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Public Comments Processing
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U.S. Fish & Wildlife Service
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RE: Public Comment – Docket No. FWS-R2-ES-2020-0007 – Endangered and Threatened Wildlife and Plants; Revision to the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*); Notice of Intent to Prepare a Supplement to an Environmental Impact Statement; 85 Fed. Reg. 20,967 (Apr. 15, 2020)

To Whom It May Concern:

Please accept the following comments submitted in response to the U.S. Fish & Wildlife Service's ("Service's") Notice of Intent to Prepare a Supplement to an Environmental Impact Statement ("Notice of Intent") for the agency's revision to the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, Section 10(j), 16 U.S.C. § 1539(j), management rule for the experimental population of the Mexican wolf (hereinafter "management rule" or "Section 10(j) rule").¹

These comments are submitted by the Western Environmental Law Center on behalf of WildEarth Guardians, Western Watersheds Project, Wildlands Network, New Mexico Wild, and the Southwest Environmental Center. Collectively, these organizations represent over 500,000 members and supporters who adamantly support the science-based restoration and recovery of critically imperiled Mexican wolves to the American southwest. Each of these organizations is actively engaged in ensuring Mexican wolves are rightfully recovered to the point at which the protections of the ESA may no longer be required. Their many members, supporters, staff, and board members have sincere aesthetic, educational, recreational, scientific, and spiritual interests in seeing Mexican wolves fully restored to the wild. These interests will be harmed if the Service promulgates an unlawful revised management rule for the species. Accordingly, we hereby submit these comments to provide the Service with the underlying legal authorities and best available

¹ U.S. Dep't of the Interior, Fish & Wildlife Serv., Endangered & Threatened Wildlife & Plants; Revision to the Nonessential Experimental Population of the Mexican wolf (*Canis lupus baileyi*); Environmental Impact Statement; Docket No. FWS-R2-ES-2020-0007, 85 Fed. Reg. 20,967 (Apr. 15, 2020) [hereinafter "Notice of Intent"].

science to apply to its revision of the ESA Section 10(j) management rule for the experimental population of the Mexican wolf.

SUMMARY

This public comment period is the result of successful litigation on behalf of the organizations submitting these comments (and others) on the Service's 2015 Section 10(j) management rule.² In *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 (D. Ariz., Mar. 31, 2018), the Federal District Court for the District of Arizona (Tucson Division) held the 2015 10(j) rule was arbitrary and capricious and remanded the rule to the Service to remedy violations of the ESA, including: (1) the rule's failure to further the species' recovery, and (2) the Service's failure to make a new determination whether the experimental population is "essential" or "nonessential." *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *17, *19, *23. The litigation raised a number of additional issues, that -- while unaddressed by the court in its order -- remain highly relevant here.³ Accordingly, the remanded rulemaking currently underway must address these deficiencies.

Our substantive comments are organized as follows: First, we outline the procedural deficiencies apparent from the Notice of Intent's limited scope for its request for comments and stated reliance on the challenged 2017 Mexican wolf Recovery Plan, First Revision. Second, we argue that the experimental population of Mexican wolves should be designated as an "essential" experimental population under the ESA's Section 10(j). Third, we provide suggested revisions to the 2015 management rule that will allow the revised rule to come into compliance with the mandates of the ESA and further the recovery of the species, as the 2018 court order demands. Fourth, we provide attachments to both new and the best available, relevant science that the Service must consider during the revision of the rule. We conclude by respectfully requesting that the Service follow the science and the law, and not bow to the political whims of states and other interests vociferously hostile to the Service's Mexican wolf recovery efforts at the expense of true recovery for Mexican wolves in the wild.

INTRODUCTION

Mexican wolves historically numbered in the thousands and were distributed across large portions of the Southwest, mostly in mountainous terrain that supports populations of deer and elk.⁴ By the mid-1900s, however, government and private eradication efforts effectively wiped out

² Dep't of the Interior, Fish & Wildlife Serv., Endangered and Threatened Wildlife & Plants; Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf; Final Rule, 80 Fed. Reg. 2,512 (Jan. 16, 2015), as corrected in 80 Fed. Reg. 4,807 (Jan. 29, 2015) [hereinafter "2015 10(j) rule"].

³ For example, Plaintiffs WildEarth Guardians et. al, raised a number of issues that the court failed to address upon finding the rule violated the ESA and APA as a whole, including: the underlying biological opinion and associated "no jeopardy" finding violated the ESA; the 2014 EIS violated NEPA for failing to evaluate a reasonable range of alternatives; and the Service violated NEPA by failing to provide a supplemental EIS despite significant changes in the final rule. See *Center for Biological Diversity*, 2018 WL 1586651 at *23.

⁴ 2015 10(j) rule, 80 Fed. Reg. at 2,514.

the native population.⁵ By the 1970s, the Mexican wolf was extirpated from the United States, and by the 1980s, it was considered extirpated from Mexico.⁶

In 1976, the Mexican wolf was listed as an endangered subspecies of gray wolf under the ESA, even though no wild populations were known to remain.⁷ In 1978, the Mexican wolf was reclassified and listed as a gray wolf in the contiguous United States.⁸ After the ESA listing, the Service initiated recovery programs for gray wolves in three geographic areas, including the Southwest.⁹ In 1982, the Service prepared a recovery plan for southwestern wolf recovery.¹⁰ However, the 1982 recovery plan did not contain recovery criteria because the status of the species at the time “was so dire that the recovery team could not foresee full recovery and eventual delisting.”¹¹ The 1982 recovery plan focused instead on the wolf’s “immediate survival.”¹² The objective was to start a captive breeding program with the hopes of reestablishing a viable, self-sustaining population of Mexican wolves in the wild.¹³ In accordance with the plan, the Service initiated a captive-breeding program “with the capture of the last remaining Mexican wolves in the wild in Mexico and subsequent addition of wolves from captivity in Mexico and the United States.”¹⁴ All Mexican wolves alive today descend from the seven founding wolves of the captive-breeding program.¹⁵

In 1998, the Service established an experimental population of Mexican wolves to pursue the primary objective of the 1982 Recovery Plan.¹⁶ In 2015, the Service issued a final rule reclassifying the Mexican wolf as a distinct subspecies of gray wolf.¹⁷ The revised listing removed the Mexican wolf from the broader gray wolf listing and identified the Mexican wolf as a distinct subspecies qualifying for “endangered” status by itself.¹⁸ Simultaneously, the Service also finalized a revised experimental population rule for Mexican wolves, prepared a new Environmental Impact Statement (“EIS”), released a new Section 10(a)(1)(A) permit, and prepared a biological opinion for the revised rule pursuant to Section 7 of the ESA.¹⁹ The Service’s 2015 Section 10(j) rule revised the regulations for the experimental population in an attempt to improve the effectiveness of the reintroduction program and management of the experimental population.²⁰

Yet now, despite well over twenty years of captive breeding and reintroduction efforts, the Mexican wolf remains one of the most critically endangered species in North America. Today, there are fewer than 200 individuals in the wild and their ability to survive and fully recover as

⁵ Dep’t of the Interior, Fish & Wildlife Serv., Endangered and Threatened Wildlife & Plants; Endangered Status for the Mexican Wolf; Final Rule, 80 Fed. Reg. 2,488 at 2,505 (Jan. 16, 2015) [hereinafter “2015 listing rule”].

⁶ 2015 10(j) rule, 80 Fed. Reg. at 2,514.

⁷ 2015 Listing Rule, 80 Fed. Reg. 2,488.

⁸ *Id.*

⁹ *Id.* at 2,489.

¹⁰ *Id.*

¹¹ 2015 10(j) rule, 80 Fed. Reg. at 2,514.

¹² *Id.*

¹³ *Id.*

¹⁴ 2015 10(j) rule, 80 Fed. Reg. at 2,515.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 2015 Listing Rule, 80 Fed. Reg. 2,488.

¹⁸ *Id.*

¹⁹ See 2015 10(j) rule, 80 Fed. Reg. 2,512.

²⁰ 2015 10(j) rule, 80 Fed. Reg. at 2,512.

envisioned by the ESA remains uncertain. This is due to the population's low genetic diversity and small population size, excessive human-caused losses (including illegal killings and agency removals), inadequate regulatory protections, and other threats. While experts confirm that the recovery of the Mexican wolf is still possible within the next several decades, this is only true if the Service moves quickly to alleviate threats. The best way to do this is by ensuring: (1) adequately sized and genetically diverse populations in the wild (the genetic health of the captive population continues to decline, so time is of the essence); (2) multiple populations exist that are separated but connected to one another through effective natural migration; (3) wolves are protected from human-caused mortality and removal from the wild; and (4) sufficient, suitable habitat is made available for Mexican wolves to roam.

With the promulgation of this revised Section 10(j) rule, the Service must act now to ensure that these threats are adequately addressed and that its management of the species furthers the long-term conservation and recovery of Mexican wolves in the wild.

I. PROCEDURAL DEFECTS

At the outset, we note there are a number of procedural concerns regarding the Service's Notice of Intent and stated strategy for revising the management rule that blatantly defy the court's 2018 order of remand.

A. Erroneously Limited Scope of Request for Comments

First, the Service far too narrowly limits the scope of its request for comments in the Notice of Intent. While the Service attempts to limit the scope of acceptable comments to only two primary substantive issues -- (1) whether the expanded take provisions of the 2015 management rule harm the genetic health of the species, and (2) whether the experimental population should be designated as "essential" or "nonessential" under Section 10(j)²¹ -- this overly narrow scope of requested comments is contrary to the court's 2018 ruling overturning the 2015 management rule in its entirety.

The court's 2018 order remanding the 2015 10(j) rule faulted the Service for violating the mandates of the ESA on a number of grounds that are not included in the Notice of Intent's request for comments, or in the Service's stated strategy for the remand of the rule. Importantly, the court held that the 2015 rule "fails to further the conservation of the Mexican wolf," altogether. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *13. This finding faulted the Service for its arbitrary and capricious population cap of only 300-325 wolves, which the court found was based on a grave misinterpretation of the science²² and provided for only short-term

²¹ Notice of Intent, 85 Fed. Reg. at 20,968-69.

²² *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *14 ("When FWS approved the population size and effective migration rate, it misinterpreted the findings of Carroll et al. (2014) and Wayne & Hedrick (2010), which it had relied upon to support its population objective. Specifically, the population size and effective migration rate that was selected for the final rule fails to account for the fact that the Blue Range population is not connected to a metapopulation and suffers from a higher degree of interrelatedness than is assumed in those studies. When these circumstances are factored in Drs. Carroll, Wayne and Hedrick, among others, conclude that the effective migration rate and population size in the 2015 rule are insufficient to ensure the long-term viability of the species. In their public comment to FWS, Drs. Carroll et al. state that

survival, while the ESA demands the rule provides for the long-term conservation of the species.²³ The court also reproached the Service for the rule's expanded take provisions, which both fail to consider the impact on the species' dire genetic health and also operate as a disadvantage to the species, contrary to Section 10(d) of the ESA.²⁴

The Service must conduct its remand in light of the 2015 10(j) rule's wholesale failure to further the conservation and recovery of the Mexican wolf. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *13, *17. This includes revisiting the arbitrary population cap, the geographic boundaries where Mexican wolves are permitted to roam, and the expanded take provisions, among other factors, in order to ensure the recovery and long-term conservation of the species in the wild. The Service cannot casually limit its review to a select set of issues that the agency itself so desires (as evidenced by the Notice of Intent). Doing so violates the plain language of the court's remand and will necessarily result in yet another round of subsequent litigation on the revised 2021 10(j) rule -- a situation that will serve only to further delay the true recovery of Mexican wolves in the wild, and will serve only to waste precious time that this critically imperiled and genetically impoverished species simply cannot afford.

B. Improper Reliance on Challenged 2017 Recovery Plan

Second, the Service cannot and should not base its remand on the 2017 Mexican wolf Recovery Plan, First Revision (hereinafter "2017 Recovery Plan").²⁵ As an initial matter, the Service is well aware that the 2017 Recovery Plan has been legally challenged, with briefing on the merits currently pending through at least July 2020.²⁶ Plaintiffs, including the organizations submitting these comments (and others), have raised serious allegations regarding the 2017 Recovery Plan's validity under the ESA; and specifically, whether the recovery plan adequately addresses all of the threats facing the species, as the ESA demands.²⁷ The court has already ruled in Plaintiffs' favor on the government's initial motion to dismiss.²⁸ As such, it is irresponsible for the Service to attempt to tie its remand of the faulty 2015 10(j) rule to the legally vulnerable 2017 Recovery Plan when the agency may very well need to revisit the substance of the recovery plan itself in the very near

'[r]eleases from the captive population at a rate equivalent to 2 effective migrants per generation would ... be inadequate to address current genetic threats to the Blue Range population.' They further note that forestalling genetic degradation and reducing the high relatedness of the population are actions that must be taken early on, while the population is still small, 'in order for this population to contribute to recovery.'" (citation omitted) (emphasis in original)).

²³ *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *14 ("The rule's provision for a single, isolated population of 300-325 wolves, with one to two effective migrants per generation, does not further the conservation of the species and is arbitrary and capricious."); *Id.* ("Ensuring the short-term survival of the species falls short of Section 10(j)'s requirement that the release of an experimental population further the recovery of the species.").

²⁴ *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *15 ("[T]he expanded take provisions contained in the new rule do not contain adequate protection for the loss of genetically valuable wolves"); *Id.* (Noting that the rule's authorization of lethal and non-lethal take "stems not from biological considerations but from the agency's need to coordinate the recovery effort with affected stakeholders," and clarifying that the issuance of take permits must be rendered in accordance with "the ESA's conservation purpose and policy, 16 U.S.C. § 1539(d).")

²⁵ Notice of Intent, 85 Fed. Reg. at 20,968-69) ("[W]e will address the remanded issues by aligning the new revised rule with the revised recovery plan, which provides an overarching strategy for the long-term conservation and recovery of the Mexican wolf.").

²⁶ *WildEarth Guardians v. Bernhardt*, No. CV-18-00048-JGZ (member case: consolidated with No. CV-18-00047-JGZ) (D. Ariz.).

²⁷ See *WildEarth Guardians v. Bernhardt*, No. CV-18-00048-JGZ (member case: consolidated with No. CV-18-00047-JGZ), Doc. No. 42, Memorandum in Support of Motion for Summary Judgment (D. Ariz., filed Apr. 17, 2020).

²⁸ *WildEarth Guardians v. Zinke*, No. CV-18-00048-TUC-JGZ, Doc. No. 34, Order (D. Ariz., filed Mar. 30, 2019); *Ctr. for Biological Diversity v. Zinke*, No. CV-18-00047-TUC-JGZ, Doc. No. 37, Order (D. Ariz., filed Mar. 30, 2019).

future. A recent article -- Carroll (2019) -- offers an analysis comparing the 2017 Recovery Plan to its prior, draft iteration in 2012/2013 and outlines a number of very serious concerns with the 2017 Recovery Plan, including the fact that criteria within are not based solely on science, but instead on a selective interpretation of the science that has been deemed acceptable on political bases.²⁹ The delisting criteria in the 2017 Recovery Plan, for instance, do not address threats that the Service itself (including its own biologists) have identified, including: (1) genetic threats (the Service falsely relies on effort only, not the results; nor do the criteria address the threat from lacking connectivity); (2) human-caused losses; (3) inadequate regulatory mechanisms; and (4) habitat-based threats.³⁰

Furthermore, the court has already explicitly cautioned the Service against relying on the contents of its recovery plan to justify the provisions of its Section 10(j) management rule, stating in its 2018 order:

The Court concludes that the substance or terms of future recovery actions do not relieve [the Service] of its obligations under Section 10(j). Moreover, the provisions of a recovery plan are discretionary, not mandatory. Thus, even if the recovery plan contained all terms promised by [the Service] here, there is no guarantee that those terms will protect against the harms that the Court finds presented by the 10(j) rule.

Center for Biological Diversity v. Jewell, 2018 WL 1586651 at *15. The Section 10(j) rule is legally enforceable and must be based on the best available science, 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2). Recovery plans are subject to different standards than experimental population

²⁹ Carlos Carroll et al., *Biological and Sociopolitical Sources of Uncertainty in Population Viability Analysis for Endangered Species Recovery Planning*, 9 Sci. Reports 10130 (2019) [hereinafter "Carroll 2019"]; *Eg., id.* at 8 ("The criteria developed in the 2017 wolf plan, although purportedly drawn from PVA results, match the wolf population threshold previously negotiated between the FWS and state agencies based primarily on socioeconomic concerns. To produce congruence between [Population Viability Analysis ("PVA")] output and this negotiated agreement on a politically acceptable wolf population size, the 2017 PVA needed to opt for a suite of parameter values that provides relatively optimistic outcomes in terms of species viability, but runs a higher risk of underpredicting extinction probability. Parameter uncertainty should suggest the need for a precautionary approach to devising criteria, rather than a license to select from within the range of plausible parameter values to give results congruent with policy preferences." (notes and internal citations omitted)); *Id.* ("In the 2013 model, scientifically defensible recovery criteria were ultimately not politically acceptable due to FWS's reluctance to move forward in the face of opposition by powerful stakeholders. In 2017, FWS helped to ensure against a similar outcome by allowing state officials to directly influence development of recovery criteria. However, these criteria may prove legally untenable if they violate the science-only provisions of the ESA. The 2017 process also fell short in terms of inclusivity. While some politically-influential stakeholders played a central role in the process, the Service excluded tribal representatives and civil society organizations that participated on previous recovery teams."); *Id.* at 8-9 ("The Service has claimed that the 2013 and 2017 recovery plans merely represent contrasting visions of recovery, and that opting for the 2017 plan's less ambitious goals is within the agency's discretion. However, the history of Mexican wolf recovery planning, during which the Service convened and disbanded three successive recovery teams until they secured a set of 'science-based' criteria that was politically acceptable to influential state politicians, is clearly at odds with the intent of lawmakers when they established the ESA's solely science-based requirement. Such situations in which political decisions are characterized as purely science-based should be of concern because they undermine transparent and evidence-based decision-making. Politically-constrained criteria also have real-world consequences for the Mexican wolf in that they lead the Service to underestimate the number of captive individuals that need to be released into the existing wild population and to forgo opportunities to establish new populations in unoccupied suitable habitat."); *Id.* at 9 ("As a result of this disconnect between science and politics — and to make decisions appear as the products of science-based decision-making as required by law — federal agencies may turn to PVA as a mechanism to produce politically acceptable definitions of recovery. However, any recovery plan that relies on misrepresentation of scientific data faces long odds in effectively achieving biological recovery.").

³⁰ See *WildEarth Guardians v. Bernhardt*, Case No. 4:18-cv-00048-JZ, Doc. 42, Memorandum In Support of Motion for Summary Judgment (D. Arizona, filed Apr. 17, 2020).

management rules under the ESA. *See* 16 U.S.C. § 1533(f). Accordingly, the Service cannot use the 2017 Recovery Plan as the basis for its remand of the 10(j) rule.

C. Section 7 Conferencing & Consultation (Including New Biological Opinion) Required

The Notice of Intent fails to describe the required Section 7, 16 U.S.C. § 1536, conferencing and consultation processes that will be conducted for the revised rule, which are procedures the ESA demands be undertaken here.

To achieve the ESA's recovery goal, Congress directed federal agencies to engage in consultation with the Service to ensure any actions it funds, authorizes, or carries out are "not likely to jeopardize the continued existence" of any listed species. 16 U.S.C. § 1536(a)(2). Actions that are "likely to adversely affect a listed species" must obtain a biological opinion from the Service discussing the effects of the action and including a finding whether the action "is likely to jeopardize the continued existence" of the species. 16 U.S.C. §1536(a)(2); 50 C.F.R. § 402.14. The phrase "jeopardize the continued existence of" means to engage in an action that appreciably reduces the likelihood of the survival and recovery of a listed species in the wild. 50 C.F.R. § 402.02. Impacts to both survival and recovery must be addressed in the biological opinion's jeopardy finding. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008). The jeopardy finding must also be based on the best available science. *Id.*; 50 C.F.R. § 402.14(g)(8). This standard does not require the Service to conduct "new tests or make decisions on data that does not yet exist," *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F. 3d 1031, 1047 (9th Cir. 2015) (citation omitted), but it does prohibit the agency from "disregarding available scientific evidence that is in some way better than the evidence [it] relies on." *Kern Cnty. Farm Bureau v. Allen*, 450 F. 3d 1072, 1080 (9th Cir. 2006).

For the 2015 management rule, the Service engaged in intra-agency conferencing and consultation on the rule and related Section 10(a)(1)(A) take authorization permit. In the litigation challenging the 2015 rule, plaintiffs WildEarth Guardians et al., raised an argument that the Service's biological opinion and "no jeopardy" finding for the 2015 rule and take authorization permit were arbitrary and capricious or otherwise not in accordance with the law.³¹ While the court did not reach this argument in coming to its conclusion that the 2015 rule violated the ESA and APA as a whole,³² we caution the Service against relying on the severe deficiencies underlying the 2015 rule's consultation process, biological opinion, and associated "no jeopardy" finding. The Service must conduct the required Section 7 consultation and conference processes anew, including by issuing a new biological opinion and new jeopardy finding. Additionally, because the Service should designate the experimental population as essential (*see infra* Part II), the Service should also consult on and evaluate a critical habitat designation for the essential experimental population of Mexican wolves.

³¹ *See WildEarth guardians v. Jewell*, Case No. 4:15-cv-00019-JGZ, Doc. 112, Memorandum in Support of Motion for Summary Judgment (D. Ariz., filed Feb. 23, 2016).

³² *Center for Biological Diversity*, 2018 WL 1586651 at *23 ("Because further agency action will be required, the Court will not reach the parties' challenges to the November 17, 2014 Biological Opinion or the parties' arguments under NEPA.").

D. Supplemental EIS Improper, New EIS Required

NEPA “promotes its sweeping commitment to ‘prevent or eliminate damage to the environment’ ... by focusing Government and public attention on the environmental effects of proposed agency action.” *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989). By so doing, “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Id.* “Ultimately, of course, it is not better documents but better decisions that count.” 40 C.F.R. § 1500.1(c).

Under NEPA, the Service is required to prepare an Environmental Impact Statement (“EIS”) for any proposed federal action “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2). An EIS must address, among other things, the environmental impacts (direct, indirect, and cumulative) of the proposed action and evaluate all reasonable alternatives. *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F. 3d 1037, 1045 (9th Cir. 2011) (citing 40 C.F.R. §§ 1508.8(b), 1502.14(a)). Agencies are allowed to modify a proposed action in light of public comments received on a draft EIS, but if the final action “departs substantially from the alternatives described in the draft EIS, a supplemental EIS is required.” *Russell Country*, 668 F.3d at 1045.

While we appreciate that the Service is proceeding with -- at the very least -- a supplement to the 2014 EIS underlying the 2015 management rule and associated findings, we suggest that the Service develop a completely new EIS for the revised management rule. A supplemental EIS is only appropriate where the underlying NEPA document itself is not legally deficient. In the prior litigation, Plaintiffs WildEarth Guardians et al., argued that the Service violated NEPA for failing to evaluate a reasonable range of alternatives in the 2014 EIS, and by failing to publish a supplemental EIS despite the presence of significant changes in the final rule.³³ While the court failed to reach a decision on these arguments because it found the Service’s rule violated the ESA and APA altogether,³⁴ we caution the Service against ignoring these vulnerable NEPA deficiencies during its remand of the 2015 management rule. The Service must remedy these deficiencies by developing new draft and final EISs that properly evaluate a reasonable range of alternatives, including an alternative that considers the viable and reasonable alternative of designating the experimental population of Mexican wolves as “essential.” We also suggest that the Service prepare a new EIS that properly evaluates the direct, indirect, and cumulative effects of the revised management rule on Mexican wolves and the recovery of Mexican wolves in the wild. The Service must conduct a full and proper NEPA process anew in order to ensure that the revised rule comports with all aspects of federal law.

II. ESSENTIALITY DETERMINATION

The Service must designate the experimental population of Mexican wolves as “essential” pursuant to Section 10(j) and the Service’s implementing regulations.

³³ See *WildEarth guardians v. Jewell*, Case No. 4:15-cv-00019_JGZ, Doc. 112, Memorandum in Support of Motion for Summary Judgment (D. Ariz., filed Feb. 23, 2016).

³⁴ *Center for Biological Diversity*, 2018 WL 1586651 at *23.

A. Legal Framework

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978). The ESA was enacted to forestall the extinction of species, whatever the cost, and allow species to recover to the point where the protections afforded by the Act are no longer necessary. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004). Survival and recovery are two different (though complementary) goals of the ESA. *Id.*

To achieve the ESA’s goals, Congress gave the Service authority to “live’ trap and transplant (reintroduce) rare species, if necessary,” for recovery. *Defenders of Wildlife v. U.S. Fish & Wildlife Serv.*, 797 F. Supp. 2d 949, 954 (D. Ariz. 2011) (citing 16 U.S.C. §§ 1536(a)(1), 1532(3)). In 1982, Congress took additional steps to further reintroduction efforts by adding Section 10(j), 16 U.S.C. § 1539(j), to the ESA.³⁵

Pursuant to Section 10(j), the Service is authorized to release an “experimental population” of a listed species into the wild subject to certain requirements. 16 U.S.C. § 1539(j). An “experimental population” is any population of an endangered or threatened species authorized for release that is “wholly separate geographically from non-experimental populations of the same species” and outside the current range of that species. 16 U.S.C. §§ 1539(j)(1), (2)(A). Before authorizing a release, the Service must find that it “will further the conservation of such species.” 16 U.S.C. § 1539(j)(2)(A). The Service must also develop regulations identifying the experimental population, 16 U.S.C. § 1539(j)(2)(B), the geographic area where the regulations apply, 50 C.F.R. § 17.81(c)(1), and the specific management restrictions that apply (or not) to the population, 50 C.F.R. § 17.81(c)(3). The regulations must also include a determination, based solely on the best available science, as to whether or not the experimental population is “essential to the continued existence of an endangered species or a threatened species.” *McKittrick*, 142 F.3d at 1176 (citing 16 U.S.C. § 1539(j)(2)(B)); *see also Wyoming Farm Bureau*, 199 F.3d at 1233 (same); 50 C.F.R. § 17.81(c)(2)(same).

“Essential” means the experimental population’s loss “would be likely to appreciably reduce the likelihood of the survival of the species in the wild.” 50 C.F.R. § 17.80 (b). All other experimental populations that do not satisfy this definition are deemed “nonessential.” *Id.* Congress recognized that in most -- but not all -- circumstances, experimental populations will likely be deemed nonessential.³⁶ This is because the loss of a single experimental population will rarely appreciably reduce the likelihood of the entire species’ or “parent populations” survival in the wild.³⁷ Under “some circumstances,” however, essential status may be justified “[w]here the

³⁵ Section 10(j) was designed to address frustration over political opposition to reintroduction efforts. Congress hoped the provisions of section 10(j) would mitigate industry’s fears and actually encourage private parties to host such populations on their land. *Wyoming Farm Bureau v. Babbitt*, 1999 F.3d 1224, 1232 (10th Cir. 2000) (citing H.R. Rep. No. 97-567 at 8 (1982)); *see also U.S. v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998) (section 10(j) gives more flexibility).

³⁶ Dep’t of the Interior, Fish & Wildlife Serv., Endangered and Threatened Wildlife and Plants; Experimental Populations; Final Rule, 49 Fed. Reg. 33,885 at 33,888 (August 27, 1984) (citing H.R. Conf. Rep. No. 835 at 34).

³⁷ *Id.*; *See also* 49 Fed. Reg. at 33,890 (same).

biological facts support an essential designation.”³⁸ In those cases, the Service stated that it intends to make an essentiality finding.³⁹

The distinction between “essential” and “nonessential” populations is important because they are managed differently under the ESA. Essential experimental populations are treated as “threatened” species and, as such, are subject to special Section 4(d) or 10(j) regulations providing more flexibility for their management. 16 U.S.C. § 1539(j)(2)(C); 16 U.S.C. § 1533(d). As “threatened” species, essential populations are also subject to the consultation requirement of Section 7 of the ESA, 16 U.S.C. § 1536, and qualify for the designation of critical habitat, *see* 16 U.S.C. § 1533(a)(3)(A). Nonessential experimental populations are treated as “threatened” species and subject to special section 4(d) or 10(j) regulations except that: (1) solely for the purposes of Section 7, nonessential populations are to be treated as a species “proposed to be listed;” and (2) no critical habitat is to be designated for nonessential populations. 16 U.S.C. §§ 1539(j)(2)(C)(i), (ii).

Importantly, determinations on essentiality must be based on the best available science and biological factors alone, not on political considerations or a desire for management flexibility. 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2).⁴⁰

B. Essential Designation Warranted

Here, the plain language of the ESA and its implementing regulations require the Service to designate the experimental population of Mexican wolves as “essential” under Section 10(j).

As noted, an “essential” designation is warranted when the experimental population’s loss “would be likely to appreciably reduce the likelihood of the survival of the species *in the wild*.” 50 C.F.R. § 17.80 (b) (emphasis added). Here, the Service has repeatedly recognized that the experimental population represents the only population of Mexican wolves *in the wild* today.⁴¹ The Court acknowledged this fact in its 2018 ruling as well. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *16.⁴² It follows that if the *sole* population of Mexican wolves in the wild today -- the experimental population at issue here -- were lost (due to illegal killings or excessive removals, further deterioration of the population’s already dire genetic health, a catastrophic wildfire or drought event, etc.), the species’ continuing likelihood of survival *in the wild* would necessarily be appreciably reduced. Simple logic and the plain language of the applicable law and regulations supports this as the *only* conclusion: the Service must designate the experimental population of Mexican wolves as “essential” in the revised Section 10(j) rule.

³⁸ *Id.* at 33,888.

³⁹ *Id.*

⁴⁰ *See also* 49 Fed. Reg. at 33,888.

⁴¹ *See e.g.*, 2015 10(j) Rule, 80 Fed. Reg. at 2,514–15; 2015 Listing Rule, 80 Fed. Reg. 2,488; Dep’t of the Interior, Fish & Wildlife Serv., Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico, Final Rule, 63 Fed. Reg. 1,752 at 1,753 (Jan. 12, 1998) [hereinafter “1998 10(j) Rule”] (“The subspecies is not considered extirpated from its historic range in the south western United States because no wild wolf has occurred since 1970.”).

⁴² “The experimental population that is the subject of this litigation is the only population of Mexican wolves in the wild.”

In the 1998 Section 10(j) rule establishing the experimental population, the Service justifies its “nonessential” designation based on the fact that there is a captive population of Mexican wolves upon which to ensure the species will not be lost.⁴³ However, such an interpretation wrongly reads the relevant language “in the wild” completely out of the statute.⁴⁴ The Service cannot merely rely on the *captive* population to serve as a sufficient back-up population, should the only population *in the wild* ever be lost.

First, the ESA demands recovery *in the wild*, not in captivity alone. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *4⁴⁵; *See also Trout Unlimited v. Lohn*, 559 F.3d 946, 957 (9th Cir. 2009)⁴⁶; *California State Grange v. Nat’l Marine Fisheries Serv.*, 620 F. Supp. 2d 1111, 1155–57 (E.D. Cal. 2008)⁴⁷; USFWS Section 7 Handbook (defining recovery as occurring in the wild); 16 U.S.C. § 1539 (referring to recovery in the wild). As explained prior, if the experimental population were lost, there would be no more Mexican wolves remaining *in the wild* to further the species’ recovery *in the wild*. There is no second, or third population *in the wild* in the United States upon which to fall back upon, plain and simple. Further, the ESA demands recovery of species not in captivity, nor in zoos alone, but in their natural habitat such that they may survive and thrive independent of constant human-intervention. The ESA’s provision designating critical habitat for select species (including those experimental populations deemed “essential”) is evidence of this manifest, underlying goal. 16 U.S.C. §§ 1532(5), 1533(a)(3)(A).

The Service’s attempt to rely exclusively on the captive breeding program and future availability of wolves for release turns the ESA’s goal for endangered and threatened species recovery *in the wild* on its head and mistakenly reads “in the wild” out of Section 10(j). Having 250, or 500, or even 1,000 Mexican wolves in captivity, holding pens, and zoos does not fix the problem, satisfy the ESA’s recovery goals, or transform an essential population in the wild into a “nonessential” one, as the Service has tried to assert. Consistent with the ESA’s recovery goals, a determination on “essentiality” is premised on the impact the population in the wild, if lost, would have on the species in the wild, not on the number of wolves in captivity or zoos available for future release. *See* 50 C.F.R. §§ 17.80(b), 17.81(c)(2). Indeed, Section 10(j) of the ESA directs the

⁴³ 1998 190(j) Rule, 63 Fed. Reg. at 1,756 (“The Service determined that the nonessential experimental classification fits the Mexican wolf’s status. Only wolves surplus to the captive breeding program will be released ... Their loss would not jeopardize the continued survival of the subspecies.”).

⁴⁴ *See id.*; 50 C.F.R. § 17.80 (b) (defining “essential” means the experimental population’s loss “would be likely to appreciably reduce the likelihood of the survival of the species *in the wild*.” (emphasis added)).

⁴⁵ “[T]he agency must determine recovery based on the viability of species, not in captivity but in the wild. ‘In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element.’ H.R. Conf. Rep. No. 97-835, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2871; H.R. Rep. 95-1625, n. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455 (purpose of ESA is not only to reduce threats to the species’ existence, but ‘to return the species to the point where they are viable components of their ecosystems.’).”

⁴⁶ “[T]he ESA’s primary goal is to preserve the ability of natural populations to survive in the wild ... ‘[t]hat the purpose of the ESA is to promote populations that are self-sustaining without human interference can be deduced from the statute’s emphasis on the protection and preservation of the habitats of endangered and threatened species.’ *See e.g.*, 16 U.S.C. § 1531(b) ... The statute mentions artificial propagation merely as a means ‘to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.’ 16 U.S.C. §1532(3). The ESA’s legislative history also confirms that the ESA is primarily focused on natural populations. *See* H.R. Rep. No. 95-1625, at 5, *reprinted in* 1978 U.S.C.C.A.N. at 9455.”

⁴⁷ Discussing the issue and citing other listed species where the Service does not count individuals held in captivity as part of the ESA’s recovery goal, and further explaining that recovery efforts should aim “toward establishing self-sustaining populations.” An interpretation that permits exclusive reliance on a captive breeding program is thus antithetical to recovery efforts. *Id.* at 1157.

Service to determine whether the experimental population is “essential” to the continued existence of the species *in the wild*. 50 C.F.R. § 17.80(b).⁴⁸ If the only population of a listed subspecies in the wild -- here, a single population of Mexican wolves that only exists in portions of Arizona and New Mexico -- is lost, it would do more than “appreciably reduce the likelihood of” the subspecies’ survival in the wild; it would eliminate it altogether.⁴⁹

Second, even if the Service could somehow legally rely on the captive population to serve as sufficient back-up such that if the experimental population in the wild were lost, the species’ chance for recovery in the wild would not be appreciably reduced (which we argue they cannot), the captive population is also in such grave shape that relying on it alone is not biologically supportable. Relying on a captive population that itself faces genetic health issues, is aging, and does not replicate the gene diversity of the wild population to replace the 160 or so wolves in the wild, should they be lost, would be catastrophic.

Though not as severely as the wild population’s genetic status (yet), the genetic health of the captive population is also seriously diminished.⁵⁰ The captive population is also derived from the same seven founding members, and accordingly, Mexican wolves are about as related to one another as brothers and sisters.⁵¹ The level of founder genome equivalents of the population is among the lowest of any other reintroduced endangered species in North America.⁵² This means that the Mexican wolf population is critically threatened by inbreeding, which reduces litter sizes and decreases the chances that a mating pair of wolves will even produce any offspring.⁵³

Additionally, the age of the captive population presents a grave threat to the health of the population. Roughly 60 percent of captive Mexican wolves are over 7 years of age, and as such, will likely die in the coming year or two. Accordingly, the two populations cannot be thought of in the abstract. If the experimental population in the wild were to be lost, the chances for the surviving captive Mexican wolves to be recovered in the wild would, likewise, be appreciably reduced. In short, reliance on the captive population alone -- while not legally viable in the first place -- still would not remedy the fact that if the experimental population were lost, the species’ chances for recovery would continue to be appreciably reduced. Reliance on the captive population alone would make an already bad situation even worse.

Further, the Service must evaluate and explain how the current captive population it relies on -- which, again, is in trouble, genetically impoverished, and consists of only roughly 250 individuals originating from 7 founders -- is and will continue to be capable of potentially

⁴⁸ See also 49 Fed. Reg. at 33,888.

⁴⁹ While we acknowledge that the Service and its partners are trying to restore a population of Mexican wolves in Mexico, these wolves are still derived from the single, captive experimental population and arguably do not constitute a “population” yet in the sense that renders the sole population of wild Mexican wolves in New Mexico and Arizona “nonessential.” Further, the success of potential recovery of the species in the wild Mexico is specious at best (see *infra*, Part III (C)(3)).

⁵⁰ See Carroll 2019 at 7 (“Given that that [sic] genetic diversity of the Mexican wolf captive population is already greatly depleted due to the small number of founders and the subsequent losses of diversity during generations in captivity, it is important to minimize further loss of genetic variation.” (citation and note omitted)).

⁵¹ See Carroll 2019 at 5 (“The Mexican wolf population currently shows high levels of relatedness equivalent to individuals being as related as full siblings in a non-inbred population.”).

⁵² *Id.*

⁵³ *Id.*

replacing a lost wild population of approximately 160 wolves. Factors to consider include the importance of the wild population, the number of captive wolves needed to replace a lost wild population, political opposition and barriers to releases, the poor genetic make-up of the captive population (which continues to decline), the time lapse and changes that have occurred to the captive breeding program since 1998, and the number of suitable captive Mexican wolves available for release (many wolves in captivity have already been deemed “non-releasable” due to age, health, or having already been removed from the wild).

Finally, we also note that to the extent the Service and others demand “management flexibility,” this can still be obtained by designating an “essential” experimental population of Mexican wolves in accordance with Section 10(j) of the ESA. *See* 16 U.S.C. § 1539(j)(2)(C). Special regulations for essential populations provide significant flexibility, just as they do for nonessential populations. 50 C.F.R. § 17.81(c)(3). The applicable regulations are largely the same for “essential” and “nonessential” experimental populations. Just as with a “nonessential” designation, such regulations may include measures to isolate the experimental population to certain areas and flexible provisions allowing for various kinds of “take.” *Id.*; *see also* 49 Fed. Reg. at 33,888 (discussing the benefits of regulations for *all* experimental populations); *Wyoming Farm Bureau*, 199 F.3d at 1231–32 (same). The Service may not premise its essentiality finding on a desire to avoid critical habitat designation or Section 7 consultations, as this would conflict with Congress’ directive to premise its determination solely on the best available science. 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2).

In the end, if the experimental population of Mexican wolves at issue here -- the only wild population of Mexican wolves -- is not “essential” to the survival of the subspecies in the wild, then an experimental population will never be deemed essential. This is not what Congress intended. *See* 16 U.S.C. § 1539(j)(2)(B). While it may be true that in “most” cases experimental populations will not qualify as essential, “most” does not mean “all.” Exceptions, like the one presented here by the single population of Mexican wolves in the wild, exist and must be evaluated in accordance with Section 10(j) of the ESA. To date, the Service has yet to establish a single “essential” experimental population pursuant to Section 10(j) of the ESA. *See* 50 C.F.R. § 17.84 (listing experimental population rules). If the Service designates Mexican wolves -- one of the rarest mammals in North America and the only population (experimental or otherwise) in the wild -- as “nonessential,” it is hard to imagine an experimental species that will ever be deemed “essential.” The Service would be effectively writing the “essential” status for experimental populations out of the statute.⁵⁴

In sum, we request that the Service designate the experimental population of Mexican wolves as “essential” in the revised Section 10(j) rule. We also request that the Service initiate promulgation of a critical habitat rule for the essential experimental population of Mexican wolves upon designation.

III. REVISED RULE MUST FURTHER THE RECOVERY OF THE SPECIES

⁵⁴ *See Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 932 (9th Cir. 2007) (rejecting interpretation that reads text out of the ESA).

The revised rule must be based solely on the best available science. 16 U.S.C. § 1539(j)(2)(B). The rule must be the product of due consideration of the species' biological needs and factors, and should not solely be the product of a political agreement with states and other partners. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *17.⁵⁵ The rule must further the overarching conservation purpose and policy of the ESA, and cannot operate to the disadvantage of the species' recovery in the wild. 16 U.S.C. § 1539(d); *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *6, *15.⁵⁶ The rule must also further the long-term conservation needs of the species, and cannot be focused merely on ensuring short-term survival of the species alone. *Id.* at *16.⁵⁷

Accordingly, the Service must revise the rule as follows:

A. Eliminate Expanded Take Provisions of 2015 Rule

The court faulted the Service for its expansive allowance of take⁵⁸ of Mexican wolves in the 2015 rule. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *15. The 2015 rule allows for take on both federal and non-federal lands, in defense of human health or safety, and for purported "unacceptable" impacts to wild ungulate herds. See 50 C.F.R. § 17.84(k)(7). Allegedly "unintentional" take of Mexican wolves by trappers operating in accordance with state law is also permitted in the 2015 rule. See 50 C.F.R. § 17.84(k)(5)(iii); 50 C.F.R. § 17.84(k)(7)(viii). These harmful take allowances must be remedied in the revised rule in order to bring the rule into compliance with the ESA's overarching conservation mandate, 16 U.S.C. § 1536 (a)(1).

The Service has repeatedly recognized that human-caused losses and illegal mortality are the number one threat facing the species in the wild.⁵⁹ Yet, the 2015 rule blatantly -- and illegally -- increased this threat by allowing for overly expansive levels of take contrary to the mandates of the ESA. While take authorizations are based primarily on the Service's need to coordinate with affected stakeholders, such coordination cannot override the fundamental conservation purposes

⁵⁵ "Section 10(j) of the ESA does not require that the 10(j) rule be the product of an agreement with state and private stakeholders ... On the contrary, the legislative history demonstrates that, although Congress anticipated Section 10(j) regulations would be implemented in consultation with affected parties, the Secretary would retain the authority and management flexibility to issue regulations that further the conservation of the species."

⁵⁶ See *also id.* at *5 ("As with other provisions of the ESA, conservation and recovery are at the heart of Section 10(j).") (citing *Defs. Of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1117 (D. Ariz. 2009) ("USFWS has a non-discretionary duty to ensure that the Final Rule for the Reintroduction Program, 50 C.F.R. § 17.84(k), provides for the conservation of the Mexican wolf.")); see *also id.* at *6 ("[A]n experimental designation based on nonconservation purposes would not be supported.") (quoting 49 Fed. Reg. 33,888-89).

⁵⁷ Rejecting the Service's contention that the 2015 rule was sufficient as an interim measure, as part of a stepwise approach to recovery, and stating "[t]his argument completely misconstrues the principles guiding recovery, which focus on long-term viability of the species, and again requires that the Court rely on the promise of future action that may never be implemented. The Court declines to do so. The experimental population that is the subject of this litigation is the only population of Mexican wolves in the wild. See *Motor Vehicle Mfrs. Ass'n of United States Inc.*, 463 U.S. at 43. It is undisputed that recovery of the population is in genetic decline and that the present agency action will have long-term effects on the genetic health of the species."

⁵⁸ 16 U.S.C. § 1532 (19) (defining "take" to mean "to harass, harm, pursue, hunt, shoot, wound, capture, or collect, or to attempt to engage in any such conduct."); 50 C.F.R. § 17.84(k)(3) (same)

⁵⁹ See *e.g.*, 2015 10(j) rule, 80 Fed. Reg. 2,512; See *also Carroll* 2019 at 4-5 ("Human-caused mortality constituted 81% of Mexican wolf mortalities with known causes from 1998 to 2011, and is the primary threat to persistence of wolf populations globally, particularly where wolves occupy landscapes used by humans and livestock." (notes and citations omitted)).

of the ESA and serve to the disadvantage of the species' recovery overall. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *15.⁶⁰ Where take would serve to harm the species' recovery, the Service cannot permit it to occur absent sufficiently compelling circumstances (i.e., in the rare instance where severe harm to human life actually occurs).

In the 2018 opinion, the Court held that the Service's stated explanation for allowing extremely high levels of take of Mexican wolves violated the ESA. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *15.⁶¹ While repeatedly recognizing the loss of genetic diversity as a chief threat facing the species and hampering its recovery, the Service failed to include any protection from such loss in the rule's provisions allowing for excessive levels of lethal and nonlethal take and removal from the wild population. *Id.*⁶² This severe fault must be remedied in the revised rule, and the Service can do so in a number of ways:

- (1) *Curtail Permissive Take Altogether*: The Service should drastically curtail the amount of allowable take within the 2015 rule in all respects in its revision. Take should only be permitted under the most dire of circumstances, and only if it can be proven not to hamper the recovery of the species overall. The Service should not allow for the take of any Mexican wolf for preying on domestic livestock on public lands. Period. On private lands, the Service should require livestock producers to have employed coexistence practices before removing or relocating any Mexican wolf at the livestock operator's request. The Service should further prohibit the grazing of livestock on public lands in occupied wolf habitat to alleviate the need for removals based on livestock/wolf conflict. The Service can do this by coordinating with the applicable land management agency to condition grazing permits on such a requirement, in accordance with all federal agencies' conservation duties under the ESA. 16 U.S.C. § 1536(a)(1).⁶³
- (2) *Incorporate a Mechanism to Account for the Genetic Value of a Wolf Being Considered for Removal*: For any removal being considered, the Service must implement a mechanism that accounts for the individual wolf's and the wolf pack's genetic value to the recovery of the species as a whole. The Service should base its analysis on solely the best available science and should document its analysis in a publicly available format before a removal occurs. The Service should refuse to remove any wolf that is genetically valuable where that value cannot be at least equally replaced, absent sufficiently compelling circumstances (i.e., the extremely rare occurrence of actual harm to human life).

⁶⁰ "The agency's authority to manage a 10(j) population includes the option to authorize lethal and nonlethal take. This authority stems not from biological considerations, but from the agency's need to coordinate with affected stakeholders. However, in issuing take permits, 'the Secretary is subject to the requirement of Section 10(d) that issuance will not operate to the disadvantage of the listed species,' S. Rep. No. 97-418 at 8, and the permit issued must be consistent with the ESA's conservation purpose and policy, 16 U.S.C. § 1539(d)."

⁶¹ "FWS justifies the expanded take provisions on the ground that they will 'make reintroduction compatible with current and planned human activities, such as livestock grazing and hunting.' This explanation fails to show that FWS considered the requirements of Section 10(d), or that its decision adhered to the ES's conservation purpose."

⁶² "[T]he expanded take provisions contained in the new rule do not contain adequate protection for the loss of genetically valuable wolves."

⁶³ Additionally, upon designation as an "essential" experimental population (*see supra*, Part II), Section 7 consultation will be required for livestock allotment management plans ensuring that Mexican wolf biologists evaluate the effects of livestock grazing on the species' recovery.

- (3) *Provide for the Release of a Genetically Valuable Wolf from Captivity in Exchange for Every Wolf Removed from the Wild Population:* The Service should ensure that for every wolf removed from the wild, a replacement of equal or better genetic value from the captive population is concurrently released into the wild in an effort to replace the wolf removed from the critically imperiled wild population. The Service should go further, and make every effort to release well-bonded wolf pairs and pups in exchange for every removal order carried out in order to maintain and further the long-term conservation of the species.
- (4) *Prohibit Take for Predation of Native Prey (i.e., ungulates):* Ungulates -- including deer, elk, etc. -- are the native prey of Mexican wolves. It is completely contrary to the fundamental purposes of the ESA to allow for the take of wild Mexican wolves for feeding on their native prey.⁶⁴ Indeed, wolves play a vital role in ensuring the health and ecological carrying capacity of wild ungulate herds by keeping ungulate populations in check. Wolves' natural ability to keep their own populations in check also avoids any concern for alleged "decimation" of wild ungulate herds. Mexican wolves should not be removed from the wild for simply *being* wolves. The Service must remove entirely the harmful provision allowing for take of Mexican wolves at the behest of state wildlife management agencies for allegedly "unacceptable" impacts to wild ungulate herds, as it is utterly contrary to ESA.
- (5) *Prohibit Take for Natural Dispersal:* The Service must remove the provision of the Section 10(A)(1)(a) permit that allows for the capture and removal or translocation of any Mexican wolf that naturally disperses outside of the arbitrary political boundaries of the Section 10(j) rule's Mexican wolf Experimental Population Area ("MWEPA").⁶⁵ As explained further below, the 2015 rule's boundaries are not based in science, and accordingly require revision.⁶⁶ Allowing the take of Mexican wolves that naturally roam north of Interstate-40 hampers the recovery prospects for the species overall, as it prevents Mexican wolves from accessing and re-inhabiting the ample, viable suitable habitats afforded by the Southern Rockies and Grand Canyon Ecoregions. Accordingly, the Service must prohibit the take of Mexican wolves naturally dispersing, even if they roam outside of the MWEPA, in the revised rule.
- (6) *Remove "Unintentional" Take Loophole:* The Service must also remove the egregiously lethal loophole found in the 2015 rule's provision allowing for "unintentional" take by recreational trappers operating in accordance with state laws, regulations, and best practices.⁶⁷ Arguably at least, it appears that this loophole is already being used by anti-wolf advocates and trappers to actively decrease the wild population and remove protected Mexican wolves without consequence. For example, public records requests have documented at least 20 Mexican wolves have been caught in recreational traps

⁶⁴ See 16 U.S.C. § 1531(b).

⁶⁵ See 50 C.F.R. § 17.84(k)(3) (defining the MWEPA as "an area in Arizona and New Mexico including Zones 1, 2, and 3, as defined in this paragraph (k)(3), that lies south of Interstate Highway 40 to the international border with Mexico."); 50 C.F.R. § 17.84(k)(9) (describing the management approach for Mexican wolves, and explaining that Mexican wolves may only occupy the MWEPA).

⁶⁶ See e.g., Carroll et al. 2014; USFWS 2012; See also, *infra* Part III. C.

⁶⁷ 50 C.F.R. § 17.84(k)(7)(viii)(A) ("Take of a Mexican wolf by any person is allowed if the take is unintentional and occurs while engaging in an otherwise lawful activity."); See also 50 C.F.R. § 17.84(k)(5)(iii) (prohibiting take by trapping unless the trapper exercised "due care," which includes abiding by state laws and regulations, best practices, etc.).

since 2015, and 8 of those incidents have occurred in the first five months of 2020 alone. “Take” should be considered to occur not just when these trapping events result in fatalities, but also when injuries or removal to captivity occurs as well. The Service must work with the relevant state and federal land management agencies to prohibit trapping in the entirety of the Mexican wolf recovery area altogether. The revised rule should explicitly state that the trapping of a Mexican wolf -- whether intentional or not (as the very nature of trapping does not allow the trapper to select its intended target) and even if conducted in accordance with local laws and best practices -- is unlawful and subject to the criminal consequences provided by the ESA.⁶⁸

B. Remove Arbitrary Population Cap

The revised rule must eliminate altogether, or at the very least amend, the population cap of 300-325 Mexican wolves in the wild to comport with the best available science.⁶⁹ The court faulted the Service for explicitly misinterpreting the scientific data upon which it relied to develop the arbitrary 325 wolf cap. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *14.⁷⁰

The best available science provides that a minimum population of at least 750 Mexican wolves existing in a metapopulation consisting of three connected subpopulations of at least 200 Mexican wolves each is necessary for the species to recover.⁷¹ Yet, the Service has arbitrarily capped the population at only a fraction of what the best available science states is necessary for recovery to be achieved.⁷² This arbitrary population cap plainly fails to conserve the species. The critical aspects of a restored Mexican wolf population include: (1) the establishment of at least three populations (as opposed to a single, isolated population in the United States) that are (2) sufficiently large (at least 200 individuals) and of equal size, and (3) well connected to allow for the dispersal and movement of Mexican wolves and the genes they carry.⁷³ But in effect, the 2015 management rule’s population cap actually prevents recovery from ever occurring. This is completely contrary to the Service’s duties under the ESA, in which it must actively “conserve” listed species, 16 U.S.C. § 1536(a), and bring them to the point at which the protections afforded by the Act are no longer necessary. 16 U.S.C. § 1532(3).⁷⁴

Additionally, it must be noted that there is absolutely no scientific justification whatsoever for setting a population cap on wild populations of critically imperiled Mexican wolves. Wolves are

⁶⁸ See 16 U.S.C. § 1538 (providing it is unlawful for any person to take an endangered species).

⁶⁹ 50 C.F.R. § 17.84(k)(9)(iii) (“Based on end-of-year counts, we will manage for a population objective of 300 to 325 Mexican wolves in the MWEPA in Arizona and New Mexico. So as not to exceed this population objective, we will exercise all management options with preference for translocation to other Mexican wolf populations to further the conservation of the subspecies.”).

⁷⁰ “The rule’s provision for a single, isolated population of 300-325 wolves, with one to two effective migrants per generation, does not further the conservation of the species and is arbitrary and capricious. When FWS approved the population size and effective migration rate, it misinterpreted the findings of Carroll et al. (2014) and Wayne & Hedrick (2010), which it had relied upon to support its population objective.”

⁷¹ Carroll et al. 2006; Wayne and Hedrick 2011; Carroll et al. 2014; Hendricks et al. 2016; USFWS 2012.

⁷² 50 C.F.R. § 17.84(k)(9)(iii).

⁷³ Carroll et al. 2006; Wayne and Hedrick 2011; Carroll et al. 2014; Hendricks et al. 2016; USFWS 2012.

⁷⁴ Defining “conserve” means “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.”

naturally regulated through mechanisms such as prey density, territoriality, intraspecific strife, and behavioral suppression of breeding by subordinate family members.⁷⁵ Wolves must be allowed to achieve natural, ecologically effective densities in distributions throughout suitable habitats in order to carry out their essential role as a keystone, top predator species wherever found.⁷⁶ Setting a population cap actually works to prevent the Service from carrying out its duties under the ESA. See 16 U.S.C. § 1536(a). Forcing the wild population to be physically manipulated below its ecological and biological capacity, while at the same time limiting its natural range (see below), is contrary to the fundamental purposes of the ESA. See 16 U.S.C. § 1531(b). It is well documented that wolves, as apex predators, play a key role in maintaining the biological diversity and ecosystem health of the areas they inhabit.⁷⁷ The Service simply cannot ignore this science in favor of coming to an acceptable “negotiation” with select stakeholders for purely political purposes. *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *17.

Further, the Service must revise the rule to ensure that the number of effective migrants, *i.e.*, the number of individuals released into the wild from the captive population, is not arbitrarily limited. As the Service is well aware, the current population of Mexican wolves in the wild has extremely low levels of gene variation, well below what is needed for healthy reproduction. Yet, the 2015 10(j) rule arbitrarily limited the number of effective migrants to only two per generation (every four years) while the population is around 100-250 animals. The rule further allowed for this number to decrease to only one effective migrant per generation in populations over 250. Once again, however, the Service misinterpreted and misrepresented the findings of Carroll (2014) and Wayne and Hedrick (2010) to support this provision. These papers estimated effective migration rates to ensure acceptably low long-term erosion of genetic health in a recovered metapopulation of *three* populations, not a single, isolated population provided for in 2015 rule. The 2015 rule’s provision for only one to two effective migrants per generation is simply too low to provide for the genetic integrity of the experimental population. The Service must remedy this severe deficiency in the revised rule and allow for more releases from the captive population.

And, as noted above, the Service cannot ignore the fact that the genetic health of the captive population is deteriorating rapidly, such that the release of as many wolves from the captive population as is feasible is warranted now. See *supra* II. (B). A population cap based on politics, and not on science, cannot be used to limit necessary releases from the captive population in the wild. See *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *17.

Finally, the Service must give due consideration to the recent findings of Carroll et al. (2019) outlining the serious flaws and fatal assumptions underlying the Service’s 2017 Recovery Plan approach regarding the adequate size and make-up of a recovered Mexican wolf population.⁷⁸ Carroll et al. (2019) sharply criticized the Service for relying on a Population Viability Analysis (“PVA”) that was manipulated to comport with a politically agreed upon management approach.⁷⁹

⁷⁵ See *e.g.*, Wolff 1997; Fuller et al. 2003; Cubaynes et al. 2014; Mech and Barber-Meyer 2015; Smith et al. 2015.

⁷⁶ See *e.g.*, Soule et al. 2003, 2005

⁷⁷ See *e.g.*, Beschta and Ripple 2016; Letnic and Ripple 2017; Painter et al. 2018.

⁷⁸ Carroll 2019.

⁷⁹ See *e.g.*, Carroll 2019 at 9 (“Ultimately recovery planning science is embedded within a political process in which scientific information is only one of many influences. As a result of this disconnect between science and politics — and to make decisions appear as the products of science-based decision-making as required by law — federal agencies may turn to PVA

In sum, the 2015 management rule's population cap effectively ensures the species will never be brought to the point at which the Act's protections are no longer necessary. This is unambiguously contrary to the mandates of the ESA. 16 U.S.C. § 1536(a). Accordingly, the revised rule must address the serious flaws inherent in the arbitrary, politically-based, and scientifically unjustified population cap of the 2015 rule that allows for only 300-325 wolves to ever be permitted in the wild. Instead, the revised rule must eliminate the population cap altogether, while affirmatively allowing for the establishment of a well-connected metapopulation of at least 750 individuals in the wild.⁸⁰

C. Expand Geographic Range of the Experimental Population

In accordance with the best available science providing that a minimum metapopulation of at least 750 wolves in three connected subpopulations of at least 200 individuals each is required for recovery, the Service must expand the geographic scope of the experimental population's boundaries in order to allow for Mexican wolves to roam all suitable habitats in the American Southwest. The best available science states that ample -- and indeed, some of the most viable -- suitable habitat for Mexican wolves exists in the Southern Rockies of Northern New Mexico and Southern Colorado, as well as in the Grand Canyon Ecoregion of Northern Arizona and Southern Utah.⁸¹ Yet, the 2015 rule arbitrarily bounded the area where wolves would be allowed to exist to areas of New Mexico and Arizona south of Interstate-40 alone.⁸² This boundary is based solely on politics and not on the biological needs of the species, and accordingly fails to comport with the mandates of the ESA. See 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2); *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *17.

The Court has already explicitly faulted the Service for including this politically-based hard boundary that would serve only to limit the species' chances for recovery in the wild. See *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *14, n. 13.⁸³ As such, the revised rule must expand the geographic range of the experimental population as follows:

- (1) *Expand the Boundary to Include the Southern Rockies and Grand Canyon Ecoregions*: The best available science explains that ample suitable habitat exists -- and, indeed, is necessary for the species' recovery -- in both the Southern Rockies and Grand Canyon Ecoregions.⁸⁴

as a mechanism to produce politically acceptable definitions of recovery. However, any recovery plan that relies on misrepresentation of scientific data faces long odds in effectively achieving recovery.”).

⁸⁰ Carroll et al. 2006; Wayne and Hedrick 2011; Carroll et al. 2014; Hendricks et al. 2016; USFWS 2012.

⁸¹ Carroll et al. 2014; USFWS 2012.

⁸² 50 C.F.R. § 17.84(k)(3).

⁸³ In faulting the Service for the 2015 rule's failure to further the conservation needs of the species, the court noted the geographic boundary was focused on ensuring only short-term survival rather than long term conservation, as demanded by the ESA: “The remaining provisions of the 2015 rule fail to remedy this deficiency and, in some instances, threaten to compound the problem ... [A]lthough FWS acknowledges that territory north of I-40 will likely be required for future recovery and recognized the importance of natural dispersal and expanding the species' range, it nevertheless imposed a hard limit of dispersal north of I-40. Any wolves that venture outside the MWEPA will be captured and returned. The agency again relied on the limited scope of the rule to justify this provision, stating that the purpose of the rule is to improve the effectiveness of the reintroduction project and citing to the recovery plan as the likely means of addressing the insufficient geographic range that is provided by the present rule.”

⁸⁴ Carroll et al. 2014; USFWS 2012.

This includes areas of Northern New Mexico and Southern Colorado, as well as portions of Northern Arizona and Southern Utah.⁸⁵ In both of these areas, thousands of acres of federal lands containing all of the habitat requirements Mexican wolves need are currently off-limits to Mexican wolves for the sole reason that that these areas are not feasible for recovery for “geo-political” reasons. But, the Service must base the experimental population boundary solely on the best available science. *See* 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2); *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *17. Mexican wolves historically occurred in these areas and should be rightfully restored to these important habitats.⁸⁶ Accordingly, the Service must modify the MWEPA boundary to include these regions by eliminating the 2015 rule’s arbitrary northern boundary of Interstate-40 and instead using Interstate-70 (and extending westward along Highway 50 in Utah to the Nevada border) as the northern extent of where the experimental population will be restored. The revised rule should also expand the MWEPA’s eastern flank to Interstate-25. Expanding the MWEPA as suggested here will allow the Service to release Mexican wolves from the captive population into the suitable habitats afforded by the Southern Rockies and Grand Canyon Ecoregions in addition to the important habitat afforded by the current range, as the best available science deems is necessary to recover the species in the wild.⁸⁷

- (2) *Expand the Boundary to Include All Portions of the Species Historical Range and Suitable Habitats Outside Such Range Necessary to Further the Conservation Needs of the Species:* The rule should be revised in accordance with the best available science in order to recover the species throughout its historical range. As noted, Mexican wolves historically ranged throughout the 2015 rule’s MWEPA, as well as throughout the Southern Rocky Mountain and Grand Canyon Ecoregions.⁸⁸ While the historical range of the sub-species has recently been disputed, Heffelfinger (2017), we note that the Service has the discretion to restore experimental populations in areas outside of the species’ historical range where it would further the conservation and recovery of the species overall. *See* 50 C.F.R. § 17.81(a). Further, the Service must reject recent arguments against releasing Mexican wolves in areas where there is the potential for the sub-species to interact with other gray wolves, such as those currently inhabiting areas of the Northern Rockies in Wyoming, Idaho, and Montana.⁸⁹ Gray wolves historically occurred throughout North America with an area of intergradation naturally occurring at the far northern extent of the Mexican wolf subspecies’ range.⁹⁰ Instead of using this factor as an excuse to prevent Mexican wolves from being recovered in the northernmost reaches of the subspecies’ historic range, the Service should actively encourage the restoration of the gray wolf across the entire Spine of the Continent region in accordance with its conservation duties under the ESA.
- (3) *Maintain Focus on Ensuring Recovery in the United States (Recovery in Mexico is Secondary):* Finally, we caution the Service against relying too heavily on Mexican wolf recovery efforts in Mexico in order to justify that only minimal recovery of the subspecies in the United States is required. The best available science shows that the recovery of Mexican wolves in

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Heffelfinger 2017.

⁹⁰ Hendricks 2019; Leonard et al 2005.

Mexico is uncertain at best.⁹¹ The patchwork of primarily private land ownership, high cattle densities, and low prey availability combine to severely limit the recovery chances for Mexican wolves south of the border. Further, the Service cannot rely upon the recovery efforts of a foreign entity not subject to the jurisdiction of our federal laws in order to ensure it meets its conservation mandates under the ESA. The Service must ensure adequate habitat is made available to ensure the conservation and recovery of the Mexican wolf is carried out in the United States first and foremost. See *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115 (D.D.C. 1995) (faulting the Service for failing to explain how reliance on small populations of threatened grizzly bears in Canada could justify a small population target for the species in the United States).

E. Include Provision to Address Human-Caused and Illegal Killings

Finally, the Service must add a provision to the revised rule that accounts for the threat of human-caused losses and illegal killing. As noted, human-caused mortality and removal of Mexican wolves from the wild population is the leading threat hampering the species' recovery overall.⁹² Unquestionably, this threat must be alleviated if the species is ever to recover to the point at which the Act's protections are no longer necessary (which, again, is the Service's ultimate goal and, indeed, legal mandate here, 16 U.S.C. §§ 1536(a), 1532(3)). Accordingly, the Service must include a mortality limit in the revised rule in order to further the long-term conservation and recovery of the species.⁹³ The Service has provided similar mortality limits in management rules and/or delisting criteria for other species (e.g., grizzly bears). Yet, for Mexican wolves, the Service has refused to include a binding mechanism to address this primary threat based solely on politics and its desire to reach an acceptable agreement with select stakeholders. This is unacceptable, and contrary to the mandates of the ESA. See 16 U.S.C. § 1539(j)(2)(B); 50 C.F.R. § 17.81(c)(2); *Center for Biological Diversity v. Jewell*, 2018 WL 1586651 at *17. As such, we request that a provision addressing human-caused losses and illegal killings be properly included in the revised rule.

Though we recognize that the Service cannot likely stop all of the illegal killings of Mexican wolves, adding provisions such as mandatory supplementary releases in response to such killings would disincentivize the killers whose goals are to reduce wolf populations. By setting a response

⁹¹ See Carroll 2019 at 7 ("The 2013 plan proposed establishing two additional wild populations within large protected areas in the southwestern US which would form a connected metapopulation together with the current wild population. In contrast the 2017 plan proposed establishing 1-2 additional small populations on fragmented private landholdings in northern Mexico which would have little or no connectivity with the US population. The appropriate geographic focus of recovery, and questions as to whether habitat quality and protection from persecution in Mexico were sufficient to allow persistence of populations there, has been a major point of dispute concerning recovery strategies for the Mexican wolf." (citations and notes omitted)).

⁹² See e.g., 2015 10(j) rule, 80 Fed. Reg. 2,512; See also Carroll 2019 at 4-5 ("Human-caused mortality constituted 81% of Mexican wolf mortalities with known causes from 1998 to 2011, and is the primary threat to persistence of wolf populations globally, particularly where wolves occupy landscapes used by humans and livestock." (notes and citations omitted)).

⁹³ See Carroll 2019 at 5 ("Because the adequacy of recovery criteria (e.g., minimum population size) is contingent on assumptions regarding future mortality rates, the 2013 draft plan included a criterion requiring that the rate of human-caused wolf mortality be reduced below the specific level assumed in the PVA before delisting ... By creating an additional recovery criterion based on an uncertain demographic parameter, the 2013 draft plan ensured that a key assumption regarding future threat amelioration was met at the time of delisting. In contrast, the 2017 plan opted against creating a quantitative mortality criterion, in deference to resistance by stakeholders to establishing recovery criteria predicated on changes in human behavior." (citations omitted)).

that undermines the intention of such malfeasance, the Service would be at least offsetting these losses in a way that accounts for the substantial losses this activity incurs.

We also understand that there are many ongoing investigations into illegally-killed wolves within the recovery area, and we encourage the agency to include provisions in the new rule for the expedited resolution of such investigations and prosecutions of these crimes. The failure to adequately resolve most of these cases up until now has surely sent a message to would-be killers that they are likely to get away with their crimes. The Service should provide an appropriate remedy in the revised rule.

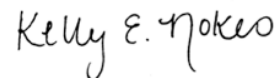
IV. BEST AVAILABLE SCIENCE

In addition to the scientific literature cited herein, we request that the Service duly consider the additional articles and documents attached to these comments.

CONCLUSION

Thank you for considering these substantive legal and scientific comments in response to the Notice of Intent. While we applaud and appreciate the Service's efforts to-date to further the recovery of the Mexican wolf in some regards, we respectfully request that Service use this latest opportunity to actually follow the science and the law in revising the Section 10(j) management rule for Mexican wolves. Now, more than ever, the Service must put the biological needs of the species' first. Mexican wolves deserve true recovery in the wild, and it is the Service that is charged with ensuring such a fate may eventually be realized.

Respectfully Submitted,



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