No. 16-2202 (consolidated with 16-2089)
ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NEW MEXICO DEPARTMENT OF GAME AND FISH,

Plaintiff-Appellee,

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants-Appellants,

and

DEFENDERS OF WILDLIFE, *et al.*,

Intervenor-Defendants-Appellants.

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

OPENING BRIEF FOR THE FEDERAL APPELLANTS

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STATEMENT OF RELATED CASES

This appeal has been consolidated with an appeal from the same district-court judgment, docketed as 10th Cir. No. 16-2189, filed by Intervenor-Defendants-Appellants Defenders of Wildlife, Center for Biological Diversity, WildEarth Guardians, and New Mexico Wilderness Alliance ("Defenders").

Before the district court, Plaintiff-Appellee New Mexico Department of Game and Fish ("New Mexico") asserted at various points that it was challenging the Department of the Interior's 2015 Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512 (Jan. 16, 2015), the so-called revised "10(j) rule." Aplt. App. at 140. That rule has been challenged in three consolidated actions pending in the U.S. District Court for the District of Arizona. *See Ctr. for Biological Diversity v. Jewell*, No. 4:15-cv-00179, *WildEarth Guardians v. Ashe*, No. 4:15-cv-00285, *Ariz. and N.M. Coal. of Ctys. for Econ.Growth v. U.S. Fish & Wildlife Serv.*, No. 4:15-cv-0019. The rule has also been challenged in an additional, unconsolidated action also pending in the U.S. District Court for the District of Arizona. *Safari Club Int'l v. Jewell*, 4:16-cv-00094. While the Federal Defendants-Appellees in the instant appeal,[1] collectively referred to herein as "Interior," maintained that New Mexico had

[1] Department of the Interior; Sally Jewell, in her official capacity as Secretary of the Interior; Fish and Wildlife Service; Daniel M. Ashe, in his official capacity as Director of the Fish and Wildlife Service; and Dr. Benjamin Tuggle, in his official capacity as Southwest Regional Director for the Fish and Wildlife Service.

not pleaded a challenge to the 10(j) rule itself, they requested that the district court transfer this case to the District of Arizona to be consolidated with the pending challenges there if the court determined that New Mexico did in fact articulate a challenge to the 10(j) rule. Aplt. App. at 103. The district court did not address that request in its order granting preliminary injunctive relief.

GLOSSARY

APA	Administrative Procedure Act
EIS	Environmental Impact Statement
ESA	Endangered Species Act

INTRODUCTION

Preliminary injunctions are extraordinary remedies, available only where a plaintiff successfully demonstrates that it meets four stringent requirements—including that, absent an injunction, the plaintiff will likely suffer irreparable injury *before the court can reach a final decision on the merits*. Here, Interior appeals from a preliminary injunction giving the state of New Mexico power to block Interior from taking action needed to conserve the endangered Mexican wolf. Specifically, the preliminary injunction prevented Interior from releasing on federal lands in New Mexico up to three adult captive-bred Mexican wolves and less than ten pups this past summer. And, unless lifted, it will prevent Interior from releasing any wolves next spring and summer, as well.

Interior has explained that the releases it had expected to conduct in 2016 and hopes to conduct in 2017—though limited in number—are critical to combatting the dwindling genetic diversity of the country's only wild population of Mexican wolves before inbreeding sends the population into peril. New Mexico, by contrast, failed to demonstrate how these limited additions to the Mexican wolf population could conceivably impact prey species managed by the state (*e.g.,* elk and other wild ungulates) while litigation is pending, given unchallenged environmental analysis showing that even *tripling* the current population of Mexican wolves would have no significant impact on these prey species. The district court granted a preliminary injunction anyway—one that threatens the survival in the wild of a protected species,

based entirely on the court's decision to impose a restrictive and erroneous reading on an Interior policy. Rather than risk another year (or more) of stagnation in the vulnerable Mexican wolf population while the case winds through the district court, Interior seeks this Court's reversal of the preliminary injunction.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. It granted New Mexico's preliminary-injunction motion on June 10, 2016. Defenders and Interior filed timely notices of appeal on July 28 and August 8, 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

1. Whether the district court abused its discretion by granting a preliminary injunction in the absence of evidence showing that New Mexico would suffer irreparable harm before the court reaches a final decision on the state's claims.

2. Whether the district court abused its discretion in finding that the balance of harms favored injunctive relief.

3. Whether the district court abused its discretion in finding that the public interest favored an injunction preventing Interior from taking action to decrease an endangered species' risk of extinction from the wild.

4. Whether the district court erred in determining that New Mexico was likely to succeed on the merits.

STATEMENT OF THE CASE

I. Legal background

A. The federal government's historic role in managing scarce wildlife

It is true that states "play a most important role in regulating wildlife" within their borders. *Gibbs v. Babbitt*, 214 F.3d 483, 499 (4th Cir. 2000). But the federal government has its own critical role in managing wildlife—particularly when it comes to conserving scarce resources for the good of the nation as a whole. As the Supreme Court has recognized, conserving wildlife is not only a matter of state concern, but is a "national interest of very nearly the first magnitude," which the federal government may act to advance. *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (Holmes, J.). Moreover, with regard to wildlife on *federal* lands, the Supreme Court has found that the federal government's "complete power" over public lands includes "the power to regulate and protect the wildlife living there," even when states would prefer a different management regime. *Kleppe v. New Mexico*, 426 U.S. 529, 540–41 (1976); *see also Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002) (rejecting state's claim that it had a constitutional right to manage wildlife on federal land).

B. The Endangered Species Act

The Endangered Species Act ("ESA") confers on the federal government wildlife-management responsibilities that are limited both in scope and duration. Limited in scope, because the federal government only has authority to manage those species that qualify for listing under the act. *See* 16 U.S.C. § 1533(a), (b) (providing

process and criteria for listing). Limited in duration, because the aim of federal management under the ESA is to recover the species to healthy levels, such that it can be delisted and management responsibility returned to the states. *See Gibbs*, 214 F.3d at 503. Within this specified scope and duration, however, the federal government's authority over listed species is paramount and preempts contrary state regulation. *See id.* at 486–87, 489 (upholding a federal regulation limiting take of the endangered red wolf on private land, contrary to state law permitting such takes).

Under the ESA, the Secretary of the Interior[2] determines whether a species is "endangered," meaning in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1533(a)(1); *id.* § 1532(6). Once a species is listed, the ESA prohibits any "take" of that species, which includes "harass[ing], harm[ing], pursu[ing], hunt[ing], shoot[ing], wound[ing], kill[ing], trap[ping], captur[ing], or collect[ing], or . . . attempt[ing] to engage in any such conduct." *Id.* §§ 1532(19), 1538.

Section 4(f) of the ESA charges Interior with designing and implementing for listed species a recovery plan that incorporates management actions necessary for the survival and "conservation" of the species—defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* §§ 1532(3), 1533(f). Preparation of a recovery plan is a complex task,

[2] Or, for marine species not here at issue, the Secretary of Commerce. *See* 16 U.S.C. § 1532(15); 50 C.F.R. §§ 17.11(a), 402.01(b).

which requires Interior to not only describe "site-specific management actions," but also to develop "objective, measurable criteria which, when met, would result in a determination … that the species be removed from" the list of ESA-protected species. *Id.* § 1533(f)(1)(B). While Interior is generally required to develop recovery plans, it need not promulgate or revise recovery criteria before taking action to conserve a species under other sections of the ESA. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989–90 (9th Cir. 2010). To the contrary, when managing listed species, Interior is not bound by the contents of a recovery plan. *See Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012).

One particular type of conservation action that ESA Section 10(j) expressly authorizes Interior to pursue is the "release … 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). Such populations are referred to as "experimental" populations. 50 C.F.R. § 17.80. Before authorizing the release of an experimental population, Interior must "by regulation [commonly called a 10(j) rule] 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." 16 U.S.C. § 1539(j)(2)(B). To the extent the experimental population is deemed non-essential, that designation relaxes the protections of the ESA that are otherwise applicable to the reintroduced population. *Id.* § 1539(j)(2)(C).

A "non-essential" population may still be necessary if the species has any hope of recovering. *See id.* § 1539(j)(2)(B). The statute contains no requirement that Interior promulgate or revise a recovery plan before promulgating a 10(j) rule.

The ESA requires that all federal agencies, including Interior, "utilize their authorities in furtherance of the purposes of" the act. *Id.* § 1531(c)(1); *see also* 16 U.S.C. § 1534(a). One of those express purposes is "to provide a program for the conservation of … endangered species and threatened species." *Id.* § 1531(b).

C. Interior's policy on cooperation with state permit regimes

Although nowhere directed to do so by the ESA, to promote comity, Interior has voluntarily chosen to confer with state permitting authorities before releasing wild species on federal land. In published policies "clarify[ing] State and Federal responsibilities" for actions taking place on federal land, Interior instructs that the agency "shall" "comply with State permit requirements" when "carrying out … programs involving reintroduction of fish and wildlife." 43 C.F.R. § 24.4(i)(5); 48 Fed. Reg. 11,642 (Mar. 18, 1983).[3] The policy does *not* require Interior to abide by a state's permitting decision in all cases, however. Instead, it contains an express exception,

[3] Interior has consistently treated this pronouncement as policy guidance, rather than a binding rule. *See* 48 Fed. Reg. at 11,642 (noting that the policy was "not subject to [] informal rulemaking requirements," although Interior voluntarily submitted the policies for public comment). Nevertheless, in this case, Interior's actions were consistent with 43 C.F.R. § 24.4(i)(5).

releasing Interior from any obligation to comply "in instances where the Secretary of the Interior determines that such compliance would prevent [her] from carrying out [her] statutory responsibilities." *Id.* § 24.4(i)(5).[4]

II. Factual background

A. The endangered Mexican wolf

The Mexican wolf is a subspecies of gray wolf. 80 Fed. Reg. at 2514. The smallest subspecies of American gray wolf, adult Mexican wolves weigh about 50 to 90 pounds, with a length of five to six feet and a shoulder height of 25 to 32 inches. *Id.* The Mexican wolf's coat typically contains patches of black, brown or cinnamon, and cream, with a light underbelly. *Id.* Historically, Mexican wolves occupied forested mountain habitats and preyed on hoofed mammals ("ungulates"), including elk. *Id.* Although the species formerly ranged throughout the southwestern United States and northern and central Mexico, it was extirpated from the wild in the United States by the 1970s and in Mexico by the 1980s. *Id.* The species' decline was driven by human efforts to decrease or eradicate the population—including by trapping, shooting, and even poisoning the animals. Aplt. App. at 50–52. Interior first listed the Mexican wolf as endangered in 1976. 80 Fed. Reg. at 2513. New Mexico supported Interior's decision to list the species. *See* 41 Fed. Reg. 17,736, 17,737–38 (Apr. 28, 1976).

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[4] The Secretary has delegated this authority to the Assistant Secretary for Fish and Wildlife and Parks, who has re-delegated this authority to the Director of the Fish & Wildlife Service. *See* 209 DM 6.1; 242 DM 1.1.

B. Interior's establishment and management of the Mexican wolf experimental population

Following Interior's listing of the Mexican wolf, the agency promulgated a recovery plan for the species in 1982. *See* Aplt. App. at 46. Although ESA recovery plans generally include criteria defining when the species will be sufficiently recovered so as to be delisted, *see* 16 U.S.C. § 1533(f)(1)(B)(ii), Interior determined that, given the Mexican wolf's particularly depressed state, it could not yet foresee recovery for the species. Aplt. App. at 53; *see also* 80 Fed. Reg. at 2514. Instead, the recovery plan focused on the immediate task of "conserving and ensuring the survival" of the species. Aplt. App. at 53. To that end, the plan recommended a two-prong strategy: breeding the few wolves that were surviving in captivity, and then reintroducing members of the captive-bred population to the wild. *Id.*; 80 Fed. Reg. at 2513. The plan envisioned re-establishing "a viable, self-sustaining population of at least 100 Mexican wolves in the middle to high elevations of a 5,000-square-mile area within the Mexican wolf's historic range." Aplt. App. at 53. Consistent with that plan, and after many years of captive breeding, in 1998 Interior promulgated a 10(j) rule establishing an experimental wild population of Mexican wolves, with the goal of producing a wild population of 100 wolves in New Mexico and Arizona. *See* 63 Fed. Reg. 1752, 1754 (Jan. 12, 1998).

More than a decade later, however, the progress toward an experimental population of 100 wolves was slower than expected. *See* 80 Fed. Reg. at 2524; U.S.

Fish & Wildlife Serv., Final Environmental Impact Statement for the Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf (Nov. 2014), at 1-19, *available at* https://www.fws.gov/southwest/es/mexicanwolf/NEPA_713.cfm [hereinafter EIS].[5] Reviews of the program "universally identified" the low number of releases and the original 10(j) rule's limitations on where wolves could disperse as the reason for the smaller-than-expected growth. EIS at 1-19.

Also troubling was evidence of a high degree of relatedness in the experimental population and the resulting potential for inbreeding. 80 Fed. Reg. at 2517. Decreased genetic diversity—and the inbreeding between closely related wolves that results—compromises the health of a population by causing smaller litter sizes, lower birth weights, and greater mortality in infant pups. EIS at 1-21. Greater mortality can, in turn, further reduce genetic variation, leading to exacerbated mortality in pups, and ultimately sending the species into a self-reinforcing state of decline called an "extinction vortex." *Id.* at 1-19; *see also* Aplt. App. at 128–29.

Starting a few years into the captive-breeding program, Interior had begun breeding the captive population to retain its genetic diversity. EIS at 1-20. But Interior

[5] This Court may take judicial notice of the contents of the 2014 Environmental Impact Statement, an agency publication available on the Fish & Wildlife Service's website. *See N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (taking notice of falcon-population information available on agency websites).

had not released enough of the relatively more-diverse captive wolves into the wild population to produce the number of "effective migrants"—*i.e.*, released wolves that enter a population and go on to reproduce successfully—needed to "establish or maintain adequate genetic variation" in that population. *Id.* at 1-22. Several reviews of the reintroduction program documented evidence of strongly depressed litter sizes due to inbreeding between closely related wolves in the wild population. *See, e.g.*, *id.* at 1-21; 78 Fed. Reg. 35,664, 35,706 (June 13, 2013). Without infusions of genetic diversity from the captive population, Interior anticipates that the wild population's genetic health will continue to stagnate or worsen, that the impacts of inbreeding will accumulate, and that the population will be at increased risk of extinction. Aplt. App. at 128–29; *see also* EIS at 1-21.

In 2015, Interior revised the 10(j) rule for the experimental population to address these barriers to the wild population's stability. *See* 80 Fed. Reg. at 2517. Like the original 10(j) rule, the revised rule is not designed to unilaterally bring the Mexican wolf population to full recovery. *See id.* at 2516–17. It is instead designed to bolster the vulnerable population, in hopes of ensuring that the population will persist and be able to "contribute to the future population goal" for range-wide recovery of the species, once that goal is set. *Id.* at 2517. Interior plans to promulgate a revised recovery plan, including recovery criteria, for the Mexican wolf in November 2017. *See* Mot. to Enter Stipulated Settlement Agreement, *Defenders of Wildlife v. Jewell*, No. 4:14-cv-02472 (D. Ariz. Apr. 26, 2016), ECF No. 50.

In the meantime, the revised 10(j) rule makes several changes to Interior's management of the experimental population. First, consistent with criticisms that the original 10(j) rule allowed reintroductions over too limited an area, the revised rule calls for a gradual expansion of the areas in New Mexico and Arizona where Interior can release wolves. 80 Fed. Reg. at 2519–24. This expansion is critical, because the agency needs flexibility to go to those locations where wild wolves have settled when releasing captive-bred pups into wild dens—a process known as "cross-fostering." *See* Aplt. App. at 124–25. The location of already-existing wild packs also informs where releases of adult wolves and their pups can occur. *See* Aplt. App. at 126.

Second, the revised 10(j) rule roughly triples the population objective for the experimental population, to about 300 to 325 wolves, and calls for regular migration of captive wolves into the wild population. *Id.* at 2516–17. According to the best available scientific literature, a population of 300 to 325 wolves with one to two effective migrants per four-year generation would carry an extinction risk that Interior deems acceptably low. *Id.* at 2524. Ensuring two *effective* migrants per generation requires releasing more than two wolves every four years; indeed, based on Interior's experience with the experimental population, only about two out of every ten wolves released will become effective migrants. *Id.* Thus, to meet its population objectives, Interior contemplates releasing at least two captive-bred packs, each consisting of an adult pair with several pups, during the first two four-year generations following the rule's promulgation, followed by additional releases in later years. *Id.*

Third, the rule revises procedures allowing New Mexico and Arizona to protect their local ungulate herds from potential threats caused by the expanding wolf population. To be clear, expanding the wolf population to 300 to 325 wolves is unlikely to harm New Mexico's large ungulate herds; indeed, Interior's environmental analysis of the revised 10(j) rule shows that, when and if the experimental population reaches the 300-to-325-wolf objective, the ratio of wolves to elk across the wolf's habitat will still be below the threshold at which the scientific literature would anticipate impacts on the elk population to occur. *See* EIS at 4-15. Nonetheless, Interior has provided a mechanism for mitigating even the localized effects wolf predation may have on particular ungulate herds by allowing states to request wolf removal—by capture and translocation or even by lethal means—if they "determine[] that Mexican wolf predation is having an unacceptable impact to a wild ungulate herd." 80 Fed. Reg. at 2561. What constitutes an "unacceptable impact" to ungulates is for the states themselves to determine, although any removal request is subject to peer review and is ultimately Interior's to decide. *Id.* at 2558, 2561–62.[6] With these safeguards in place, even a population of 300 to 325 wolves is expected to have no significant impact on New Mexico's ungulates. EIS at 4-15; *see also* 80 Fed. Reg. at 2542.

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[6] Interior has power to authorize these takes—which the ESA would otherwise prohibit, *see* 16 U.S.C. § 1538—because the experimental population is considered "nonessential" to the Mexican wolf's survival, given that the captive population provides a backstop against the species' total extinction. *See* 63 Fed. Reg. at 1756–57.

C. Interior's efforts to cooperate with New Mexico

For years, New Mexico supported Interior's efforts to conserve the Mexican wolf by re-establishing and growing the experimental population. *See* 41 Fed. Reg. at 17,738; Aplt. App. at 55 (commending Interior's 1982 recovery plan as a "carefully written document that presents a logical approach that will hopefully result in the recovery of the Mexican Wolf."). In 2011, however, more than a decade into the reintroduction program, New Mexico changed course. After signing onto a memorandum of understanding on Mexican wolf conservation with Interior and others in both 2003 and 2010, the state withdrew from the agreement and suspended participation in Mexican wolf-recovery efforts. Aplt. App. at 78. Then, New Mexico informed Interior that, in the state's view, state regulations required Interior to apply for a state permit before it could release any more wolves within the state's borders, even on federal land. Aplt. App. at 123; *see* N.M. Code R. § 19.35.7.8 (declaring it "unlawful to import any live non-domesticated animal into New Mexico without first obtaining appropriate permit(s)"); *id.* § 19.35.7.19 (prohibiting any person from "releas[ing] from captivity an imported animal into New Mexico except by obtaining a release permit"); *see also id.* § 19.31.10.11 (declaring it "unlawful for any person or persons to release … any mammal … without first obtaining a permit").

To promote comity, and consistent with its policy expressed in 43 C.F.R. § 24.4(i)(5), Interior agreed to submit applications to New Mexico before releasing any wolves within New Mexico during the 2015 breeding and release season, which

stretches from early spring to July. Aplt. App. at 78, 124. When New Mexico denied Interior's application, Interior agreed to go through the state's administrative appeal process. Aplt. App. at 124. Interior abstained from releasing any wolves in New Mexico while the appeal worked its way through the state agency. *Id.*

In fall 2015, New Mexico denied Interior's administrative appeal. *Id.*; *see also* Aplt. App. at 56–57. In refusing to grant Interior the permits it sought, New Mexico did not question the need for releasing new wolves into the experimental population. Instead, New Mexico cited the fact that Interior has not yet promulgated a revised recovery plan setting specific recovery criteria for the Mexican wolf. Aplt. App. at 65–69. New Mexico did not dispute that Interior's actions were consistent with the ESA, but nonetheless held that as a matter of *state* law, the state would not permit releases unless the federal agency followed the state's preferred order of operations and finalized recovery criteria first. *See* Aplt. App. at 75–76.

D. Interior's decision to release Mexican wolves on federal land over New Mexico's objection

In October 2015, following the denial of Interior's administrative appeal, the Director of the U.S. Fish & Wildlife Service determined that Interior could and would proceed with releases of Mexican wolves in 2016, notwithstanding New Mexico's refusal to issue a permit. Aplt. App. at 78. In a letter informing New Mexico of this decision, the Director stated that, under 43 C.F.R. § 24.4(i)(5), Interior need not comply with state permit requirements if compliance would prevent the agency from

carrying out its "statutory responsibilities." *Id.* The Director explained that adhering to New Mexico's permit denial would prevent the agency from doing just that, because it would "preclude[]" the agency "from taking actions to promote the conservation of Mexican wolves." *Id.* Specifically, relying on the environmental analysis accompanying the revised 10(j) rule, the Director found that Interior "needs to improve the genetic diversity and reduce the kinship of Mexican wolves in the wild to achieve recovery." *Id.* The agency cannot do so "without the ability to release wolves from captivity in the Mexican Wolf Experimental Area in both New Mexico and Arizona." Aplt. App. at 78–79. The Director thus concluded that Interior was "left with no option except to continue to move forward with wolf recovery efforts" without state consent. *Id.*

Interior subsequently promulgated a plan for introducing captive Mexican wolves into the experimental population during spring and summer 2016. Aplt. App. at 124; *see also* Aplt. App. at 80–89. Interior planned to cross-foster up to six pups from the captive population into wild dens in New Mexico during spring and early summer. Aplt. App. at 124–25. The agency also planned to release one pair of adult Mexican wolves into the state, along with their pups, in June or July 2016, and possibly to re-release an additional single adult wolf. Aplt. App. at 126–27. All of these releases were to take place on federal land. Aplt. App. at 124–27.

III. Procedural background

A. New Mexico's lawsuit and motion for preliminary injunction

On May 20, 2016, New Mexico sued Interior and simultaneously filed a motion for preliminary injunction to block the limited number of introductions planned for spring and summer 2016. Aplt. App. at 23, 40–41. New Mexico claimed that Interior's decision to release the wolves on federal land without state permission violated the Administrative Procedure Act ("APA"), both because it was inconsistent with Interior's policy set forth at 43 C.F.R. § 24.4(i)(5) and because it was arbitrary and capricious for Interior to release additional Mexican wolves without first revising its species recovery plan. Aplt. App. at 19–21. New Mexico also claimed that the planned releases violated state law. Aplt. App. at 16–18.

In support of its motion, New Mexico submitted a declaration from the Director of its Department of Game and Fish. Aplt. App. at 42. According to Director Sandoval, "Mexican wolves are apex predators that prey primarily on elk and other ungulate species," which the state manages on behalf of its people. Aplt. App. at 44. Director Sandoval asserted, without elaboration, that "[i]ncreasing the population of wolves *has the potential to affect* predator-prey dynamics, and *may affect* other attributes of the ecosystem." *Id.* (emphasis added). Director Sandoval did not attempt to trace the particular releases scheduled to occur while litigation was pending to any specific effect on the state's ungulate herds or hunting program. *See id.* Nor did Director

Sandoval provide any examples of past impacts to the state's management efforts caused by the Mexican wolf population. *See id.*

Interior, by contrast, explained in a declaration from its Mexican Wolf Recovery Coordinator, that postponing the particular releases Interior planned for 2016 would negatively impact the experimental population by allowing the population's genetic health to "stagnate and possibly deteriorate" for another year, increasing "the risk of extinction of Mexican wolves in the wild." Aplt. App. at 127–29. Interior further explained that its power to cure the population's genetic problems by adding new wolves becomes less effective with each passing year, because "[a]s the population grows larger, more releases of genetically diverse animals will be needed to achieve the same degree of genetic diversity benefit for the overall population." Aplt. App. at 128–29.

B. The district court's order

On June 10, 2016, the district court granted a preliminary injunction prohibiting Interior from releasing or importing any wolves into New Mexico, even on federal land, without first obtaining the state's permission. Aplt. App. at 166–67. In the opinion justifying its order, the court determined that New Mexico had

standing,[7] and then found that preliminary injunctive relief was appropriate because New Mexico had met the four well-established requirements.

First, the district court found that New Mexico had demonstrated "a significant risk that [it] will experience harm," which is "likely to occur before the district court rules on the merits." Aplt. App. at 163 (quoting *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009)). Specifically, the court identified the "release of wolves in violation of the State permitting process" and "disruption to the State's comprehensive wildlife management effort" as sufficient injuries. Aplt. App. at 164. But the court did not articulate how the limited number of releases scheduled to occur while litigation was pending would themselves cause irreparable injury, especially in light of Interior's unrebutted analysis showing that even *tripling* the wolf population will not significantly impact New Mexico's ungulates. *See* Aplt. App. at 113, 129–31.

Second, the district court found that the balance of equities favored injunctive relief. The court recognized that a preliminary injunction would "disrupt[]" Interior's planned releases, which Interior explained were needed to begin remedying the population's genetic problems. Aplt. App. at 165. But the court nevertheless found

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[7] In this appeal, Interior no longer challenges whether New Mexico has a sufficient injury to satisfy Article III, even though the state has not demonstrated an *irreparable* injury in the near term. The district court however, held that New Mexico had standing not only to vindicate its own injury, but also to sue as *parens patriae* on behalf of its citizens. Aplt. App. at 150. The district court's *parens patriae* holding is contrary to this Court's precedent and is not a proper basis for jurisdiction. *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992); *see also Wyoming v. U.S. Dep't of the Interior*, 674 F.3d 1220, 1231 (10th Cir. 2012).

that an injunction was warranted because an injunction would not "necessarily" prevent Interior from releasing wolves: In the district court's view, Interior could always go back to the state, seek a permit, and lawfully release wolves under that permit. *Id.* The court did not explain why the state might change its mind and grant Interior's requested permit if Interior submitted a new application, given that Interior has not yet finalized long-term recovery criteria for the Mexican wolf. *See id.*

Third, the district court found that a preliminary injunction would not be adverse to the public interest, again relying on its assumption that "[b]y seeking and receiving a State permit for the releases," Interior could continue to release wolves, even while the preliminary injunction was in effect. Aplt. App. at 166.

Finally, the district court found that New Mexico was likely to succeed on the merits of its claim that Interior's decision to release wolves without state permission was inconsistent with Interior policy expressed in 43 C.F.R. § 24.4(i)(5). Aplt. App. at 161–63. The court gave no deference to Interior's interpretation of its own regulation, which was set out in the Director of the Fish & Wildlife Service's October 2015 letter. *See* Aplt. App. at 78. Instead, it imposed its own reading on Interior's policy, holding that the exception Interior cited only applied in situations where compliance with state law would prevent the agency from performing a mandatory statutory duty. Aplt. App. at 161–62. Convinced that Interior could not show any such mandatory duty here, the court found that New Mexico was likely to succeed on its claim that Interior was obligated to comply with New Mexico's state permit regulations. Aplt. App. at

162. The court brushed aside potential federalism problems with this finding, based on its belief that Interior's own policy compelled this outcome. *Id.*

C. The preliminary injunction's effect on the Mexican wolf

Interior was only able to cross-foster two pups in New Mexico in 2016 before the district court's injunction issued. Aplt. App. at 122, 126. Interior was not able to release *any* adult wolves. *See* Aplt. App. at 126–27. Nor did Interior release any adults or pups in 2015, while New Mexico considered Interior's permit application. Aplt. App. at 124. And unless the preliminary injunction is lifted by this Court before spring 2017, Interior will be blocked from releasing any adults or pups in New Mexico during the 2017 release season, as well. That will mark three years—almost an entire wolf generation—with next to no migrants into the vulnerable population.

SUMMARY OF ARGUMENT

Time and again, this Court and the Supreme Court have cautioned that injunctive relief is an extraordinary remedy, only granted when a movant has demonstrated that four requirements are satisfied. Here, the district court entered a preliminary injunction subordinating Interior's responsibilities under the federal ESA to New Mexico's state policies even though *none* of those four requirements was met. The court's conclusions to the contrary defy binding law and assume facts plainly contrary to the record before it.

To begin, the district court abused its discretion in finding that New Mexico has shown that it would suffer irreparable injury in the absence of preliminary

injunctive relief. It is beyond dispute that the movant's burden at the preliminary-injunction stage is not merely to show that it may suffer irreparable injury *someday*, but that it will suffer irreparable injury *before the court can reach a final judgment*. Here, the record showed that the only actions slated to take place while litigation was pending—the release of two to three adult wolves and less than a dozen pups—could have no significant impact on New Mexico's natural resources. New Mexico never rebutted that evidence, offering only conclusory assertions that increasing the wolf population "may" have an unspecified impact on state ungulates, at an unspecified time in the future. The district court plainly erred in finding that such statements satisfy the movant's burden. And to the extent the district court found that the releases would injure New Mexico's sovereignty, that determination was incorrect as a matter of law.

The district court's erroneous irreparable-injury finding infected its balancing of the harms and its assessment of the public interest. But the court's findings on those requirements were an abuse of discretion for independent reasons, as well. With regard to the balance of harms, the district court recognized that its preliminary injunction would prevent Interior from taking actions that the agency deems necessary to conserve an endangered species. But, in weighing the harms, the court discounted the resulting injury to the species by instead assuming that Interior could avoid any harm by seeking—and receiving—permits to release wolves from New Mexico. Nothing in the record supports the district court's assumption.

The district court's determination that the preliminary injunction was in the public interest relied on the same reasoning as its balancing of the harms and was clearly erroneous for the same reasons. The public-interest finding was also an abuse of discretion because it is incompatible with Congress's determination in the ESA that preventing further loss of rare species is of the highest national interest.

Finally, separate and apart from its errors in assessing the impacts of a preliminary injunction, the district court committed legal error in determining that New Mexico was likely to succeed on the merits. The court found that Interior had failed to comply with its own policy on interstate cooperation. But that policy does not oblige Interior to follow state permit law when doing so would "prevent" the agency from "carrying out" its "statutory responsibilities." Interior has reasonably interpreted that policy to exempt it from compliance with New Mexico's permitting decision here, because Interior has a statutory responsibility to safeguard the wild Mexican wolf population, and bending to New Mexico's wishes would prevent the agency from carrying out that responsibility. The law of both this Court and the Supreme Court required the court to defer to that reasonable interpretation of the agency's own regulation. But the court failed to even consider whether deference was due, instead imposing its own restrictive reading on Interior's regulation and determining that New Mexico was likely to win on the strength of that reading. This was error. Because New Mexico is not likely to win on this claim, nor any of its other claims, preliminary injunctive relief was inappropriate.

STANDARD OF REVIEW

Injunctive relief is "an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). To obtain a preliminary injunction, a movant must establish likely irreparable harm. *Id.* at 20. That harm must be "likely to occur before the district court rules on the merits." *RoDa*, 552 F.3d at 1210. In addition to establishing irreparable harm, a movant must show that the balance of equities tips in its favor, that an injunction is in the public interest, and that it is likely to succeed on the merits. *Winter*, 555 U.S. at 20. All four factors must be met for a preliminary injunction to issue. *Id.* This Court reviews a preliminary-injunction order for abuse of discretion, which occurs when the district court commits an error of law or makes clearly erroneous factual findings. *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006). The district court's legal conclusions are reviewed *de novo*. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003).

ARGUMENT

The district court abused its discretion in granting a preliminary injunction.

A. The district court plainly erred in finding that New Mexico was likely to suffer irreparable injury before the court could reach a final judgment.

It is beyond dispute that a party moving for preliminary injunctive relief must establish that it is likely to suffer irreparable injury if a preliminary injunction does not issue. *See Winter*, 555 U.S. at 20. Irreparable injury "must be both certain and great."

Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1250 (10th Cir. 2001). It is not enough that the injury be "merely serious or substantial." *Id.* Nor is it sufficient for the movant to show that the actions it challenges may *one day* result in harm that meets these exacting requirements. Instead, the movant must show that it will likely suffer irreparable injury before the court can reach a final judgment. *RoDa*, 552 F.3d at 1210. A mere "possibility" of irreparable injury during that timeframe will not do; instead, the Supreme Court's "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Movants must generally rely on more than "affidavits alone" to meet that burden, and district courts "should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by plaintiff." *Lane v. Buckley*, -- F. App'x --, No. 15-8111, 2016 WL 1055840, at *3 (10th Cir. Mar. 17, 2016) (unpublished).

Although the district court recited the proper standard in deciding New Mexico's motion, *see* Aplt. App. at 163, the court's conclusion that New Mexico had satisfied its burden is irreconcilable with these well-established requirements.

1. New Mexico did not show it was likely to suffer irreparable injury to its ungulate herds pending a final decision.

New Mexico asserted that, absent a preliminary injunction, it faced irreparable injury, because releases of Mexican wolves "threaten[ed] to disrupt" state management of wildlife, specifically of its ungulate herds. *See* Aplt. App. at 35. But the record that

New Mexico put before the district court did not support the court's conclusion that the particular releases at issue were likely to cause harm.

Interior recognizes that significant damage to wildlife can constitute irreparable injury in some circumstances. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). But Interior planned to release a maximum of three adult wolves in summer 2016, along with less than a dozen pups. Aplt. App. at 124–27. Interior's environmental analysis of the revised 10(j) rule, which New Mexico has not challenged, establishes that even when the Mexican wolf population reaches 300 to 325 wolves, there will be no significant impact on ungulate herds, in part because that rule provides a mechanism by which states can request removal of wolves causing impacts that the state deems unacceptable. Aplt. App. at 130–31; EIS at 4-15.

New Mexico offered no contrary analysis to rebut Interior's showing. Instead, it relied on the declaration of the Director of its Department of Game and Fish. Aplt. App. at 143. But that declaration asserted only that "[i]ncreasing the population of wolves" by an unspecified amount "*has the potential* to affect predator-prey dynamics" in unspecified ways. Aplt. App. at 44 (emphasis added). It neither demonstrated nor even posited any connection between the actual number of releases scheduled and any likely effect on ungulates. *See id.* Indeed, New Mexico's reply in support of its preliminary-injunction motion seemed to acknowledge that the state could not actually show that the scheduled releases would "alter the status quo": The state instead argued that injunctive relief was necessary, because "if [Interior] can move

forward with these unpermitted releases, [it] can presumably move forward with hundreds" more in the future. Aplt. App. at 143. But the number of releases Interior may conduct in future years is not relevant. All that matters at the preliminary-injunction stage is what injury, if any, the movant is likely to suffer before final judgment is rendered. *See Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1260 (10th Cir. 2003) (noting that if movants had only alleged irreparable harm from activities taking place after litigation, "this would be insufficient to justify a preliminary injunction in advance of the trial court's decision on the merits.").

The district court accepted New Mexico's conclusory assertions of unspecified future effects as proof that the state would likely suffer irreparable injury while litigation was pending. Specifically, the court reasoned that "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. App. at 164. In the first place, the record does not show that Interior planned to release wolves without providing notice regarding the "size, location, or number of releases." *Id.* To the contrary, Interior's 2016 release plan already provided many of those details. *See* Aplt. App. at 83–88. And to the extent New Mexico believes it needs more information to adequately plan for the releases, Interior is willing to communicate closely with the state—as it already does.

More centrally, for the reasons above, the district court had no evidence before it linking the scheduled releases to any effect on New Mexico's ungulate-management regime, let alone one serious enough to satisfy the irreparable injury burden. Instead, the unrebutted evidence before it plainly showed that no irreparable injury was likely, and even New Mexico's conclusory declaration suggested only a possibility of harm. On this record, it was an abuse of discretion to find that New Mexico had satisfied the stringent requirements for obtaining preliminary injunctive relief.

2. The releases do not threaten New Mexico's sovereignty.

New Mexico also argued that releases performed in derogation of its permit requirements would cause irreparable injury to its sovereignty. Aplt. App. at 35–36. It is unclear from the district court's decision whether the court relied on this theory in finding that the state met its burden. *See* Aplt. App. at 164 (finding that "the release of wolves in violation of the State permitting process" was an irreparable injury, without clarifying how such releases harmed the state). To the extent the court did rely on this theory, it committed legal error. New Mexico cannot show any injury to its sovereignty because, for reasons explained below, Interior's actions to conserve federally protected species are not subject to state control, and New Mexico may not interfere with them. *See* Point D.1, *infra*. A state has no right to overrule duly promulgated federal law. *See Wyoming*, 279 F.3d at 1227; *see also Kleppe*, 426 U.S. at 545. To the extent the district court found that New Mexico had such a right, it erred.

Because New Mexico failed to establish the requisite likelihood of irreparable injury to either of the interests it asserted, it was not entitled to preliminary injunctive relief. *See Winter*, 555 U.S. at 24.

B. The district court plainly erred in finding that the balance of harms favors an injunction.

The district court likewise abused its discretion in finding that the balance of harms favored a preliminary injunction. In making this finding, the district court relied on both its flawed determination that New Mexico was likely to suffer irreparable injury in the near term and its assumption that a preliminary injunction would not "necessarily" harm the Mexican wolf population. Aplt. App. at 165. Both of those bases lacked a foundation in the record, the former for the reasons already given.

With regard to the latter, Interior demonstrated that being prohibited from releasing wolves in 2016 would exacerbate the already-problematic lack of genetic diversity in the experimental population, increase the risk of inbreeding and extinction, and make future efforts to improve the population's genetic health harder. Aplt. App. at 127–29. The district court discounted these harms, on the theory that a preliminary injunction would not "necessarily prevent continued releases [of Mexican wolves]" because Interior could "simply" avoid the problem by re-applying to New Mexico and obtaining a permit. Aplt. App. at 165. But nothing in the record suggests that New Mexico would consider granting permits to Interior prior to November 2017, when Interior plans to promulgate a new recovery plan for the Mexican wolf.

To the contrary, the state has been adamant that further release permits will not issue until a new recovery plan is finalized, if ever. *See* Aplt. App. at 65–70. The district court plainly erred by discounting the harms that Interior had demonstrated based on facts not in—and, in fact, contradicted by—the record. *Cf. Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 891 (10th Cir. 2013) (unpublished) (noting that a district court abuses its discretion where "the district court's factual findings made in support of its balancing were without support in the record").

C. The district court ignored both the record before it and Congress's judgment in finding that the injunction was in the public interest.

Relatedly, the district court abused its discretion in finding that the public interest favored a preliminary injunction. In so finding, the court relied on the same unfounded assumption that underpinned the court's balancing of the harms: the court's belief that "issuance of the injunction will not necessarily result in [Interior] being precluded from any further wolf releases." Aptls. App. at 166. That determination was thus erroneous, for the same reasons given above.

More broadly, the district court's willingness to discount the public's interest in protecting the wild population of Mexican wolves, without a record basis for doing so, reveals a problematic lack of regard for the policies enshrined in the ESA. When assessing the public interest, "a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 498 (2001). In enacting the ESA, Congress made such a

judgment, declaring "in the plainest of words" that "the balance has been struck in favor of affording endangered species the highest of priorities." *Tennessee Valley Authy. v. Hill*, 437 U.S. 153, 194 (1978). In light of Congress's decision to place the highest priority on conservation, the district court was not at liberty to treat lightly the impact that a preliminary injunction would have on the Mexican wolf's risk of extinction in the wild. *See Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 498. Instead, when faced with a demonstrated risk of further harm to a protected species on one side, and an unsubstantiated possibility of injury to New Mexico on the other, the court was constrained to find that the public interest favored allowing releases to proceed.

D. The district court's conclusion that New Mexico would likely succeed on the merits was based on legal error.

Finally, New Mexico independently failed to satisfy the requirements for injunctive relief by failing to show that it was likely to succeed on the merits of its challenge. To clear this hurdle, the movant must show that it has "a substantial likelihood of prevailing on the merits." *Prairie Band*, 253 F.3d at 1246. New Mexico failed to satisfy this standard with regard to both its federal- and state-law claims that Interior was bound to follow New Mexico's adverse permitting decision and its remaining federal claim that the planned releases were arbitrary and capricious. It was an abuse of discretion for the court to hold otherwise.

1. Neither federal nor state law compelled Interior to adhere to New Mexico's permit decision.

The district court concluded that New Mexico was likely to succeed on the merits of its appeal because, in the court's view, Interior policy set forth at 43 C.F.R. § 24.4(i)(5) required Interior to follow New Mexico's decision prohibiting the release of wolves in the state. But that conclusion rests on legal error. Evaluated in the appropriately deferential framework, 43 C.F.R. § 24.4(i)(5) did not oblige Interior to abandon its plans for releasing wolves on federal land. And in the absence of any federal requirement that the agency abstain from releasing wolves, state regulations may not be used to prevent Interior from effectuating federal law.

a. Federal law does not give New Mexico veto power over the release of protected species.

The district court believed that Interior would violate 43 C.F.R. § 24.4(i)(5) by releasing wolves without a state permit. Aplt. App. at 161–63. That policy provides that Interior "shall" "comply with State permit requirements" when "carrying out … programs involving reintroduction of fish and wildlife" on federal land, *except* where the Director of the U.S. Fish & Wildlife Service, wielding authority delegated from 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). Here, the Director explained in his October 2015 letter to New Mexico why that policy allowed Interior to release Mexican wolves over New Mexico's objection. He read Interior's "statutory responsibilities," as the term is used in the policy, to include "taking actions to

promote the conservation of Mexican wolves." *See* Aplt. App. at 78. He further reasoned, drawing on prior environmental analyses, that New Mexico's permit denial would "preclude[]" the agency from performing that responsibility, because recovery cannot occur without "improv[ing] the genetic diversity and reduc[ing] the kinship of Mexican wolves in the wild," which is only possible if Service has flexibility to release wolves in the wild. Aplt. App. at 78–79.

The Director's interpretation of 43 C.F.R. § 24.4(i)(5) was reasonable. As this Court has recognized, the term "responsibility" is broad: Its "normal usage" encompasses "the state or fact of being … answerable or accountable, as for something within one's power or control." *Vill. of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1485 n.7 (10th Cir. 1990) (quoting *Random House College Dictionary*, 1125 (1980)) (interpreting the word as used in an Executive Order not at issue in this case). There can be little dispute that ESA Section 10(j) places experimental populations within Interior's control. *See* 16 U.S.C. § 1539(j). The statute also plainly directs Interior to use its authority over experimental populations in a way that promotes species conservation. *See* 16 U.S.C. § 1531(c)(1). It was thus sensible to find that the statute confers on Interior a "responsibility" to manage the Mexican wolf population in a way that promotes the species' conservation. *See* 80 Fed. Reg. at 2544 (agreeing with commenter that Interior "has the primary *responsibility* for the conservation of federally listed species" under the ESA (emphasis added)).

It was equally appropriate for the Director to find that, on the particular facts before him, exercising that statutory responsibility called for releasing captive wolves to reduce the wild population's risk of loss due to inbreeding. The record shows that the wild population is at an increased risk of extinction because its genetic health is stagnant. Aplt. App. at 128–29; *see also* EIS at 1-19 to 1-22. The population already exhibits signs of damage from inbreeding, and combating the risk of extinction is most effective while the population remains low. Aplt. App. at 127–29; *see also* EIS at 1-21. These facts, which New Mexico has not challenged, support the Director's determination that conservation of the Mexican wolf in the wild requires immediate releases from the captive population. *See Andalex Res., Inc. v. Mine Safety & Health Admin.*, 792 F.3d 1252, 1257 (10th Cir. 2015) (noting that an agency's factual conclusions need only be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

Because Interior's interpretation of its own policy was neither "plainly erroneous" nor "inconsistent with" the text of 43 C.F.R. § 24.4(i)(5), that interpretation warranted deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also Biodiversity Conserv. All. v. Jiron*, 762 F.3d 1036, 1062 (10th Cir. 2014). Interior argued as much to the district court. *See* Aplt. App. at 106–07. But the district court did not even consider whether deference was appropriate before imposing its own reading on Interior's policy. *See* Aplt. App. at 161–62. Instead, the district court found that the policy's reference to statutory responsibilities only included "specific statutory

directive[s] requiring [Interior] to take an action." Aplt. App. at 161. Because Section 10(j) provides only that Interior "may" authorize the release of experimental populations, the court reasoned, the statute does not *require* Interior to release Mexican wolves into the experimental population, and thus Interior has no statutory responsibility to conduct additional releases. Aplt. App. at 161–62.

The reading of 43 C.F.R. § 24.4(i)(5) that the district court advanced was not compelled by the text of the policy and the court therefore erred in substituting it for Interior's own reasonable reading. As explained above, the normal meaning of the word "responsibility" can refer to any actions that a statute places uniquely in Interior's control. *See Vill. of Los Ranchos*, 906 F.2d at 1485 n.7. As such, there is no reason the word cannot include those actions that the agency undertakes in order to fulfill its broad statutory duty to conserve federally protected species, the details of which the ESA leaves for Interior to define. *See Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1233–34 (10th Cir. 2000) (noting that "Congress purposely designed section 10(j) to provide [Interior] flexibility and discretion," which "allows [Interior] to better conserve and recover endangered species."). When a state seeks to block Interior from taking such an action, the state interferes with the sphere of control that the ESA entrusts to the agency, just as surely as if the state attempted to stop Interior from taking a discrete action that the statute expressly contemplates.

The result of the district court's contrary reading of 43 C.F.R. § 24.4(i)(5) would be to make the states the final arbiters on virtually all reintroduction decisions

under the ESA. *See* Aplt. App. at 161; 16 U.S.C. § 1539(j). Such a reading turns the federal-state relationship envisioned by the ESA on its head. *See* Point D.1.b, *infra*. Indeed, there are serious questions whether Interior would even have authority to promulgate a policy that subjugates to state control a decision that Congress entrusted to Interior. For that reason, the court's reading of 43 C.F.R. § 24.4(i)(5) may not even be viable. But, of course, Interior need not prove that it has the best reading of its policy to receive deference—only a permissible one. *See Biodiversity Conserv. All.*, 762 F.3d at 1062. Interior's reading of 43 C.F.R. § 24.4(i)(5) was at least permissible, and the district court abused its discretion in rejecting that reading.

b. In the absence of federal law subjecting Interior to state permit law, New Mexico's state-law claims fail.

In addition to claiming that *federal* law required Interior to abide by New Mexico's permitting decision, the state argued that its own regulations bound the agency. The state's attempt to use its regulatory powers to block federal action presents obvious federalism problems. The district court side-stepped these problems by finding that, under its interpretation of 43 C.F.R. § 24.4(i)(5), Interior had consented to be bound by state law. *See* Aplt. App. at 162–63. That finding was erroneous, for the reasons above. In the absence of any federal commitment to following state law, New Mexico's attempt to subject Interior to state permitting requirements fails, for three reasons.

First, states, "like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Block v. N. Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 280 (1983). New Mexico has identified only one such waiver that may allow suit here: the APA's waiver of sovereign immunity, found at 5 U.S.C. § 702. *See* Aplt. App. at 141–42. But the APA waives the United States' sovereign immunity only for claims alleging violations of federal law.[8] To hold otherwise would significantly broaden the scope of that waiver, in derogation of the established principle that waivers of sovereign immunity should be read narrowly. *See Iowa Tribe of Kan. and Neb. v. Salazar*, 607 F.3d 1225, 1236–37 (10th Cir. 2010). If the APA's waiver does not apply, there is no jurisdiction allowing New Mexico to bring its state-law claims, let to alone prevail on them.

Second, assuming *arguendo* that New Mexico may bring its state-law claims, the doctrine of intergovernmental immunity guarantees that those claims will fail. As the

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[8] Courts of appeals generally agree that the APA waiver extends not just to claims brought under the APA, but also to other challenges to agency action seeking non-monetary relief. E*.g., Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 672 (6th Cir. 2013); *Treasurer of N.J. v. U.S. Dep't of the Treasury*, 684 F.3d 382, 398–400 (3d Cir. 2012); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 774 (7th Cir. 2011); *see also Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1080 (10th Cir. 2006) ("We have recognized that [the APA] waive[s] sovereign immunity in most suits for nonmonetary relief against the United States, its agencies, and its officers."). But nearly all of these cases find that the waiver extends to claims arising under federal law; only the Third Circuit has found that the waiver also extends to state-law claims. *See Treasurer of N.J.*, 684 F.3d at 400 n.19. We are aware of no Tenth Circuit case addressing this issue.

Supreme Court has held, the Supremacy Clause prevents states from subjecting federal instrumentalities to regulation unless Congress "affirmatively declare[s]" otherwise. *Hancock v. Train*, 426 U.S. 167, 178 (1976). While not every state regulation "which may touch the activities of the Federal Government" is barred, a state permit requirement that would prohibit federal activity in the absence of state consent may not be enforced unless Congress has made a clear, unequivocal statement to the contrary. *Id.* at 178–81 (holding Kentucky could not require federal plants to obtain a state air-pollution permit before operating). The ESA contains no such unequivocal statement: It says only that Interior shall "cooperate" with states in carrying out ESA programs, and even then only to "the maximum extent practicable." 16 U.S.C. § 1535(a). Interior therefore cannot be required to obtain a permit from New Mexico.

Finally, New Mexico's state-law claims will fail because the doctrine of preemption prevents New Mexico from using state law to block Interior's implementation of the ESA. It is black-letter law that state laws that "interfere with, or are contrary to" federal law are invalid. *Hillsborough Cty., Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 712 (1985). So-called "conflict preemption" occurs "where compliance with both federal and state law is impossible, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *City of Stilwell, Okla. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1043–44 (10th Cir. 1996). Here, New Mexico's assertion of permitting authority over Interior plainly frustrates the purpose of the ESA. As explained above, the purpose of

the ESA is to conserve and eventually bring species back to full recovery. *See* 16 U.S.C. § 1531(b), (c)(1); *id.* § 1532(3). Interior has here determined that conserving the endangered Mexican wolf requires the immediate release of captive wolves into the wild population, in order to combat genetic stagnation and inbreeding. *See* Point D.1.a, *supra*. That determination was supported by substantial evidence. *See id.* New Mexico is attempting to use its administrative code to block Interior from making the very releases that the agency has reasonably determined it must perform to carry out the ESA's conservation directive. The state may not do so. *See Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 852 (9th Cir. 2002) (holding state law banning certain types of leg-hold traps was preempted to the extent it prohibited federal employees from using such traps to protect ESA-listed species, contrary to ESA's mandate that agencies "seek to conserve endangered species").

Recognizing that New Mexico's state-law claims must fail results in no harm to New Mexico's rights as a sovereign. Interior does not dispute that New Mexico has "traditional" power to regulate wild animals in its borders. *Kleppe*, 426 U.S. at 545. But that authority exists "only in so far as [the state's] exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." *Kleppe*, 426 U.S. at 545; *see also Wyoming*, 279 F.3d at 1227. As relevant to this case, the Constitution has bestowed on the federal government both "plenary" authority to manage wildlife on federal lands under the Property Clause, *Wyoming*, 279 F.3d at 1227, and power to conserve rare species under the Commerce Clause, *see*

Gibbs, 214 F.3d at 487. New Mexico has neither the right nor the ability to utilize its power in a way that frustrates Interior's permissible use of its paramount authority.

2. Interior's decision to release wolves was not otherwise arbitrary and capricious.

New Mexico's motion for preliminary injunction focused exclusively on the claims already discussed. *See* Aplt. App. at 38–40. But in its petition for review, the state separately claimed that Interior's decision to release wolves in 2016 was arbitrary and capricious in violation of the APA, because those releases were designed to meet the revised interim population objectives contained in the 2015 revised 10(j) rule. Aplt. App. at 20–21. In New Mexico's view, Interior could not set new population goals for the experimental population without first revising the species recovery plan. *Id.* To the extent New Mexico still means to pursue this claim, it is readily rebutted.

New Mexico's theory is a reformulation of the debunked premise that the approach laid out in a recovery plan is binding on Interior. It is not. *See Friends of Blackwater*, 691 F.3d at 434 (D.C. Cir. 2012) (holding that agency did not need to follow recovery plan's recovery criteria in deciding whether to delist a species). Nor is there merit to New Mexico's suggestion that Interior needed to set final recovery criteria for the Mexican wolf before it could rationally set a new goal size for the experimental population. "[T]here is no reason why" Interior "cannot determine what elements are necessary for conservation without determining exactly when conservation will be complete." *Home Builders Ass'n of N. Cal.*, 616 F.3d at 989

(holding that Interior could set aside habitat required for species conservation without first setting recovery criteria). Interior's 1982 recovery plan for the Mexican wolf was explicitly intended to be a starting point, rather than an end point for conservation. Aplt. App. at 53. Interior explained in its revised 10(j) rule why the interim population goal it had set in the 1982 recovery plan was no longer adequate to protect the species. 80 Fed. Reg. at 2516–18. It likewise explained why adding members to that population would promote the species' conservation until final recovery criteria could be devised. *Id.* Interior understands that New Mexico wants to see revised recovery criteria for the Mexican wolf, but the ESA simply does not require Interior to stop acting to preserve the Mexican wolf until those criteria are finalized—especially not in the face of an extinction threat.

Because New Mexico has no likelihood of success on this or any other claim, the district court abused its discretion by granting a preliminary injunction.

CONCLUSION

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

Respectfully submitted,

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SEPTEMBER 16, 2016
90-8-6-07993

STATEMENT REGARDING ORAL ARGUMENT

Interior respectfully requests oral argument. This appeal concerns the viability of the only wild population of endangered Mexican wolves, the proper interpretation of Interior's policy guidance, and the balance of federal and state authority under the ESA. Interior believes that oral argument may be helpful to the Court in resolving the issues on appeal.

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

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

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,401 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/Rachel Heron
RACHEL HERON

FORM CERTIFICATIONS

I hereby certify that:

- There is no information in this brief subject to the privacy redaction requirements of 10th Cir. R. 25.5; and
- The hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically; and
- This brief was scanned with System Center Endpoint Protection, version 1.227.2472.0, updated September 16, 2016, and according to the program the brief is free of viruses.

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RACHEL HERON

STATUTORY AND REGULATORY ADDENDUM

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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.)

Notes of Decisions (1217)

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

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United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1531

§ 1531. Congressional findings and declaration of purposes and policy

Currentness

(a) Findings

The Congress finds and declares that--

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to--

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

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

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

(G) other international agreements; and

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

(b) Purposes

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

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

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

CREDIT(S)

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

Notes of Decisions (51)

16 U.S.C.A. § 1531, 16 USCA § 1531
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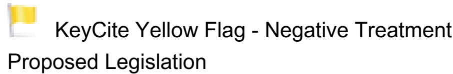
KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1532

§ 1532. Definitions

Currentness

For the purposes of this chapter--

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) between persons within one foreign country;

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

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

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

(10) The term "import" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

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

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

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

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

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

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

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

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

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

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

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

CREDIT(S)

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

Notes of Decisions (75)

16 U.S.C.A. § 1532, 16 USCA § 1532
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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Limitation Recognized by Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 11th Cir. (Fla.), Sep. 15, 2010

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1533

§ 1533. Determination of endangered species and threatened species

Effective: November 24, 2003
Currentness

(a) Generally

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

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

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

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[OMITTED]

(f) Recovery plans

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable--

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan--

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

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(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

[OMITTED]

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CREDIT(S)

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

Notes of Decisions (355)

Footnotes

1 So in original. Probably should be "paragraph (7)".

16 U.S.C.A. § 1533, 16 USCA § 1533

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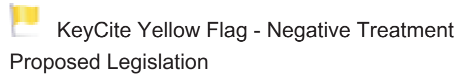
KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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.

[OMITTED]

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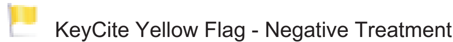
KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Limitation Recognized by Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 11th Cir. (Fla.), Sep. 15, 2010

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--

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(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.

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(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--

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(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.

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(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.)

Notes of Decisions (167)

16 U.S.C.A. § 1538, 16 USCA § 1538
Current through P.L. 114-219.

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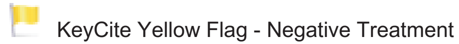
KeyCite Yellow Flag - Negative Treatment
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KeyCite Yellow Flag - Negative Treatment Proposed Legislation

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1539

§ 1539. Exceptions

Currentness

[OMITTED]

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(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.

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

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

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

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

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

CREDIT(S)

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

Notes of Decisions (63)

Footnotes

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

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

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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;

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(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 August 25, 2016; 81 FR 58768.

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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.

Notes of Decisions (8)

Current through August 25, 2016; 81 FR 58768.

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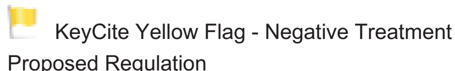
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Proposed Regulation

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]

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[OMITTED]

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]

[OMITTED]

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 permitees 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.

[OMITTED]

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.

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[OMITTED]

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:

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(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.

[OMITTED]

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DISTRICT COURT FINDINGS AND CONCLUSIONS

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 ungulate[1] 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

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[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 conversation 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.

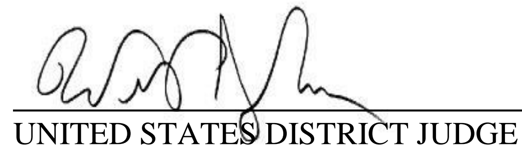
The Court finds that Petitioner is entitled to a preliminary injunction in which Respondents are enjoined from important or releasing any Mexican wolves into the State without first obtaining the requisite importation and release permits from the Department, and are enjoined from importing and releasing 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 relief[3] that were not raised or addressed in Petitioner's Motion for Preliminary Injunction, subsequent briefing, or at oral argument. Therefore, the Court will not grant relief for these requests.

SO ORDERED



UNITED STATES DISTRICT JUDGE

[3] *See* **Doc. 1**, at 13. "9. Adjudge and declare that Defendants have violated the APA by finalizing and implementing the *Initial Release and Translocation Plan for 2016*; 10. Order the Service to vacate the *Initial Release and Translocation Plan for 2016*; 11. Issue an injunction enjoining the Service from issuing an experimental population rule that is inconsistent with the operative recovery plan for the Mexican wolf."

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NEW MEXICO DEPARTMENT OF
GAME AND FISH,

Petitioner,

v. No. CV 16-00462 WJ/KBM

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

Respondents.

ORDER OF PRELIMINARY INJUNCTION

The Court, pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order (**Doc. 32**), hereby ORDERS that Respondents United States Department of the Interior; Sally Jewell, in her official capacity as Secretary of the United States Department of the Interior; United States Fish and Wildlife Service; Daniel M. Ashe, in his official capacity as Director of the United States Fish and Wildlife Service; and Dr. Benjamin N. Tuggle, in his official capacity as Southwest Regional Director for the United States Fish and Wildlife Service ("Respondents") are hereby:

(1) ENJOINED from importing or releasing any Mexican wolves into the State of New Mexico without first obtaining the requisite importation and release permits from the New Mexico Department of Game and Fish ("Department"), *see* 43 C.F.R. § 24.4(i)(5)(i);

(2) ENJOINED from importing and releasing any Mexican wolf offspring in violation of prior Department permits.

In its request for injunctive relief, Petitioner has also asked that Respondents be required

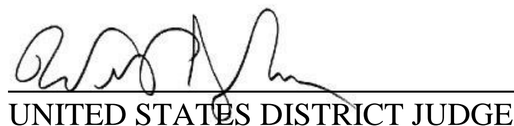
to capture and remove from the State any and all Mexican wolves that were imported and/or released in violation of State law. However, as the Court has noted in the accompanying Memorandum Opinion and Order, Petitioner is not granted injunctive relief as to this request.

The Court shall retain jurisdiction of this matter until the Respondents have fulfilled their legal and Court-ordered obligations as set forth in this Order of Preliminary Injunction.

This Preliminary Injunction Order shall apply to the parties until the final disposition of this case on the merits.

This Preliminary Injunction Order shall be effective immediately and shall remain in full force and effect unless modified or dissolved by order of this Court or by order of the United States Court of Appeals for the Tenth Circuit.

SO ORDERED



UNITED STATES DISTRICT JUDGE

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1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3

4 NEW MEXICO DEPARTMENT OF GAME AND FISH,) No. 16-CV-00462-WJ-KBM
No. 16-CV-00440-WJ-KK

5 Petitioner,

6 Pete V. Domenici U.S. Courthouse
vs. Bonito Courtroom

7 Albuquerque, New Mexico
UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Thursday, May 26, 2016

8 1:30 P.M.

9 Respondents.

10

11

12 TRANSCRIPT OF PROCEEDINGS
MOTION FOR PRELIMINARY INJUNCTION

13 BEFORE THE HONORABLE WILLIAM P. JOHNSON
UNITED STATES DISTRICT JUDGE

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24 Proceedings recorded by mechanical stenography; transcript

25 produced by computer.

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U.S. FISH AND WILDLIFE SERVICE
17 Mexican Wolf Recovery

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1 I N D E X

2 Page

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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

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1 lack of standing. Do you want to address that as an initial
2 matter?
3 MR. STEVENS: Good afternoon, Your Honor. Cliff
4 Stevens, Department of Justice.
5 Your Honor, Petitioner here has really fallen very
6 far short of alleging any kind of concrete injury, in fact, to
7 game herds. The State -- there's really been no concrete
8 allegation that the relatively small number of wolves that are
9 going to be released in the near term, or even the numbers that
10 are projected over an extended period, have any impact on game
11 herds. The evidence is all to the contrary.
12 The State has alleged that these releases will
13 interfere with its management, but respectfully, there needs to
14 be some impact on the herd before there can be some impact on
15 its management. In fact, the State submitted a declaration,
16 and the declaration does not identify any herd the management
17 of which has been changed as a result of wolves.
18 These wolves have been present in these areas for
19 some time now. If there was an interference, they should be
20 able to allege some actual impact on their management. We
21 really just have a conclusory allegation that these releases
22 will cause that type of interference.
23 Since there's such a vague allegation, they've tried
24 to rely on sort of a legal argument that their state
25 sovereignty has been displaced and that that is adequate. But

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1 as we pointed out in our papers, that's insufficient. Even in
2 the Supreme Court case they've cited, which is the
3 Massachusetts v. EPA case, there the State showed an impact on
4 climate change to its coastline. So the State can't simply, in
5 our view, rely on, you know, our interests here are going to be
6 displaced. We think it needs to show that it has some actual
7 concrete injury resulting from that.
8 That's, in short, our standing argument, Your Honor,
9 although I think that standing is really just a small part of
10 it. I think really for purposes of our position, the showing
11 for standing isn't as high as the showing that you need for a
12 preliminary injunction. What the Tenth Circuit has said is
13 that you need --
14 THE COURT: Although, as your co-counsel well knows,
15 if there is not standing, you can get all the way through one
16 of these cases, and all the time and effort you give it, if it
17 gets up to the Circuit and there wasn't standing, it gets
18 dismissed.
19 MR. STEVENS: Yes, he told me about that case. But
20 we do think standing has not been adequately alleged, and we
21 think for many of the same reasons, they have fallen far short
22 on irreparable harm. But we'll probably talk about that more.
23 I can stop there.
24 THE COURT: Sure. Mr. Weiland, why don't you
25 initially address the standing issue.

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1 MR. WEILAND: Thank you, Your Honor.
2 So one of the fundamental disagreements we have is
3 with regard to the issue of self-governance sovereignty and
4 whether that is a basis for standing. We think that the
5 Massachusetts vs. EPA case is pertinent. There's no question
6 here, I don't think it's in dispute, that the releases that
7 have occurred and that are imminent violate state law, and that
8 the Department is charged to carry out that law, and that, in
9 and of itself, can constitute injury.
10 The suggestion that we have to wait until the herd
11 populations are affected and then go into court really has us
12 in a position that is totally untenable and is unrealistic. We
13 can see that the releases are occurring. We can see that there
14 are plans to currently triple the wild population. We can see
15 that there is an agreement with Arizona that the adults in the
16 wild population will only be released within the borders of the
17 state of New Mexico. So it's coming down the pike.
18 In a lot of ways, it's analogous to the Mass v. EPA,
19 where the issue was climate change. It wasn't that the damage
20 had already all occurred, it was a question of, in fact, it was
21 coming down the pike there, too.
22 THE COURT: At this stage, I agree with the
23 Petitioner that it has alleged sufficient harms, and the
24 motion, what's of record, what's been filed that are concrete
25 and particularized, as well as actual and imminent, is such

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1 that there is standing.
2 I'll also note that the way this has been pled,
3 release of the wolves on an ad hoc basis without the State's
4 knowledge, could impact the State's species management
5 objectives. So I'll find that there is standing, and
6 therefore, there is jurisdiction to proceed with this.
7 I will say, again, this ruling does not preclude at
8 some other time Respondents re-raising that issue because,
9 again, I don't like these situations where you put a lot of
10 work into a case, it goes up on appeal, and then everybody's
11 efforts were for naught because the Circuit finds there was a
12 lack of standing, and therefore no jurisdiction to begin with.
13 But at this point, I will make a finding of standing.
14 So Mr. Weiland, how did you want to proceed today?
15 MR. WEILAND: I'll be happy to present argument, your
16 Honor. And we don't have any witnesses or testimony to
17 present. I'd prefer it, if you would agree, to reserve some
18 time for rebuttal.
19 THE COURT: Sure, absolutely. You may proceed.
20 MR. WEILAND: Thank you.
21 We are here today, Your Honor, because for the first
22 time in the history of the Federal Government's efforts to
23 reintroduce wolves within the borders of the state of
24 New Mexico, the Fish and Wildlife Service determined earlier
25 this month to release wolves without first securing State

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Rachel Heron
RACHEL HERON

Taylor, Amy R.

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Sent: Friday, September 16, 2016 9:05 AM
To: Taylor, Amy R.
Subject: 16-2202 NM Game & Fish Dept. v. DOI, et al "Appellant/Petitioner's Opening Brief"

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Tenth Circuit Court of Appeals

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Case Name: NM Game & Fish Dept. v. DOI, et al
Case Number: 16-2202
Document(s): Document(s)

Docket Text:
[10405510] Appellant/Petitioner's brief filed by Daniel M. Ashe, Sally Jewell, Benjamin Tuggle, DOI and United States Fish and Wildlife Service. 7 paper copies to be provided to the court. Served on 09/16/2016 by email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [16-2202, 16-2189] RH

Notice will be electronically mailed to:

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