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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
NEW MEXICO**

**ARIZONA and NEW MEXICO COALITION of)
COUNTIES for ECONOMIC GROWTH; NEW)
MEXICO CATTLE GROWERS ASSOCIATION;)
GILA LIVESTOCK GROWERS; NEW MEXICO)
FEDERAL LANDS COUNCIL; NEW MEXICO)
WOOL GROWERS, INC.; SOUTHERN ARIZONA)
CATTLEMEN'S PROTECTIVE ASSOCIATION;)
CENTRAL VALLEY SOIL and WATER)
CONSERVATION DISTRICT; DOÑA ANA SOIL)
and WATER CONSERVATION DISTRICT; GRANT)
SOIL and WATER CONSERVATION DISTRICT;)
HAGERMAN-DEXTER SOIL and WATER)
CONSERVATION DISTRICT; SIERRA SOIL and)
WATER CONSERVATION DISTRICT; HIDALGO)
SOIL and WATER CONSERVATION DISTRICT;)
McKinley SOIL and WATER CONSERVATION)
DISTRICT; SOUTHWEST QUAY SOIL and WATER)
CONSERVATION DISTRICT; JIM CHILTON;)
WHITE WATER DRAW NATURAL RESOURCE)
CONSERVATION DISTRICT; WILCOX-SAN)
SIMON NATURAL RESOURCE CONSERVATION)
DISTRICT; PIMA NATURAL RESOURCE)
CONSERVATION DISTRICT)**

Petitioners,

v.

UNITED STATES FISH and WILDLIFE SERVICE,)
an agency of the United States Department of the Interior;)
DANIEL M. ASHE, Director, United States Fish and)
Wildlife Service; **THE UNITED STATES DEPARTMENT**)
OF THE INTERIOR, SALLY JEWELL, Interior Secretary;)
and BENJAMIN N. TOGGLE, Regional Director, Region 2)
of the United States Fish and Wildlife Service)

Respondents.

Civil Action No.

PETITION FOR REVIEW

1. Petitioners, by and through counsel, Karen Budd-Falen (*pro hac vice pending*) and Andrea R. Buzzard, Budd-Falen Law Offices, LLC, seek judicial review pursuant to 5 U.S.C. §§ 702, 704 and 706 of the “final agency action” of Respondents United States Department of the Interior and United States Fish and Wildlife Service, an agency of the Department of the Interior (collectively "USFWS") adopting, on or about January 16, 2015, its final rule under section 10(j) of the Endangered Species Act entitled: “Endangered and Threatened Wildlife and Plants; Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf.” 80 Fed. Reg. 2512 – 2567 (Jan. 16, 2015) ("2015 10(j) Rule"). Endangered Species Act section 10(j) is codified at 16 U.S.C. § 1539(j).

2. The 2015 10(j) Rule changes the 1998 10(j) Rule (63 Fed. Reg. 1752 (January 12, 1998)) in several material respects:

A. Much larger land areas of New Mexico and Arizona are impacted by the 2015 10(j) Rule, in contrast to the areas of land impacted by the 1998 10(j) Rule. The 2015 10(j) Rule provides for a fourfold increase in the land area where Mexican wolves primarily are expected to occur and provides for a tenfold increase in the land area where Mexican wolves can initially be released from captivity. Specifically, the 2015 10(j) Rule extends the Mexican Wolf Experimental Population Area's ("MWEPA") southern boundary from I-10 to the border with Mexico, the northern boundary to I-40 and dramatically expands the MWEPA to comprise 153,853 square miles 98,465,920 acres). Most of the geographical areas of the States of New Mexico and Arizona are now

included in the expanded MWEPA, essentially all of those two States below Interstate 40.

B. The 2015 10(j) Rule enlarges the wolf population objective from 100 under the 1998 10(j) Rule, to 300-325 under the 2015 10(j) Rule. Importantly however, the 300-325 population objective is not a fixed cap, because the Record of Decision ("ROD") issued by the USFWS on January 6, 2015 states that number may change to accommodate a new recovery plan.

C. The 2015 10(j) Rule MWEPA is divided into three zones. Wolves would be released from captivity and translocated into two of those zones, comprising 91,263 square miles (58,408,320 acres). Under the 1998 10(j) Rule, wolves were only released from captivity into Arizona in an area comprising 737,857 acres. Under the 2015 10(j) Rule, wolves would be allowed to occupy the whole of 153,853 square miles (98,465,920 acres).

D. The 2015 10(j) Rule includes the provisions establishing conditions under which a permit could be issued to livestock owners allowing "take" of any Mexican wolf present on private and tribal lands. Under the 1998 10(j) Rule, a "take" permit could be issued if there were six wolf breeding pairs and wolves were wounding or biting livestock on public lands. In contrast, the 2015 10(j) Rule allows a livestock owner to acquire a "take permit" only after the Respondents or other designated federal agency have engaged in a removal action.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 702 *et seq.* (Administrative Procedure Act).

4. Petitioners have suffered a legal wrong and are adversely affected or aggrieved by the challenged USFWS's final agency actions and are entitled to seek review pursuant to 5 U.S.C. §§ 702 and 704.

5. The challenged USFWS's final agency actions are reviewable in accordance with the scope of review provided by 5 U.S.C. § 706.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(2), providing that when a defendant is an agency of the United States government, venue is proper in the judicial district where a substantial part of the events or omissions giving rise to the lawsuit occurred, or a substantial part of the subject property is situated. A substantial amount of the land area where the USFWS proposes to release Mexican wolves and where Mexican wolves will be "managed" is within the State of New Mexico.

7. With the issuance of the Final Environmental Impact Statement ("FEIS") on November 25, 2014 (79 Fed. Reg. 70154 (Nov. 25, 2014)), the Record of Decision on January 6, 2015 and the publication of the final rule in the Federal Register on January 16, 2015 (80 Fed. Reg. 2512 (Jan. 16, 2015)), this case is ripe for judicial review.

PARTIES

8. Petitioners can be divided into three general Groups:

9. Group 1 – Membership Organizations: Membership organization
Petitioners include the Arizona and New Mexico Coalition of Counties for Stable

Economic Growth ("ANMC"), New Mexico Cattle Growers Association ("NMCGA"), Gila Livestock Growers ("GLG"), New Mexico Federal Lands Council ("NMFLC"), New Mexico Wool Growers Inc. ("NMWGI") and the Southern Arizona Cattlemen's Protective Association ("SACPA"). These Petitioners are membership organizations that represent the interests of farmers, ranchers and landowners and include, as members, ranchers, farmers and landowners who live, work and graze livestock within the expanded MWEPA. Some of the members of these organizations have suffered injury from the 1998 10(j) Rule and many more of their members will suffer actual or imminent injury from the 2015 10(j) Rule as both the number of wolves, and the areas where wolves can be released and will be managed, drastically expands. That injury stems from the deaths of their members' livestock that the released wolves and their offspring are certain to cause. That injury also stems from the fear for their members' personal safety that the released wolves and their offspring will engender, because it is reasonably foreseeable that death or injury to humans will result from the USFWS's conduct in releasing wolves from captivity in their midst pursuant to the 2015 10(j) Rule.

10. Additionally, members of these organizations engage in the hunting and outfitting business. These members will also suffer actual and imminent injury from the 2015 10(j) Rule with the reduction in elk and other wildlife populations upon which these hunters and outfitters depend.

11. Members of the ANMC, NMCGA, GLG, NMFLC, NMWGI, and SACPA also recreate in all zones within the expanded MWEPA. The 2015 10(j) Rule jeopardizes

their customary uses of the land and environment and inalterably changes the area's total environment, which causes them actual and imminent injury, including actual injury to their ability to aesthetically, recreationally and spiritually enjoy the private land that they own or the public and federal land in which they recreate.

12. Group 2 – Local Governments: Local government Petitioners are the second group challenging the 2015 10(j) Rule. First, sixteen counties comprise the local government membership in the ANMC. Those local governments include the New Mexico Counties of Catron, Chaves, Eddy, Harding, Hidalgo, Lincoln, McKinley, Rio Arriba, Roosevelt and Sierra, and the Arizona counties of Apache, Cochise, Gila, Graham, and Navajo. These county government members of the ANMC have a combined population of over 700,000. Many of these local governments have local land use plans or policies specifically discussing the reintroduction of the Mexican wolf or the Mexican wolf 2015 10(j) Rule that is the subject of this complaint.

13. As local governments, some of the members of the ANMC were designated as "cooperating agencies" in the National Environmental Policy Act ("NEPA") analysis for the FEIS for the 2015 10(j) Rule. Additionally, all local government members of the ANMC attended some or all of the Defendants' Identification Team meetings for the FEIS for the 2015 10(j) Rule.

14. Local governments Petitioners also include various soil and water or natural resources conservation districts. These local governments in New Mexico include the Central Valley Soil and Water Conservation District ("Central Valley"), Dona Ana Soil and Water Conservation District ("Dona Ana"), Grant Soil and Water

Conservation District ("Grant"), Hagerman-Dexter Soil and Water Conservation District ("Hagerman-Dexter"), Sierra Soil and Water Conservation District ("Sierra"), Hidalgo Soil and Water Conservation District ("Hidalgo"), McKinley Soil and Water Conservation District ("McKinley"), and Southwest Quay Soil and Water Conservation District ("Southwest Quay"). These Petitioners are elected governmental entities, whose constituents also reside within the original and expanded MWEPA.

15. New Mexico soil and water conservation districts are organized pursuant to the Soil and Water Conservation District Act, N.M. Stat. Ann. § 73-20-25 *et seq.* These local governments are a division of the State of New Mexico. N.M. Stat. Ann. § 73-20-44. These districts are authorized by statute to sue and be sued in their respective names. N.M. Stat. Ann. § 73-20-45.

16. New Mexico local government Petitioners Central Valley, Dona Ana, Grant, Hagerman-Dexter, Grant, Sierra, Hidalgo, McKinley, and Southwest Quay have adopted local land use policies or plans directly related to the Mexican wolf 2015 10(j) Rule. These local land use plans or policies were forwarded to the Respondents pursuant to the NEPA.

17. Petitioners Central Valley, Dona Ana, Grant, Hagerman-Dexter, Grant, Sierra, Hidalgo, McKinley, and Southwest Quay requested "cooperating agency status" related to the development of the environmental impact statement for the Mexican wolf 2015 10(j) Rule. That request was rejected by the USFWS.

18. Arizona local government Petitioners White Water Draw Natural Resource Conservation District ("White Water Draw"), Pima Natural Resources Conservation

District ("Pima") and Wilcox-San Simon Natural Resource Conservation District ("Wilcox-San Simon Draw") are elected governmental entities whose constituents reside and work within the expanded MWEPA.

19. Pursuant to ARS 37-1054, natural resource conservation districts can sue and be sued. The Arizona legislature has declared that natural resource conservation districts are to provide for the restoration and conservation of lands and soil resources of the state, the preservation of water rights and the control and prevention of soil erosion, thereby conserving natural resources and wildlife, protecting the tax base and public lands and protecting and restoring Arizona's rivers and streams and associated riparian habitats, including fish and wildlife resources that are dependent on those habitats, "in such manner to protect and promote the public health, safety and general welfare of the people." ARS 37-1001.

20. Management and release of Mexican wolves within these boundaries of these Arizona and New Mexico local governments will unquestionably alter the physical landscape these local governments are charged with protecting. Additionally, the ability of these local governments to govern and establish land use plans for the benefit of their constituents and the natural resources will be compromised and harmed.

21. Group 3 – Private Individuals: The third category of Petitioners is private individuals. Petitioner Jim Chilton is the owner of the cattle ranch, located near Arivaca, Arizona. Petitioner Chilton's ranching operation is located in zone 3 of the MWEPA. Petitioner Chilton will suffer actual or imminent injury from the 2015 10(j) Rule. That injury stems from the deaths of his livestock that the released wolves and

their offspring are certain to cause. That injury also stems from the fear for his children and grandchildren's personal safety that the released wolves and their offspring will engender, because it is reasonably foreseeable that death or injury to human beings will result from the USFWS's conduct in releasing wolves from captivity in their midst pursuant to the USFWS's 2015 10(j) Rule.

22. The Petitioners filed substantive comments related to the Mexican wolf Final 10(j) Rule as part of the National Environmental Policy Act process. Each of the Petitioners is located within one of the zones created to the 2015 10(j) Rule.

23. Respondent Department of the Interior is a Department of the United States Government and is charged with the oversight of the U.S. Fish and Wildlife Service. Respondent Department of the Interior is bound by the requirements of the National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA"), the Council of Environmental Quality ("CEQ") regulations, the Regulatory Flexibility Act ("RFA") and Executive Order 12898 entitled "Environmental Justice" ("E.O. 12898").

24. Respondent United States Fish and Wildlife Service is a division of the United States Department of the Interior, and is charged with the conservation, protection, and enhancement of the nation's fish, wildlife, and plants, and associated habitats. Respondent USFWS is also bound by the requirements of the NEPA, the ESA, the CEQ regulations, the RFA and E.O. 12898.

25. Respondent Region 2, New Mexico Ecological Services Field Office ("Region 2") is a region of the U.S. Fish and Wildlife Service charged with management

of the Mexican wolf population. Respondent Region 2 is bound by the requirements of the NEPA, the ESA, the CEQ regulations, the RFA and E.O. 12898.

STATEMENT OF FACTS

History of Grey Wolf Listing and Management

26. The Mexican wolf was originally listed as an endangered species distributed in New Mexico, Arizona and Texas pursuant to the ESA on April 28, 1976. 41 Fed. Reg. 17736 – 17740 (April 28, 1976).

27. Region 2 of the USFWS was responsible for implementing the Mexican Gray Wolf Recovery Program based upon that listing.

28. In 1978, the USFWS listed the entire gray wolf species as endangered under the species name *Canis lupus*. That endangered species listing completely subsumed the 1976 Mexican wolf listing into the larger listing. 43 Fed. Reg. 9607 (March 9, 1978). As stated by the USFWS in that species listing, "the grey wolf (*Canis lupus*) group in Mexico and the coterminous States of the United States other than Minnesota, is being considered as one 'species,' and the gray wolf group in Minnesota is being considered as another group." *Id.* at 9610.

29. The USFWS approved a Recovery Program for the species *Canis lupus* in 1982, which included a captive breeding component for the wolves in Arizona and New Mexico. The Recovery Plan establishes a prime objective "to conserve and ensure survival of the Mexican gray wolves by maintaining a captive breeding program and reestablishing a viable, self-sustaining population of at least 100 Mexican wolves in a 5,000 square mile area within the subspecies' historic range."

30. The first release of those captive-bred wolves into the wild occurred in 1998 as an experimental non-essential ("ENE") population pursuant to the ESA § 10(j). 63 Fed. Reg. 1752 (Jan. 12, 1998).

31. The ENE designation for the Mexican wolf contained a component allowing release of captive born Mexican wolves into an area known as the Blue Range Wolf Recovery Area ("BRWRA"). The original BRWRA contained a "primary" and "secondary" recovery zone. 63 Fed. Reg. 1752 (January 12, 1998). Under the original program, Mexican wolves were only released into the primary recovery zone of the BRWRA in Arizona, an area of 737,857 acres. No Mexican wolves were released in New Mexico.

32. Additionally, under the original program, Mexican wolves were only allowed to disperse into the BRWRA. If wolves traveled outside the BRWRA, they were trapped or captured and returned to the BRWRA. 63 Fed. Reg. 1752, 1754, 1758 (January 12, 1998).

33. In 2012, the USFWS issued an ESA "12-month finding" stating that listing the Mexican wolf as a subspecies or a distinct population segment ("DPS") was not warranted because the species was already being protected as endangered. 77 Fed. Reg. 61375 – 61381 (October 9, 2012).

34. On June 13, 2013, the USFWS published a notice in the Federal Register announcing its intent to amend the 1998 ENE 10(j) rules for the Mexican wolf; the amendment would be accompanied by an analysis pursuant to the NEPA. 78 Fed. Reg. 35719 (June 13, 2013).

35. In anticipation of this notice, in the Summer of 2013, some Group 2 Petitioners, as local governments, requested that they be allowed to participate with the USFWS as "cooperating agencies" pursuant to NEPA as allowed by 40 C.F.R. § 1508.5.

36. Via e-mail dated August 26, 2013, the USFWS declined to recognize some of the Group 2 Local Government Petitioners as cooperating agencies, determining that "extending an invitation to your District to act as a cooperating agency in the development of this [environmental impact statement] EIS would not provide additional benefit beyond that achievable through the District's normal consultations with local government." Those specific Group 2 Petitioners include Central Valley, Dona Ana, Grant, Hagerman-Dexter, Sierra, Hidalgo, McKinley, and Southwest Quay.

37. Additionally, in order to effectuate their responsibilities as local governments, the Group 2 Local Government Petitioners individually adopted certain policy resolutions related to the Mexican wolf 10(j) rule.

38. Each and every policy Resolution or local land use plan adopted by the Group 2 local government Petitioners was sent to the USFWS to be incorporated into the USFWS NEPA analysis based upon NEPA's "consistency review" requirements.

39. On January 16, 2015, the USFWS issued a final rule changing the species classification for the grey wolf and separately listing the Mexican wolf as a subspecies, except in the areas where the ENE population is located. 80 Fed. Reg. 2488 – 2512 (January 16, 2015).

40. Additionally, on January 16, 2015, the USFWS issued the final Mexican wolf 10(j) Rule challenged in this case. 80 Fed. Reg. 2512 – 2567 (Jan. 16, 2015).

LEGAL BACKGROUND

A. National Environmental Policy Act

41. As stated above, the USFWS has prepared a FEIS in connection with the proposed revision to the Mexican wolf 10(j) Rule. 79 Fed. Reg. 43358.

42. NEPA, 42 U.S.C. § 4332, requires that major Federal actions significantly affecting the quality of the human environment must include a detailed statement about the environmental impact of the proposed action, the adverse environmental effects which cannot be avoided, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity and an irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

43. NEPA also requires the following:

A. "[P]rior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, . . . shall accompany the proposal through the existing agency review processes." 42 U.S.C. § 4332(c).

B. The federal agency must study, develop and describe appropriate alternatives to the recommended course of action, which involves unresolved conflicts concerning alternative uses of available resources. 42 U.S.C. § 4332(C)(iii).

C. The federal agency must develop procedures, in consultation with CEQ, to ensure that unquantified environmental amenities and values are given appropriate consideration along with economic and technical considerations. 42 U.S.C. § 4332(B).

44. The CEQ regulations implementing NEPA bind all federal agencies, including Respondents in this case. Among other things, those regulations require:

A. Agencies shall use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of the actions upon the quality of the human environment. 40 C.F.R. § 1500.2.

B. The alternatives should present the environmental impacts and the alternatives in comparative form to sharply define the issues and to provide a clear basis for choice among options. Agencies must rigorously explore and objectively evaluate all reasonable alternatives and discuss the reasons for elimination of those alternatives that were eliminated. Agencies must devote substantial treatment to each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits. Agencies must include the alternative of "no action." Agencies must include appropriate mitigation measures not included in the proposed action or alternatives. 40 C.F.R. § 1502.14.

C. Federal agencies must discuss the environmental impacts of the alternatives, including the proposed action, any adverse environmental effect which cannot be avoided if the proposal is implemented. The relationship between the short-term uses of man's environment and the maintenance and enhancement of long-term

productivity and any irreversible or irretrievable commitments of resources if the proposal is implemented. It must include (1) discussion of the direct and indirect effects and their significance; (2) conflicts between the proposed action and objectives of State and local land use plans and policies and controls for the area concerned; (3) environmental effects of alternatives, including the proposed action; (4) conservation potential of the various alternatives and mitigation measures; (5) natural or depletable resource requirements; (6) urban quality, historic and cultural resources; and (7) means to mitigate adverse environmental impacts. 40 C.F.R. § 1502.16.

D. When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an EIS and there is incomplete or unavailable information, the agency shall make clear that such information is lacking. If the incomplete information, relevant to reasonably foreseeable significant adverse impacts, is essential to a reasoned choice among alternatives, and the costs of obtaining are not exorbitant, the agency must include it in the EIS. The analysis about reasonably foreseeable adverse impacts must not be based on pure conjecture but must be supported by credible scientific evidence and within the rule of reason. 40 C.F.R. § 1502.22.

E. The federal agency shall identify and discuss all factors, including economic, technical and national policy, which were balanced by the agency in making its decision and state how those considerations entered into its decision. An agency must state whether all practicable means to avoid or minimize environmental harm has

been adopted and if not, why not. A monitoring and enforcement program shall be adopted for any mitigation. 40 C.F.R. § 1505.2.

F. Federal agencies must cooperate with State and local agencies to the fullest extent possible, including joint planning research and environmental assessments. Specifically, NEPA regulations require that federal agencies cooperate with state and local governments. In furtherance of this goal, NEPA regulations require "[t]o better integrate environmental impact statements into State or local planning processes, [environmental impact] statements shall discuss any inconsistency of a proposed action, with any approved State or local plan and law (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law." 40 C.F.R. § 1506.2(d).

G. The "human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. Economic or social effects are not intended by themselves to require preparation of an EIS. When an EIS is prepared and economic or social and natural or physical environmental effects are interrelated, then the EIS will discuss all of these effects on the human environment. 40 C.F.R. § 1508.14.

H. Actions which may be connected should be discussed in the same impact statement. Actions are connected if they automatically trigger other actions which may require an EIS or are interdependent parts of a larger action and depend on the larger for justification. Cumulative actions, which when viewed with other proposed

actions, have cumulatively significant impacts should be discussed in the same impact statement. 40 C.F.R. § 1508.25.

I. “Significantly” must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Both short and long-term effects are relevant. In evaluating severity of impact, an agency must consider the degree to which the action affects public health or safety, the unique characteristics of the geographic area; the degree to which the effects on the human environment are likely to be highly controversial, highly uncertain or involve unique or unknown risks; and the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration. Significance exists if it is reasonable to anticipate a cumulatively significant impact. Agency must consider if the action adversely affects an endangered or threatened species or its critical habitat. An agency must consider whether the action threatens a violation of State or local law or requirements imposed for protection of the environment. 40 C.F.R. § 1508.27.

J. A supplemental environmental impact statement is required when (a) the agency makes substantial new circumstances or information relevant to environmental concerns or (b) there are significant new circumstances or new information relevant to the environmental concerns and bearing on the proposed impacts of the decision. 40 C.F.R. § 1502.9(c).

B. Endangered Species Act

45. Authority for a 10(j) regulation is found at 16 U.S.C. § 1539(j) “experimental populations.”

46. According to those regulations, the USFWS may authorize for release “any population” but only when, and at such times as, the population is “wholly separate geographically” from “nonexperimental populations of the same species.” *Id.* at 1539(j)(1).

47. The population released, which can include individuals, must be of an endangered or threatened species, the release must be outside the “current range of the species” and the Secretary [of the Department of the Interior] must “determine[] that such release will further the conservation of such species.” *Id.* at 1539(j)(2)(A).

48. Before authorizing the release of any population, the Secretary must, by regulation “identify the population” and must “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.” *Id.* at 1539(j)(2)(B).

49. Each member of an experimental population must be treated as a threatened species except that if nonessential to the continued existence, the species is treated as a species proposed to be listed and critical habitat shall not be designated. *Id.* at 1539(j)(2)(C).

50. The USFWS regulations at 50 C.F.R. § 17.80 define “experimental population” as an introduced or designated population that has been designated in accordance with procedures but only when, and at such times as the population is

wholly separate geographically from non-experimental populations of the same species. Where there is overlap with natural populations at times but wholly separate at other times, the experimental population will not be recognized outside the areas of overlap. The population will 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.

51. Under 50 C.F.R. § 17.81, providing for the designation of an experimental population, the population must be “released into suitable natural habitat” that is “outside the current natural range (but within its probable historic range” (absent a finding, in the extreme case, that the primary habitat has been unsuitably and irreversibly altered or destroyed).

52. The Secretary “must find by regulation that such release will further the conservation of the species.” In making the finding, the Secretary “shall utilize the best scientific and commercial data available to consider” the following:

--any possible adverse effects on the existing populations of a species as a result of removal of individuals for introduction elsewhere;

--the likelihood that such experimental population will become established and survive in the foreseeable future;

--the relative effects that the experimental population will have on the recovery of the species; and

--the extent to which the introduced population may be affected by existing or anticipated Federal, State actions or private activities within or adjacent to the experimental population area.

50 C.F.R. § 17.81(b).

53. The Secretary may issue a permit to allow acts necessary to establish and maintain an experimental population. Any regulation must provide: (1) appropriate means to identify the experimental population, including actual or proposed location, actual or anticipated migration, number of specimens released or to be released and other criteria appropriate to identify; (2) a finding, based solely on the best scientific and commercial data available, and supporting factual basis, whether the experimental population is or is not essential to continued existence of the species in the wild; (3) management restrictions, protective measures or other special management concerns of that population, including measures to isolate or contain the population designated from natural populations; and a process for periodic review and evaluation of the success or failure of the release and the effect of release on conservation and recovery of the species. 50 C.F.R. § 17.81(c).

54. USFWS regulations at 50 C.F.R. § 17.81(d) require USFWS to consult with, among others, “local governmental entities” in developing experimental population rules, including the 2015 10(j) Rule at issue in this case. This regulation requires that:

Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population.

50 C.F.R. § 18.81(d).

C. Special Expertise and the Consistency Review Requirements for the Arizona and New Mexico Soil and Water Conservation Districts

55. Group 2 Petitioners are local governments. New Mexico statutes specify that a “soil and water conservation district’, organized under or perpetuated by the

provisions of the Soil and Water Conservation District Act, is a governmental subdivision of the state, a public body politic and corporate." N.M. Stat. Ann. § 73-20-44.

56. According to New Mexico statutes, Soil and Water Conservation Districts may:

A. conduct research, investigations and surveys treating soil erosion and floodwater and sediment damage, concerning the conservation, development, utilization and disposal of all waters and relating to control programs and public works necessary to facilitate conservation and development.

B. publish and disseminate research findings and preventive and control measures relating to resource conservation and development;

C. with the consent and cooperation of the landowner or the state or federal agency administering the land, conduct projects upon land within the district to demonstrate by example the methods by which soil and other natural resources may be conserved, . . .

G. foster, publish and promote district natural resource development plans and their adoption and development by landowners within the district;

H. acquire or administer the project of any other governmental agency undertaken to provide for the conservation, development and utilization of natural resources within the district.

N.M. Stat. Ann. § 73-20-44.

57. Based upon the New Mexico statutes, Petitioners' activities include the development of expertise related to soil, water, wildlife, agricultural, and economic protection.

58. The Petitioners in Group 2 have developed resource management and conservation programs and plans and have adopted Resolutions related to the management of the Mexican wolf and the 2015 10(j) Rule.

59. The New Mexico Soil and Water Conservation District Resolutions adopted by the local governments do not argue for any violation of federal law, including the ESA.

60. Rather the Resolutions include the following policies:

A. A requirement that local prey and habitat studies be done before any action introducing the predators [Mexican wolves] takes place;

B. A requirement that the quantitative conclusions of such studies equate to conditions conducive to natural species survival opportunities rather than induced or artificial;

C. A requirement that no individual predator be released or slated to be released until the ESA [10(j) final decision] is concluded;

D. A requirement that any individual [Mexican wolf] that enters the boundaries of the District be captured and removed immediately;

E. A requirement that the management plan emanating from any [Mexican wolf] introduction shall give citizens and livestock operators the right to protect their livestock, pets, and personal safety;

F. A requirement that such authority be extended to but not limited to action to discourage such predators near personal and or contracted property;

G. A requirement that such authority be further extended to acts of shaping prey to be killed, wounding, or killing such pet and livestock prey;

H. A requirement that ESA "take" permits must be offered without regard to predator numbers;

I. A requirement that allows and favors all lawful trapping;

J. A request that the District be informed of any private land discussions or contracts for release within or adjacent to lands of the District, and

61. The Resolutions were forwarded to the Respondents to meet the consistency review requirements outlined in the NEPA and CEQ regulations.

D. Regulatory Flexibility Act

62. The RFA requires all agencies, as part of the rulemaking process, to conduct a “regulatory flexibility analysis” for their proposed rules. 5 U.S.C. §§ 603-604. In the analysis, the agency must evaluate how the proposed rule will affect small entities, consider alternatives that would “minimize the significant economic impact on small entities,” and explain “why each one of the other alternatives” was rejected. See 5 U.S.C. § 604(a)(6).

63. In the context of ranching and the raising of livestock, a “small entity” means an agricultural enterprise (including its affiliates) that has annual receipts not exceeding \$750,000. See 5 U.S.C. § 601 (3) and (6); 5 U.S.C. § 632 (a)(1).

64. The agency does not have to prepare a flexibility analysis “if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605 (b). Such certification must be published with the rulemaking notice “along with a statement providing the factual basis for such certification.” *Id.*

E. Executive Order 12898 – "Environmental Justice"

65. Section 1-101 of E.O. 12898 states that federal agencies, to the greatest extent practicable and permitted by law, shall make achieving environmental justice part of its mission by identifying and addressing disproportionately high and adverse

human health or environmental effects of its programs and activities on minority and low-income population.

66. E.O. 12898 also states, in § 6-609, "This order is intended only to improve the internal management of the executive branch. This order does not create any right or benefit enforceable at law or in equity by a party against the United States or its agencies or officers. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance."

67. However, in this case, the Defendants chose to complete an E.O. 12898 analysis as part of the Mexican wolf 2015 10(j) Rule FEIS. Therefore, this analysis is reviewable by this court.

CLAIMS FOR RELIEF

First Claim

Violations of the National Environmental Policy Act

68. Petitioners restate the foregoing paragraphs as if fully stated herein.

69. The Administrative Procedure Act, codified at 5 U.S.C. § 551 *et seq.* ("APA") provides that 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." 5 U.S.C. § 702. "[F]inal agency action for which there is no other adequate remedy in a court" is subject to judicial review. 5 U.S.C. § 704.

A. Violation of NEPA's Consultation and Consistency Review Requirements

70. Group 2 Petitioners are local governments that have special expertise that is highly relevant to the EIS process associated with USFWS's proposed revision to the

2015 10(j) Rule. This expertise has developed as a result of Plaintiffs' activities that include (1) the creation and implementation of resource management plans and (2) the representation of conservation and agricultural interests in the development of state and national policies.

71. Group 2 Petitioners' officially adopted Resolutions expressing the policies and positions of the Group 2 Petitioners with regard to the management of the Mexican wolf and the proposed 2015 10(j) Rule.

72. Even though they were timely filed with the Respondents, copies of the Local Governments' Resolutions were not discussed or appended to the 2014 Proposed Rule or Draft Environmental Impact Statement in violation of the requirement that the comments and views of Local Governments "shall accompany the proposal through the existing agency review process." 42 U.S.C. § 4332(c).

73. Additionally, CEQ regulation 40 C.F.R. § 1506.2 (d) provides: "To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law." *See also* 40 C.F.R. § 1502.16 (c) (environmental impact statement should discuss possible conflicts of its proposed action with local land use plans).

74. The USFWS's FEIS, ch. 4 at 96-98, states that the USFWS evaluated the consistency of its 2015 10(j) Rule and the alternatives with the Petitioners' (governmental entities') local land use plans Resolutions or policies.

75. However, the USFWS does not discuss any inconsistencies with Petitioners' local land use plans or state how it would reconcile its action with any inconsistencies of those land use plans.

76. Instead, the USFWS asserts that under the Supremacy Clause the federal government's authority displaces that of the local governments.

77. The USFWS does not make federal law.

78. Federal law requires that the USFWS review and describe any inconsistencies of its proposed action with Petitioners' local land use plans and state how it would reconcile its proposed action, here the 2015 10(j) Rule, with the Petitioners' local land use plans.

79. The USFWS has failed to comply with 40 C.F.R. § 1506.2(d), 40 C.F.R. § 1502.16(c) and 42 U.S.C. § 4332(c).

80. The 2015 10(j) Rule, the ROD, and the FEIS are not in accordance with law, are arbitrary or capricious and have not been made with observance of procedures required by law.

B. The USFWS Piecemeal Approach is Erroneous under NEPA and CEQ Regulations

81. Plaintiffs restate the foregoing paragraphs as if fully stated herein.

82. CEQ regulation 40 C.F.R. § 1508.25 provides that the scope of an environmental impact statement must include connected actions, interdependent parts

of a larger action, and cumulative actions, which have cumulatively significant impacts. The same environmental impact statement must discuss and thus disclose to the public the total impact of a program.

83. The USFWS is not permitted to segment its wolf conservation or reintroduction project, only partially analyzing it in an environmental impact statement and thus not revealing the true, total impacts of its project.

84. The USFWS is not permitted under NEPA and CEQ regulation 40 C.F.R. § 1508.25 to “piecemeal” its environmental impact statements for its project, the conservation of the Mexican wolf.

85. Here, the USFWS has taken one admittedly inadequate “first step” and now under the 2015 10(j) Rule has taken a second “first step,” all the while not knowing whether it is achieving conservation, not knowing whether its objective of 300-325 wolves is realistic and having no concrete means to verify population counts or know, definitively, what to do if there are more than 300-325 wolves.

86. The currently existing recovery plan developed by Region 2 of the USFWS states a recovery goal of 100 wolves.

87. The USFWS has not updated this plan, thus, there is no legal basis for a goal of 300 – 325 wolves. According to the 2015 10(j) Rule and FEIS, recovery is beyond the scope of its FEIS and ROD.

88. Thus, the USFWS’ 2015 10(j) Rule is premature until a final decision is issued regarding the ESA final listing of the Mexican wolf and, depending upon that status, an updated recovery plan (if required by law) is issued.

89. The USFWS has argued in *Defenders of Wildlife et al v. Jewell*, 14-cv-2472-TUC-FRZ that Plaintiffs complain seeking the USFWS to develop a recovery plan for the Mexican wolf is moot because of the existence of the 1982 Mexican wolf recovery plan. See *Id.* at Defendants' Motion to Dismiss, filed January 30, 2015, at Docket 18 (stating, "As Plaintiffs admit, '[i]n 1982, [FWS] issued the Mexican Wolf Recovery Plan.' *Defenders of Wildlife v. FWS*, 797 F. Supp. 2d 949, 950 (D. Ariz. 2011); Compl. ¶ 4; Ex. B. The Recovery Plan establishes a prime objective "to conserve and ensure survival of the Mexican gray wolves by maintaining a captive breeding program and reestablishing a viable, self-sustaining population of at least 100 Mexican wolves in a 5,000 square mile area within the subspecies' historic range.")

90. The USFWS now is attempting to increase that "self-sustaining population" threefold, without revising the agency's existing Recovery Plan and completing that proper analysis.

91. The USFWS' 2015 10(j) Rule, its FEIS, and its ROD are not in accordance with law, are arbitrary or capricious and have not made with observance of procedures required by law until the new listing decision is made and until the USFWS revises or issues a new recovery plan.

C. *Absence of Critical Information and Narrow Range of Alternatives*

92. Petitioners restate the foregoing paragraphs as if fully stated herein.

93. Title 42 U.S.C. § 4332 requires the USFWS to prepare a detailed environmental impact statement that describes the environmental impact of its

proposed action, the adverse environmental effects, if implemented, and alternatives to its proposed action.

94. CEQ regulation 40 C.F.R. § 1500.2(f) requires that USFWS “[u]se all practicable means ... to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.”

95. CEQ regulation 40 C.F.R. § 1502.14 requires that USFWS present alternatives to its proposed action in comparative form, thus sharply defining the issues and providing a clear basis of choice among options by the decision maker and the public. USFWS must rigorously explore and objectively evaluate all reasonable alternatives and devote substantial treatment to each alternative considered in detail so that reviewers may evaluate their comparative merits.

96. CEQ regulation 40 C.F.R. § 1502.22 requires the USFWS to evaluate the significant adverse effects on the human environment. Incomplete information that is relevant to significant adverse impacts and is essential to a reasoned choice and if the costs of obtaining it are not exorbitant, the agency must obtain and include the information that it lacks.

97. In issuing its 2015 10(j) Rule, the USFWS deliberately chose to exclude highly relevant information pertaining to its future plan of recovery. Given the settlement deadline, it states that it did not have time to prepare and thus include this information.

98. The missing information is relevant and critical, because without it there is no way to assess the merits or purported necessity of the USFWS' chosen course of action.

99. This missing information is critical, because the USFWS' action has significant adverse effects on the human environment, namely, on people and their domestic animals, pets and valuable livestock, which are placed in harm's way by the deliberate release and management of captive wolves in the areas and communities where Petitioners live and work.

100. The FEIS reflects that the alternatives 2 and 3 to the proposed (and adopted) alternative 1 did not vary appreciably in terms of the USFWS' depicted summary of environmental impacts. *See* November 2014 FEIS, ES-18-20. The enlarged area for the new MWEPA remains the same under all three alternatives.

101. That summary of environmental impacts under "human health/safety" states that for alternatives 1 through 3, that there is no significant adverse impact. It states essentially the same for "economic activity (ranching/livestock production)." Yet, in zone 3, there is only 1% suitable habitat and the wolves "would be more actively managed ... to reduce human conflict." *See* FEIS, ES-6. The USFWS' conclusions are not logical.

102. The USFWS did not consider an adequate range of alternatives to provide a clear basis of choice.

103. The USFWS' 2015 10(j) Rule, its FEIS, and its ROD are not in accordance with law, are arbitrary or capricious and have not made with observance of procedures required by law.

D. Failure to Analyze Any Irreversible or Irretrievable Commitments of Resources

104. Petitioners restate the foregoing paragraphs as if fully stated herein.

105. CEQ regulation 40 C.F.R. § 1502.16 provides that an environmental impact statement should discuss “any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.” *See also* 42 U.S.C. § 4332.

106. In this case, there have not been any studies to show the adequacy of the wildlife prey base necessary for the additional number of wolves to be released.

107. The USFWS analyzes this requirement in its FEIS, ch. 4 at 101-102, but erroneously does so from the apparent perspective that it has purported authority to commit resources, namely, cattle, that it does not own.

108. The USFWS states that while it realizes that cattle will be killed by the Mexican wolves, cattle are an abundant and renewable resource, and, therefore, it does not consider depredation on cattle to be either irretrievable or irreversible.

109. The USFWS should ask that small rancher who owns a valuable cow, perhaps one that he/she was breeding for its valuable genetics, just how “renewable” his/her killed animal, worth perhaps \$1,000, is.

110. The regulation is intended to focus on the federal government's commitment of federal resources, not property that is privately owned.

111. The 2015 10(j) Rule, the ROD, and the FEIS are not in accordance with law, are arbitrary or capricious and are not made with observance of procedures required by law.

E. Failure to Consider Adverse Effects on Human Environment

112. Petitioners restate the foregoing paragraphs as if fully stated herein.

113. The USFWS must use all practicable means to avoid or minimize any possible adverse effects of their actions on the “human environment,” a broad term embracing social and economic effects. *See* 40 C.F.R. §§ 1500.2 (f) and 1508.14.

114. The FEIS and ROD do not address or consider the severe toll that its Mexican wolf reintroduction program is having and will have on the lives of impacted inhabitants and impacted ranchers and farmers who live, work and raise their families in the expanded MWEPA.

115. The USFWS’ analysis evidences bias in favor of its wolf program and against those who suffer because of it.

116. The USFWS’ conclusions regarding lack of significant effect to the rancher who runs cattle are arbitrary and lack sufficient evidence, because the USFWS fails to properly quantify the number of expected cattle depredations. For example, 59 observed wolves in 2006 committed 27 “confirmed” cattle kills, leading to a projected 45 killed head per 100 wolves. *See* FEIS, ch. 4 at 30.

117. Yet, the FEIS recognizes that it is difficult, for a number of reasons, to determine a precise number of depredations. According to one study, only one out of

eight cattle that were killed by wolves was discovered and “confirmed.” See FEIS, ch. 4 at 31.

118. Even though the USFWS did not and has not attained its 1998 wolf population count of 100, the USFWS now has decided to more than triple that number and possibly enlarge it later, without having the scientific knowledge necessary to quantify depredations, other than possibly multiplying 45 by three or four and again by eight, a calculation it does not make.

119. The USFWS has not factored into its analyses the fact that 68% of the cattle killed by wolves are calves and 27% were cows, animals which might otherwise have yielded offspring. See FEIS, ch. 4 at 34.

120. The USFWS has not factored into its analyses the fact that it intends to release an unknown (or unrevealed to the public) number of wolves the agency thinks it needs to achieve a 300-325 wolf population count, which could increase based upon a recovery plan.

121. The USFWS has not factored in the other burdens of its program, the physiological impacts to the rancher’s cattle, such as stress and weight loss due to the presence of wolves, changes in forage use, the need for additional labor and supplies and the disproportionate impact on ranchers.

122. The USFWS’ Mexican wolf reintroduction program is at-odds with and is incompatible with the human environment, and the mitigation measures offered by the USFWS that a private rancher might employ (hazing, separately pasturing, buying hay,

and the like) are unreasonably burdensome, inadequate and in derogation of one's right to peaceable enjoyment of one's property and ability to pursue a chosen livelihood.

123. The federal government is the largest landowner in many New Mexico and Arizona counties. *See* FEIS, ch. 3 at 7.

124. Of the federally managed suitable wolf habitat, 63% occurs on Forest Service land. *See* FEIS, ch. 3 at 11.

125. Many cow-calf operations in Arizona and New Mexico depend heavily on federal lands for forage. Most ranches would no longer be economically viable or sustainable without access to public land resources. *See* FEIS, ch. 3 at 71.

126. The nine national forests in the project area are managed for multiple uses. Traditional land uses include grazing. Livestock grazing are active programs throughout the national forests, under which permittees are allowed to graze their cattle on the federal land. Many communities and private land adjoin or are in close proximity to the forests. *See* FEIS, ch. 3 at 13-29.

127. In 1990, the Forest Service permitted 2.5 million animal unit months throughout the national forests in New Mexico and Arizona, declining to 2.1 million in 2012. *See* FEIS, ch. 3 at 72.

128. The ROD states that the majority of suitable wolf habitat is on Forest Service land. "This is where cumulative effects are most likely to occur.... Protection of wildlife habitat may ... require reduction of permitted livestock or exclusion of livestock from sensitive areas." *See* ROD at 19.

129. The USFWS disregards human health and public safety concerns attendant its 2015 Rule 10(j).

130. It concludes, for its proposed action and all alternatives, that there is no significant direct or indirect adverse impact on human health/public safety. See FEIS, ch. 2 at 34.

131. The USFWS' FEIS, ch. 4 at 60-69, shows that there is an adverse impact to human health/public safety. Aggression by wolves toward people was evident in 51 of 80 cases of wolf-human encounters. Twelve of those cases involved wolves with known or suspected rabies. Nineteen cases were considered by one authority to be unprovoked. Habituation contributed to unprovoked wolf aggression toward people in 11 cases, resulting in bites. In 21 out of 28 incidents, habituation was a contributing factor. In many cases, the habituation was the result of food conditioning. *Id.* at 62. "While habituation may occur without the involvement of food, food conditioned wild animals are almost always habituated (Carnes 2004). A food conditioned wolf may seek out humans or human use areas and may demonstrate an agonistic lunge, charge or bite if the food reward that they seek is withheld (McNay 2002a)." *Id.* at 62-63. "Attacks on dogs are among the most commonly reported conflicts between wolves and humans (McNay 2002b)." "Wolves treat dogs as trespassers in their territory and will kill dogs whenever the two canids occur (Fritts et al. 2003). They will also prey on domestic dogs... and dogs may be an important food source for wolves in some areas (Carnes 2004, Fritts et al. 2003)." *Id.* at 63.

132. “Approximately 39% of the documented human-wolf interactions in the BRWRA [Blue Range recovery area] have involved wolves recently released from captivity, suggesting that wolves released from captivity may be more prone to initial fearless behavior toward humans....” *Id.* at 67.

133. The USUSFWS dismisses the evidence presented by Gila Livestock Growers Association and of Catron County that proves the damage, both psychological and physical, caused by the wolves on the residents, children and pets. The USUSFWS dismisses Catron County’s report entitled *Problem Wolves in Catron County, New Mexico: A County in Crisis*, stating that no peer-reviewed studies have been conducted, and the county provides anecdotal accounts.

134. The USFWS ignores the fact that it is releasing upon the residents of New Mexico and of Arizona “problem wolves,” wolves that are habituated to humans by virtue of food conditioning, since they are captive and depend on humans for food, and by virtue of the veterinarian care they receive. *See* FEIS, ch. 3 at 96.

135. The USFWS evidences its bias in favor of its wolf project, by dismissing reliable, first-hand evidence that shows the damage its experimental population of wolves is inflicting on human beings, which will only become worse by virtue of the expansion of its program.

136. When the USFWS concludes that the risk to humans is extremely small, *see* FEIS, ch. 4 at 66, it demonstrates bias and is ignoring and disregarding evidence to the contrary that indicates a reasonable probability that it will be proved wrong.

137. The 2015 10(j) Rule, the ROD, and the FEIS are not in accordance with law, are arbitrary or capricious, have not been made with observance of procedures required by law and are not supported by substantial evidence.

F. Failure to Provide and Consider Adequate Mitigation

138. Petitioners restate the foregoing paragraphs as if fully stated herein.

139. CEQ regulations define mitigation as including "compensating for the impact by replacing or providing substitute resources or environments." 40 C.F.R. § 1508.20.

1. The Compensation Program Does Not Provide Adequate Mitigation

140. With regard to the FEIS' proposed mitigation for the loss of livestock, the FEIS, ch. 4 at 101, states that **if** the Mexican Wolf/Livestock Trust Fund continues to be funded, the USFWS would expect the Mexican Wolf/Livestock Coexistence Council (Coexistence Council) to compensate 100% of the market value of confirmed depredated cattle and 50% of the market value for probable kills.

141. The USFWS states that another possible source of mitigation funding is the USDA Livestock Indemnity Program, part of the 2014 Farm Bill, which provides (among other things) benefits to livestock producers for livestock lost due to attacks by animals introduced into the wild by the federal government or protected by federal law, including wolves.

142. The USFWS does not represent with certainty the availability of these compensation sources.

143. A “confirmed kill” represents only a small number of the actual killings of cattle by wolves.

144. There is no compensation to individuals for their pain and suffering and physical and emotional damage and injury caused by the USFWS’ reintroduction program.

145. The 2015 10(j) Rule, the ROD, and the FEIS do not provide adequate assurance of mitigation required by NEPA, thus is in violation of the APA.

2. The Regulatory “Take” Provisions are Unduly Restrictive Thus Are Not Adequate Mitigation

146. The 2015 10(j) Rule at section (k)(7) provides that an allowable “take” includes, on private land, the killing or injuring of a Mexican wolf that is “in the act of biting, killing or wounding a domestic animal.” The USFWS must be provided evidence that the wolf was, in fact, in the “act of biting, killing or wounding” at the time of the “take.” The killing or injuring must be reported to the Respondents within 24 hours.

147. The USFWS may, in its discretion, issue permits to allow a taking, specifying the number of days that the permit is valid and the number of wolves that may be taken.

148. On federal land, for example, in the situation where a livestock owner is grazing cattle on federal land, the Service may, in its discretion and in conjunction with a removal action, issue permits to allow livestock owners to take or intentionally harass any Mexican wolf that is “in the act of biting, killing or wounding livestock on Federal land where specified in the permit.” Reporting within 24 hours is required. Evidence to

support the fact that the wolf was in the act of killing, biting or wounding must be provided, such as freshly wounded or killed livestock.

149. If the USFWS intends to reduce permitted livestock to accommodate the Mexican wolf, it is proceeding in direct antithesis to mitigation, to NEPA and to multiple use requirements for federal land. Moreover, the “take” provision for permittees grazing cattle on federal land is dependent on a standardless, discretionary permit and a governmental removal action, which could render the “take” provision of little value to the rancher who needs to protect his/her cattle from the wolves that the USUSFWS has introduced into the forest.

150. These “take” provisions are onerous, because they allow the wolf a “free” kill of a cow, bull, steer or calf. Only after the damage is done, since the wolf must be “in the act of” biting or killing, may the owner strive, belatedly, to protect his/her animal.

151. The animal’s owner logically must be given the latitude to step in lethally to “protect” his or her animal against the “threat” that his or her animal may be killed or injured by the wolf posing such threat.

152. These “take” provisions are further onerous in that for the federal permittee, he or she must first have an USFWS permit. As with a private landowner, the issuance of that USFWS permit is discretionary and is “in conjunction with a removal action.”

153. The federal agency discretion to issue "take" permits is unregulated and thus is susceptible to arbitrary conduct on the part of the USFWS.

154. Moreover, the permit provisions are vague, because the USFWS has yet to prepare procedures to govern the application and grant of them. See ROD at 17 (“The process of applying for and obtaining a permit will be provided in a revised management plan and Standard Operating Procedures (SOPs) for the Reintroduction Project.”).

155. The purpose to the management flexibility allowed under Section 10(j) was to make reintroduction compatible with human activities, such as livestock grazing and hunting. See *Defenders of Wildlife v. Tuggle*, 607 F. Supp.2d 1095, 1101 (D. Ariz. 2009).

156. These onerous “take” provisions are not compatible with human activities and the fact that they exist, including the permission to kill in self-defense and the permission to the Service to kill wolves that are habituated to humans, which the released wolves necessarily are, only illustrates the irreconcilable incompatibility of USFWS’s introduction program that involves the release of wolves into a landscape populated by human beings.

157. The 2015 10(j) Rule, the 2015 ROD and the FEIS fail to provide adequate mitigation thus are not in accordance with law and are arbitrary or capricious.

***Second Claim
Violations of the Endangered Species Act***

158. Petitioners restate the foregoing paragraphs as if fully stated herein.

159. The APA, 5 U.S.C. § 551 *et seq.*, provides that 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.” 5 U.S.C. §

702. "[F]inal agency action for which there is no other adequate remedy in a court" is subject to judicial review. 5 U.S.C. § 704.

A. *The FWS Decision to Release Mexican Wolves into Unsuitable Habitat is Arbitrary and Capricious and Not in Accordance with Law*

160. Petitioners restate the foregoing paragraphs as if fully stated herein.

161. Title 50 C.F.R. § 17.81(a) requires that the Mexican wolves be released into "suitable natural habitat."

162. The habitat which the released Mexican wolves will be allowed to enter and thereafter remain and occupy is not suitable habitat.

163. Under the 2015 10(j) Rule, the MWEPA is divided into zones. Zone 1, an area of 12,507 square miles, has approximately 83% suitable habitat. Zone 2, an area of 78,756 square miles, has approximately 27% suitable habitat. Zone 3, an area of 62,590 square miles, has approximately 1% suitable habitat. See FEIS, ES-6.

164. Because Mexican wolves are going to be released into an area or remain in an area with admittedly unsuitable habitat, the 2015 10(j) Rule, the FEIS, and the ROD are not in accordance with law, are in excess of statutory authority, are arbitrary or capricious and not supported by substantial evidence.

B. *The FWS Decision Must Fail Because there is No Appropriate Means to Identify Experimental Population or Quantify the Number Released*

165. Petitioners restate the foregoing paragraphs as if fully stated herein.

166. Title 50 C.F.R. § 17.81(c)(1) states that an experimental population regulation must provide an appropriate means to identify the experimental population, including location, migration, number of specimens to be released and other criteria.

167. The 2015 10(j) Rule fails to satisfy these criteria.

168. The amended regulation at 50 C.F.R. § 17.84(k) does not provide a method to identify the population, expected migration or number of specimens, i.e, wolves, to be released from captivity into areas within the MWEPA. Although asserting a population objective of 300-325, which can change depending on a new recovery plan, the USFWS has no evident means to determine when that objective is reached or exceeded.

169. The USFWS states that it would attempt to maintain at least two radio collars per pack. However, a majority of the Mexican wolves may not have radio collars as the population grows. *See* 2015 Rule 10(j) at 45.

170. So as not to exceed the population objective, the USFWS states that it would prefer to transfer wolves to other Mexican wolf populations, but that would not ease the burden on landowners and inhabitants of the MWEPA. There has not been a Mexican wolf population in New Mexico for over 30 years. Based on the mortality of reintroduced Mexican wolves in New Mexico from 2011 to 2013, the USFWS does not expect a population to be established for at least several years. *See* 2015 Final Listing Rule at 52.

171. Petitioners have no way of knowing when the USFWS will stop releasing captive wolves, how many it will release, or how the USFWS will know when to stop releasing wolves.

172. Based upon these failures, the 2015 10(j) Rule does not comply with 50 C.F.R. § 17.81(c)(1).

C. *No Likelihood of Success and No Consideration of Recovery*

173. Petitioners restate the foregoing paragraphs as if fully stated herein.

174. Title 50 C.F.R. § 17.81 provides that before releasing an experimental population, the Secretary must consider the likelihood that the experimental population will become established and survive in the foreseeable future and the effects that establishment of an experimental population will have on recovery of the species.

175. Title 16 U.S.C. § 1533(f) provides that the Secretary shall develop and implement recovery plans for a listed endangered species, unless the Secretary finds that such a plan will not promote conservation of the species.

176. In issuing her 2015 10(j) Rule to establish an experimental population of the Mexican wolf, the Secretary has given no consideration to a recovery plan and, in fact, has completely excluded “recovery” from consideration in the FEIS and the ROD, which implement the 2015 10(j) Rule.

177. In its ROD, the USFWS states that given the time constraints imposed by its settlement agreement with the plaintiff in *Center for Biological Diversity v. Jewell*, which required that the USFWS have issued its 2015 10(j) Rule by January 12, 2015, the USFWS did not have sufficient time to develop and obtain public comment through the NEPA process of a recovery plan. See ROD at 19-20. The USFWS states: “We have been clear in the consideration of issues that were within the scope of the EIS and those which we considered to be beyond the scope. We specifically excluded those issues that we felt were related to recovery and the development of a recovery plan and for which

we did not have time to expand the scope of the EIS so that we could adequately consider them in the NEPA analysis.”

178. The USFWS’s ROD further states: “We adopted a population objective for the Mexican wolf experimental population in the MWEPA ... that ... we believe is large enough to achieve our goal of improving the probability of persistence of the experimental population.... However, full recovery is beyond the scope of the EIS and the population objective for the experimental population cannot, and should not, be used to extrapolate a hypothetical number for the metapopulation of Mexican wolves needed for recovery.” *See* ROD at pages 14-15.

179. In its 1998 experimental population rule for the Mexican wolf, the USFWS had designated the White Sands area as a wolf recovery area, but the USFWS did not use it, because, upon reevaluation, the USFWS decided that the area would not support wolves. *See* FEIS, ch. 1 at 29. Without explanation, that area is now included as a potential release site for Mexican wolves.

180. In its 1998 experimental population rule for the Mexican wolf, the USFWS had also designated the Blue Range area as a wolf recovery area. In this area, the USFWS, for the period of 1998 to 2013, had released 93 wolves. Some disappeared and for those that had known outcomes (72), only 15 were considered successful. *See* FEIS, Table 1-5, ch. 1 at 23.

181. In its 2015 endangered species Final Listing Rule, the USFWS notes the significant difficulties associated with establishing a population, such as inbreeding, loss

of adaptive potential, limited number and relatedness of the founders of the captive population, loss of genetic material, etc. *See* Final Listing Rule at 102.

182. The USFWS states that, while it intends its new 2015 10(j) Rule to “contribute to recovery, full recovery is beyond the scope of this EIS.” *See* FEIS, ch. 1 at 17.

183. The USFWS states that, under its 1998 rule, its release sites in the Blue Range, termed PRZ (primary recovery zone), are the lowest in suitability compared to certain wilderness areas. *See* FEIS, ch. 1 at 24.

184. The USFWS states that, under its 1998 rule, the released wolves established home ranges within much of the PRZ where elk are present and, as a result, suitable release sites have become difficult to identify. Conversely, it states that releases are more likely to be successful in areas that have an abundant prey base of elk. *See* FEIS, ch. 1 at 24.

185. The USFWS states that wolves with no wild experience are more likely to be involved in nuisance behavior after release. *See* FEIS, ch. 1 at 24.

186. The only wolves to be released are those in captivity. “The wolves in the captive population are the only source of animals for release into the wild.” *See* FEIS, ch. 1 at 4. Being habituated to humans and dependent on humans for food, shelter and medical care, the wolves are all necessarily “problem” wolves and thus are likely to engage in nuisance behaviors.

187. The USFWS states that it hopes to improve the genetic variation within the experimental population, yet the only animals they are using for that population are those now in captivity. *See* FEIS, ES-3.

188. The USFWS's previous population objective of 100 is now regarded as inadequate. *See* FEIS, ch. 1 at 17.

189. Regarding the 2015 Rule 10(j), the USFWS states: "We intend for the experimental population of Mexican wolves that we reestablish within the MWEPA to contribute to recovery. Until future recovery planning efforts are able to determine a population goal for range-wide recovery, setting a population objective for the experimental population ... can help us achieve 'the first step toward recovery'". *See* FEIS, ch. 1 at 19-20.

190. The USFWS has not shown that its 2015 10(j) Rule is "likely" to achieve success in both survival and establishment of its experimental population, and its past failure and neglect in undertaking the proper analyses and studies to properly inform itself is further evidence that the current rule is likely to fail, as well.

191. Also indicating that its wolf establishment program is not likely to succeed is the fact that it is dependent on private control measures. The USFWS states:

While wolf control undertaken by a governmental agency is the primary tool we use to manage problem wolves, control measures implemented by landowners and livestock owners or their agents is also a necessary element of the Reintroduction Project. Aversive and preventative non-lethal management techniques include the use of flandry and hazing, the use of non-lethal projectiles, livestock husbandry assistance, the use of calving pastures, and purchase of feed/hap to reduce the risk of depredation.... [L]ethal control of chronic depredating wolves may still be necessary.... Lethal control measures may be taken ... by landowners and livestock owners or their agents under specific limited circumstances.

See FEIS, ch. 1 at 31.

192. The USFWS states: “Under voluntary management agreements ... we could release or translocate wolves at release sites on private land in Zones 1 and 2.”

See FEIS, ch. 4 at 4.

193. The USFWS is now attempting to take its second “first step” without any regard to recovery and without regard to any informed population objective, which it admits is a “moving target,” depending on its future plans.

194. Without a recovery plan and lacking sufficient studies to inform itself, the USFWS is merely proceeding forward with its 2015 10(j) Rule in order to comply with a deadline in a settlement agreement and without regard for the lives and property of those who will suffer as a result of its hasty actions.

195. The USFWS fails to take into account the fact that it is releasing “problem wolves,” those previously in captivity by humans and that are, necessarily, habituated to humans, an important factor in considering the likelihood of success. See 2015 10(j) Rule definition at 50 C.F.R. § 17.84(k)(3).

196. As its FEIS states, ch. 4 at 62-63:

Food conditioning occurs in wolves and other wild animals when the animal learns to associate food with the presence of people.... [F]ood conditioned wild animals are almost always habituated. (Carnes 2004) ... Food conditioning was a known or suspected factor in 16 cases of habituated behavior examined by McNay (2002a). Carnes (2004) determined that habituation of wolves to humans was a contributing factor in 75% of the reports of human injuries, caused by presumably healthy wild wolves that he examined.

197. “[W]olves released from captivity may be more prone to initial fearless behavior toward humans...”. See FEIS, ch. 4 at 67.

198. The USFWS' 2015 10(j) Rule, its ROD, and its FEIS are not in accordance with law, are arbitrary or capricious and are not supported by substantial evidence.

D. ESA Requires that to Maximum Extent Possible, the FWS is to Reach an Agreement with "Persons Holding an Interest in Land"

199. Petitioners restate the foregoing paragraphs as if fully stated herein.

200. USFWS regulations at 50 C.F.R. § 17.81(d) require USFWS to consult with, among others, States and "persons holding any interest in land" in developing experimental population rules, including the 2015 10(j) Rules at issue in this case. This regulation requires that:

Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population.

50 C.F.R. § 18.81(d).

201. Petitioner Chilton owns land that will be greatly impacted by the Mexican wolf 10(j) Rule. The USFWS has not attempted to reach an agreement with him regarding the establishment of an experimental population of Mexican wolves on his property.

202. Petitioner Group 1 Membership Organizations all represent landowners owning property that will be greatly impacted by the Mexican wolf 10(j) Rule. The USFWS has not attempted to reach an agreement with any of these landowners represented by the Group 1 Membership Organizations regarding the establishment of an experimental population of Mexican wolves on his property.

203. The USFWS' 2015 10(j) Rule, its ROD, and its FEIS are not in accordance with law, are arbitrary or capricious and are not supported by substantial evidence.

Third Claim
Violation of the Regulatory Flexibility Act

204. Petitioners restate the foregoing paragraphs as if fully stated herein.

205. The RFA requires all agencies, as part of the rulemaking process, to conduct a "regulatory flexibility analysis" for their proposed rules. 5 U.S.C. §§ 603-604. In the analysis, the agency must evaluate how the proposed rule will affect small entities, consider alternatives that would "minimize the significant economic impact on small entities," and explain "why each one of the other alternatives" was rejected. See 5 U.S.C. § 604(a)(6).

206. In the context of ranching and the raising of livestock, a "small entity" means an agricultural enterprise (including its affiliates) that has annual receipts not exceeding \$750,000. See 5 U.S.C. § 601(3) and (6); 15 U.S.C. § 632(a)(1).

207. The agency does not have to prepare a flexibility analysis "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). Such certification must be published with the rulemaking notice "along with a statement providing the factual basis for such certification." *Id.*

208. The conclusion that the Mexican wolf 10(j) Rule does not impact small businesses is not supported by the evidence and its analysis is defective. For example, under the USFWS analysis, the costs to small businesses is significant, especially over

the long-term and recognizing that the wolves continue to have pups. Given that admission, the costs to small businesses is significant.

209. Additionally, the USFWS expects a 3.4% annual depredation rate. However, the USFWS did not factor in the fact that there may be eight times as many actual kills as there are confirmed wolf kills.

210. Additionally, the USFWS states that the depredation rate equates to \$430,553 (annually).

211. The USFWS also factors in livestock weight loss.

212. Inconsistently however, the USFWS minimize these losses by looking to compensation funds, which may or may not be paid. Therefore, the USFWS finds that the depredation effects are not substantial and significant.

213. Additionally, the USFWS states that wolves concentrate in certain areas—yet the USFWS also states that even with a greater number, wolves will disperse and, therefore, the density ratio will not increase from present status with a fewer number.

214. The Respondents findings are inconsistent and thus are arbitrary and capricious.

***Fourth Claim
Violation of the E.O. 12898 – Environmental Justice***

215. Petitioners restate the foregoing paragraphs as if fully stated herein.

216. Section 1-101 of E.O. 12898 states that federal agencies, to the greatest extent practicable and permitted by law, shall make achieving environmental justice part of its mission by identifying and addressing disproportionately high and adverse

human health or environmental effects of its programs and activities on minority and low-income population.

217. Although E.O. 12898 also states, in § 6-609, that the order does not create a right to judicial review, in this case, the Respondents chose to complete an E.O. 12898 analysis as part of the Mexican wolf 2015 10(j) Rule FEIS. Therefore, this analysis is reviewable by this court.

218. The USFWS made significant changes from its analysis in the draft EIS to the FEIS. Specifically, the USFWS does conclude that the 2015 10(j) Rule will have a disproportionate impact on minorities. FEIS Ch. 4 pages 80-2.

219. The USFWS has defined “fair treatment” at ch. 3, 97, to mean that no ethnic group should bear a disproportionate share of negative consequences.

220. In its ROD, the USFWS states:

Although we predict less than significant overall direct adverse effects economic impacts to ranching/livestock production within Zones 1 and 2, we also recognize that adverse economic impacts to individual small ranch operations could be significant. Because a large percentage of focus minority groups in Arizona and New Mexico are identified as principal operators of beef cattle ranches, these adverse economic impacts could be disproportionately distributed. Tribal members are also engaged in livestock production and could also suffer disproportionate economic impacts from implementation of Alternative One [the chosen alternative]. Economic losses to some small individual ranchers/livestock producers from wolf depredation could also be cumulatively more significant when combined with the aggregate effects of human caused global climate change. However, we expect that the financial losses that may be experienced by individual ranchers/livestock producers will be minimized through the mitigation measures available under this alternative. Therefore, while individual ranchers/livestock producers may experience short-term economic impacts, no significant long-term effects on overall livestock production in the project area are expected. For these reasons, we do not expect implementation of Alternative One will adversely affect

the long-term productivity or beneficial uses of the human environment in the MWEPA.

See ROD at 8.

221. Minority groups seemingly do not count in the USFWS's view of long-term productivity in the MWEPA.

222. The adverse effects of the wolves on minority groups are also unfairly minimized by the USFWS' aggregating the effects of so-called "global climate change," although the USFWS' FEIS states that no effects on climate change would occur as a result of the Proposed Action and its alternatives. See FEIS, ch. 3 at 1.

223. However, the FEIS then concludes "However, we expect any adverse disproportionate impacts ... to be less than significant due to mitigation measures available under this alternative."

224. Given that the mitigation measures proposed by the USFWS are not assured nor are they adequate, it is arbitrary and capricious to the assume that there is no disproportionate impact on minorities.

REQUEST FOR RELIEF

Accordingly, Petitioners respectfully request this Court:

- A. Declare that Respondents violated NEPA, the ESA, the RFA, E.O. 12898 and the APA in implementing its Record of Decision, FEIS and 2015 10(j) Rule related to the Mexican wolf ENE population;
- B. Set aside and vacate the final agency action implementing USFWS's ROD and FEIS;

- C. Award Petitioners their reasonable fees, costs, and expenses (including attorney's fees) incurred as a result of this litigation; and
- D. Grant Petitioners such further or additional relief as this Court may deem just and proper.

RESPECTFULLY SUBMITTED this 12th day of February, 2015.

/s/Andrea R. Buzzard

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