citation omitted). The standard requires that the injury be “both certain and great,” not “merely serious or substantial.” *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008). Furthermore, Petitioner must demonstrate that the harm “is likely to occur before the district court rules on the merits.” *RoDa Drilling Co.*, 552 F.3d at 1210 (citation omitted).

Petitioner argues that the injury is imminent because the Service has already released captive-bred wolves in the State and plans to continue to do so. Petitioner further argues that the Service’s introduction of an apex predator in numbers, at locations, and at times not known to the Department will cause irreparable harm by disrupting the State’s comprehensive management effort of wildlife in New Mexico. Further, once released, there exist practical and legal obstacles in tracking and recapturing the wolves using non-lethal means.

Respondents argue that Petitioner cannot show that the introduction of two to six cross-fostered pups, the release of one pack, and the possible translocations are likely to result in a concrete and actual injury to its interests in managing wild ungulate herds. Additionally, Respondents note that Petitioner’s argument that each single wolf release infringes on the State’s

sovereign interests can be rejected given the supremacy of the ESA. Further, Respondents argue that if Petitioner truly believed that it would suffer imminent irreparable harm from the release of additional wolves in New Mexico, it could have filed suit as early as January 2015 after issuance of the Revised 10(j) Rule. Respondents conclude that Petitioner's own delay militates against a finding of irreparable harm.

The Court finds that Petitioner has sufficiently alleged a significant risk of harm likely to occur before the district court rules on the merits. The key factor is whether the imminent injury will not be able to be compensated after the fact by monetary damages. *Compare RoDa Drilling Co.*, 552 F.3d at 1210 (finding that deprivation of control of real property constituted irreparable harm) *with Morton v. Beyer*, 822 F.2d 364, 371 (3d Cir. 1987) (finding that a loss of income was purely economic in nature and thus compensable in monetary damages). In this case, the release of wolves in violation of the State permitting process, which has already occurred, cannot be compensated after the fact by monetary damages. Similarly, disruption to the State's comprehensive wildlife management effort cannot be remedied through monetary compensation.

Respondents argue that the number of wolves planned for release will not have a significant impact on the State's management of wild ungulate herds, and thus, Petitioner cannot show an irreparable injury. However, the Court finds that Petitioner has sufficiently shown a significant risk that the release of an apex predator, without Petitioner's knowledge of the time, location, or number of releases, presents a serious enough risk of harm to the State's comprehensive wildlife management effort to satisfy the irreparable injury requirement. Finally, the Court finds that Petitioner did not unnecessarily delay filing this Motion for Preliminary Injunction. Rather, it appears that Petitioner filed a 60-day notice of suit letter several months after receiving Respondents' letter stating that they intended to release wolves in New Mexico

without following the State's permitting process.

C. Balance of Equities

Petitioner argues that the balance of equities weighs in favor of issuance of the preliminary injunction. Whereas a relatively short-term delay in the release of captive wolves will result in little harm to Respondents, release of wolves in violation of the State permitting process will result in irreparable injury. Petitioner further argues that the captive-bred wolves are designated as a "nonessential experimental population" which by definition is not essential to the continued existence of the species. *See* 80 Fed. Reg. 2512 (Jan. 16, 2015).

Respondents argue that Petitioner's request to enjoin actions necessary for the conservation of the Mexican wolf is contrary to the high priority that Congress has placed on the protection and recovery of endangered species. Without continued releases, the genetic health of the Mexican wolf population in the wild will stagnate and possibly deteriorate. Because Congress has tipped the equities heavily by affording the protection of endangered species the highest of priorities, the balance weighs in Respondents' favor.

The Court finds that the balance of equities weighs in favor of issuance of the preliminary injunction. Respondents make much of the high priority Congress has placed on the protection of endangered species. However, issuance of the preliminary injunction, while disrupting Respondents' plans to release wolves in violation of the State permitting process, does not necessarily prevent continued releases or any alteration to Respondents' release of wolves. Respondents must simply comply with their own federal regulation and comply with State permitting requirements before they import and release wolves in New Mexico.

D. Public Interest

Petitioner argues that departure from the Service's precedent to secure Department

approval before releasing captive-bred wolves in New Mexico threatens the Department's duty to fulfill its obligation to the citizens of New Mexico to comprehensively manage wildlife. Petitioner argues that wolves must be closely managed due to the predator-prey dynamics that have the potential for ripple effects within ecosystems. Additionally, Petitioner argues that wolves have the potential to amount to a public nuisance, and the power to abate a public nuisance through equity is well established.

Respondents conclude that the public interest in conserving the Mexican wolf weighs against injunctive relief given the importance of the protection of endangered species and the fragile genetic health of the current Mexican wolf population.

The Court finds that issuance of the injunction would not be adverse to the public interest. As stated earlier, issuance of the injunction will not necessarily result in the Service from being precluded from any further wolf releases. By seeking and receiving a State permit for releases, which Respondents previously have done, Respondents will comply with federal regulations governing the reintroduction of wildlife, and, upon State approval, continue to release wolves.

CONCLUSION

Accordingly, the Court finds that Petitioner has established each of the required factors necessary to obtain a Preliminary Injunction and that in addition, Petitioner is entitled to requested declaratory relief.

In Petitioner's Complaint for Declaratory Judgment and Injunctive Relief (**Doc. 1**), filed May 20, 2016, Petitioner's Prayer for Relief seeks declaratory relief. The Court grants Petitioner's request and finds and declares as follows:

- That Defendants have violated State law by failing to obtain the requisite importation and release permits from the Department prior to importing and releasing Mexican wolves into the State;
- That Defendants cannot import or release any Mexican wolves into the State without first obtaining the requisite importation and release permits from the Department;
- That Defendants have violated State law by importing and releasing Mexican wolf offspring in violation of prior Department permits;
- That Defendants cannot import and release any Mexican wolf offspring in violation of prior Department permits;
- That Defendants have violated the APA by failing to comply with State permit requirements.


The Court finds that Petitioner is entitled to a preliminary injunction in which Respondents are enjoined from importing or releasing any Mexican wolves into the State without first obtaining the requisite importation and release permits from the Department, and are enjoined from importing and releasing any Mexican wolf offspring in violation of prior Department permits. However, Petitioner seeks additional injunctive relief that the Court declines to grant.

First, Petitioner seeks an injunction requiring Respondents to capture and remove from the State any and all Mexican wolves that were imported and/or released in violation of State law. The Court has determined that including within the Preliminary Injunction a requirement that Respondents find, capture, and remove the two cross-fostered pups allegedly released around April 23, 2016 would alter Petitioner's ability to show that an injunction should be issued. First, removal of the wolves released in violation of State law would reduce Petitioner's showing of irreparable injury. Petitioner's argument that introduction of the wolves in unknown numbers, times, and locations will cause irreparable harm to the State's comprehensive management plan is diminished if the wolves released in violation of the State permitting process

are removed. Additionally, requiring Respondents to find, capture, and remove the April 23, 2016 released wolves will shift the balance of equities to favor Respondents. Accordingly, the injunction shall apply only to the Service's proposed future release of wolves.

Second, Petitioner seeks three types of relief³ that were not raised or addressed in Petitioner's Motion for Preliminary Injunction, subsequent briefing, or at oral argument. Therefore, the Court will not grant relief for these requests.

SO ORDERED


UNITED STATES DISTRICT JUDGE

³ See **Doc. 1**, at 13. "9. Adjudge and declare that Defendants have violated the APA by finalizing and implementing the *Initial Release and Translocation Plan for 2016*; 10. Order the Service to vacate the *Initial Release and Translocation Plan for 2016*; 11. Issue an injunction enjoining the Service from issuing an experimental population rule that is inconsistent with the operative recovery plan for the Mexican wolf."

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

NEW MEXICO DEPARTMENT OF
GAME AND FISH,

Petitioner,

v.

No. CV 16-00462 WJ/KBM

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

Respondents.

ORDER OF PRELIMINARY INJUNCTION

The Court, pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order (**Doc. 32**), hereby ORDERS that Respondents United States Department of the Interior; Sally Jewell, in her official capacity as Secretary of the United States Department of the Interior; United States Fish and Wildlife Service; Daniel M. Ashe, in his official capacity as Director of the United States Fish and Wildlife Service; and Dr. Benjamin N. Tuggle, in his official capacity as Southwest Regional Director for the United States Fish and Wildlife Service (“Respondents”) are hereby:

(1) ENJOINED from importing or releasing any Mexican wolves into the State of New Mexico without first obtaining the requisite importation and release permits from the New Mexico Department of Game and Fish (“Department”), *see* 43 C.F.R. § 24.4(i)(5)(i);

(2) ENJOINED from importing and releasing any Mexican wolf offspring in violation of prior Department permits.

In its request for injunctive relief, Petitioner has also asked that Respondents be required

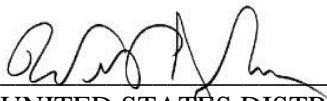
to capture and remove from the State any and all Mexican wolves that were imported and/or released in violation of State law. However, as the Court has noted in the accompanying Memorandum Opinion and Order, Petitioner is not granted injunctive relief as to this request.

The Court shall retain jurisdiction of this matter until the Respondents have fulfilled their legal and Court-ordered obligations as set forth in this Order of Preliminary Injunction.

This Preliminary Injunction Order shall apply to the parties until the final disposition of this case on the merits.

This Preliminary Injunction Order shall be effective immediately and shall remain in full force and effect unless modified or dissolved by order of this Court or by order of the United States Court of Appeals for the Tenth Circuit.

SO ORDERED


UNITED STATES DISTRICT JUDGE

From: cmecfbb@nmcourt.fed.us
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U.S. District Court

District of New Mexico - Version 6.1

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NEW MEXICO DEPARTMENT OF
GAME AND FISH,

Petitioner,

vs.

UNITED STATES DEPARTMENT
OF THE INTERIOR, et al.

Respondents.

No. 16-CV-00462-WJ-KBM

No. 16-CV-00440-WJ-KK

Pete V. Domenici U.S. Courthouse
Bonito Courtroom

Albuquerque, New Mexico

Thursday, May 26, 2016

1:30 P.M.

TRANSCRIPT OF PROCEEDINGS
MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE WILLIAM P. JOHNSON
UNITED STATES DISTRICT JUDGE

Reported by: MARY K. LOUGHRAN, CRR, RPR, NM CCR #65
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Proceedings recorded by mechanical stenography; transcript
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NM DEPT. OF GAME AND FISH v. US DEPT. OF THE INTERIOR
Motion for Preliminary Injunction 5-26-2016

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20 Also Present: JUSTIN TADE, Associate
21 U.S. DEPARTMENT OF THE INTERIOR
22 Regional Solicitors Office

23 SHERRY BARRETT, Coordinator
24 U.S. FISH AND WILDLIFE SERVICE
25 Mexican Wolf Recovery

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I N D E X

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* * * * *

1 (In Open Court at 1:51 p.m.)

2 THE COURT: This is the New Mexico Department of Game
3 and Fish, Petitioner, vs. the United States Department of the
4 Interior, et al., Respondents, 16-CV-440.

5 would counsel enter their appearances for the record.

6 MR. WEILAND: Your Honor, Paul Weiland for the
7 Department of Game and Fish. And with me at counsel table is
8 Matthias Sayer, the Department's general counsel.

9 MS. GROHMAN: Your Honor, Karen Grohman for the
10 Respondents. With me at counsel table is Andrew Smith and
11 Cliff Stevens from the Department of Justice, Sherry Barrett,
12 the Mexican Wolf Recovery Coordinator for Fish and wildlife,
13 and Justin Tade, an associate from the Regional Solicitors
14 Office of the United States Department of the Interior.

15 THE COURT: My apologies. The 1:00 telephone
16 conference went longer than anticipated, so that's why I'm
17 running behind.

18 This is on the docket for the Petitioner's Motion for
19 Preliminary Injunction, and it's denominated "and Temporary
20 Restraining Order." But Mr. Weiland, since the Respondents are
21 here and have notice, really what this is is a Motion for a
22 Preliminary Injunction; correct?

23 MR. WEILAND: Yes, I agree, Your Honor.

24 THE COURT: Okay. Let me first -- one of the
25 preliminary issues that was raised by the Respondents was a

1 MR. STEVENS: Your Honor, we are here on an emergency
2 motion where the burden of proof is upon the Petitioner to make
3 certain showings, and I want to address the facts on those.
4 But I think there's some background information here, Your
5 Honor. There's a larger story to what's happening. And
6 frankly, some of Petitioner's recounting of that is not
7 accurate.

8 what's been happening is, the Service has been
9 working to establish a wild population in New Mexico and
10 Arizona, you know, back to 1998. And they didn't know whether
11 that was going to succeed or not. They have succeeded in going
12 from zero wolves to about 100 wolves, but the objective from
13 the 1982 recovery plan that Mr. Weiland is referring to was not
14 just to get to 100 wolves, it was to get to a viable
15 self-sustaining population. That's right out of the recovery
16 plan.

17 THE COURT: What's a viable self-sustaining
18 population?

19 MR. STEVENS: It means a population that, if you left
20 it alone, it would -- you know, you don't have to keep making
21 -- you don't have to supplement it with other wolves, with
22 releases, to keep its genetics up, to keep its numbers up. You
23 can get to a point where if you take away the protections of
24 the Endangered Species Act, you don't have to do what the
25 Service is trying to do.

1 And all the wolf biologists say the problem is, it's
2 not viable with its current genetic makeup. It's an inbreeding
3 situation. All of these wolves ultimately came from like seven
4 wolves that were left in the Seventies and the Eighties, and so
5 in the population, there's too much inbreeding, too much
6 relatedness.

7 So what the Service has to do is go to the captive
8 population and genetically, very carefully, select wolves that
9 have different genes, and then introduce those and get that
10 gene pool up. And all the scientists are saying, we have to
11 improve that, otherwise the population is not going to make it.

12 THE COURT: So is there a number associated with
13 that?

14 MR. STEVENS: A number of, what, Your Honor?

15 THE COURT: I mean, I've heard the number 300 and
16 some wolves. In other words, is there a number associated with
17 that so-called viable self-sustaining population?

18 MR. STEVENS: There is. The current science, which
19 the Service very carefully examined for that 2015 10(j) rule
20 that's being challenged in Arizona, and actually has a lot of
21 overlap with this case -- I'll get to that in a minute -- but
22 the Service did a revision, a big effort, and looked at all the
23 science. It did a big environmental analysis of all the
24 impacts on elk and on cattle, the whole nine yards. Got the
25 input of the states on this. The Service did a very big effort

1 really to figure out, how are we going to get this population
2 to where it needs to be.

3 And what it found, to answer your question, is we
4 need a population of around 300 wolves. But it's not just the
5 number, they have to have the right level of genetic fitness.
6 And, in fact, if we ramp up the wolf population to 300 and it
7 stays genetically challenged, it's going to be even harder to
8 fix that problem later.

9 So the Service is trying to -- these releases are
10 critically important. This is what the science shows. They
11 point to a couple of phrases in a declaration when really
12 what's behind this is not a declaration, it's years of work by
13 the Service that went into that 2015 10(j) rule. It was
14 peer-reviewed by wolf scientists. And you can read that rule.
15 It says, we need to do these releases to recover this species.

16 Now, one thing it says, though, Your Honor, is that
17 getting this one population, it's probably not going to be
18 enough. So Mr. Weiland was referring to this recovery plan
19 that's coming. I think the State is a little bit mistaken
20 about really what that's about. They seem to be thinking that,
21 oh, that's going to have more detail about how we're managing,
22 you know, this current wild population. That's actually
23 completely wrong.

24 How we're going to manage this current population is
25 in that 10(j) rule. What that 10(j) rule says is, we need

1 about 300 wolves. We need to get what are called one to two
2 affected migrations, which is this gene interjection, per year.
3 We do enough releases so it has information about how many
4 releases they're going to do to get that -- how many
5 interchanges they're going to get, what number of wolves you
6 need. It's a very comprehensive detailed plan on how to manage
7 this population.

8 The State of New Mexico Code says, we need a
9 management plan to grant the permit. That is the management
10 plan. The recovery plan is not the management plan for this
11 population. That's just completely wrong. The recovery plan
12 is about the next step, which is really not this population,
13 it's really, you know, what other populations do we need. The
14 Service has a whole team of biologists, including biologists
15 from the Petitioner and from Colorado and -- I mean, they're
16 working with the states to figure out what's happening down the
17 road.

18 But the Service has provided to the State very
19 detailed information about how many wolves are going to be on
20 the ground over the next 13 years. So in this document there
21 is, by year, Year 2, Year 3, Year 4, here's how many wolves
22 we're projecting we're going to have. I mean, frankly, that's
23 more than enough for them to manage their elk population.

24 There's two elk -- these wolves are all going into
25 the Gila National Forest. Federal land. And there's two elk

1 herds there. There is a greater Gila herd and a lesser Gila
2 herd. And we know how many wolves are going to be in that area
3 for the reintroduced population over the next 13 years, and
4 it's not going to go above 300. So the State should be able to
5 fully manage that elk population.

6 And the other thing is, Your Honor, the data that
7 their own website shows is that the elk population is going up.
8 So wolves are -- and I can put this on the Elmo. This is from
9 their own website. This is the elk in 2011. 18,580 elk, and
10 wolves, 35. You can see the elk population going up to around
11 24,000 as the wolf population goes up to 54. So the State has
12 a lot of information about what kind of impacts there are.

13 The 10(j) rule, this big document, tells you how many
14 wolves you're going to have, as near as you can project these
15 things. I mean, one thing you have to keep in mind is that
16 there's no perfect information about -- one thing the State
17 said in their permit denial is, well, we don't know how many
18 releases there are going to be, we don't know when those are
19 going to happen. well, there's a lot of imprecision in this,
20 Your Honor. Half the wolves that you reintroduce die or don't
21 make it.

22 They're working on this new process called
23 cross-fostering where you don't just put a whole pack in, you
24 take newly born pups from captivity and you put them into a den
25 that's just had pups in the wild. This is a new process that

1 straddles two states, so how are we going to know how many are
2 in one state? It ain't happening.

3 They also are leaping into talking about a longer
4 term harm here from what the Government is doing, and we
5 dispute that. But that's not relevant to an irreparable harm
6 motion. Some of these things -- they're talking about hundreds
7 more releases. There's only a maximum of 13 happening before
8 the season is over, and then the next releases are next year.
9 Next May, next June. Thank you, your Honor.

10 THE COURT: Mr. Weiland, this was your motion, so
11 I'll give you the last word if there's anything else you want
12 to state.

13 MR. WEILAND: You've probably heard enough, Your
14 Honor. Thank you.

15 THE COURT: All right. I'll take a short recess.
16 I'll be back in about 30 minutes.

17 (Recess was held from 3:00 until 3:52 p.m.)

18 THE COURT: All right, this matter was well briefed
19 and well argued today. I've got the same dilemma that I did
20 when I first started looking at this, and that's really
21 encapsulated in 43 CFR Section 24.4(i)5.

22 It states: "Federal agencies of the Department of
23 the Interior shall consult with states and comply with state
24 permit requirements in connection with the activities listed
25 below, except in instances where the Secretary of the Interior

1 determines that such compliance would prevent him from carrying
2 out his statutory responsibilities."

3 In some ways, this language -- is this so broad that
4 every time that there is to be a release of a wolf that a state
5 doesn't approve of, then the Secretary gets to do it anyway,
6 because otherwise that would prevent him from carrying out his
7 statutory responsibilities? But if that's the law, then this
8 whole notion about the Department of the Interior consulting
9 with the states and complying with state permit requirements,
10 that, in effect, becomes a paper tiger, because then any time a
11 state and the Fish and wildlife Service disagree, what the
12 state has to say about it is of no consequence because then the
13 Secretary can say, well, he has to carry out his statutory
14 responsibilities.

15 One thing that I will note is that this part of the
16 CFR, this isn't the State of New Mexico, this is the Department
17 of the Interior's regulation, so there has to be some meaning
18 in the notion that the Department of the Interior shall consult
19 with the states and comply with the state permit requirements.

20 Anyway, I'm going to take this under advisement. I
21 realize there's a need, that the parties need a resolution on
22 this. I'll try to get a written decision out in one to two
23 weeks, and then we'll see where we go from there.

24 So with that, we'll be in recess. Thank you.

25 (Proceedings adjourned at 3:55 P.M.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NEW MEXICO DEPARTMENT OF
GAME AND FISH,

Petitioner,

vs.

UNITED STATES DEPARTMENT
OF THE INTERIOR, et al.

Respondents.

No. 16-CV-00462-WJ-KBM

No. 16-CV-00440-WJ-KK

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Dated this 21st day of June, 2016.

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