



seeks a declaratory judgment that the Director and Chairman are violating the ESA and the Mexican gray wolf Section 10(j) Rule and an injunction requiring them to comply with the law.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief), and 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision).

3. As required by the ESA's citizen suit provision, 16 U.S.C. § 1540(g), Guardians furnished the Director, the Chairman, and the U.S. Secretary of the Interior ("the Secretary") with written notice of its intent to sue for the violations of law alleged in this Complaint more than sixty days ago. Neither the Director nor Chairman has remedied these violations of law, and the Secretary has not acted to enforce the ESA. Thus, an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201.

4. Venue is proper in this judicial district pursuant to 16 U.S.C. § 1540(g)(3)(A) because Defendants' violations of the ESA are occurring in this district. Additionally, venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because both Defendants reside in this district and the events giving rise to Guardians' claim are occurring in this district.

5. This Court has authority to grant Guardians' requested relief pursuant to 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief).

### **PARTIES**

6. Plaintiff, WILDEARTH GUARDIANS, sues on behalf of itself and its adversely affected members. Guardians is a non-profit environmental organization whose mission is to protect and restore the wildlife, wild places, and wild rivers in the American West. Guardians

has over 4,500 members, most of whom reside in New Mexico, one of the only two states where the Mexican gray wolf currently occurs in the wild.

7. Guardians has an active endangered species protection campaign. As part of that campaign, Guardians has repeatedly urged those governmental entities responsible for administering and/or participating in the Mexican gray wolf reintroduction and recovery project (“the Project”) to better protect wolves from trapping in New Mexico. These governmental entities include not only the New Mexico Game and Fish Department and the New Mexico State Game Commission, but also the U.S. Forest Service (“USFS”) and the U.S. Fish and Wildlife Service (“FWS”), the federal agency ultimately responsible for administering and enforcing the ESA. See 50 C.F.R. § 402.01(b). Guardians also worked with former New Mexico Governor, William Blaine (“Bill”) Richardson III, to draft an Executive Order calling for the temporary ban on trapping in New Mexico’s wolf range so that the impacts to the Mexican gray wolf could be investigated and studied. Guardians has invested substantial time and resources to protect and conserve wolves and is harmed by the continued authorization of trapping in New Mexico’s occupied wolf range where Mexican gray wolves have been, and will continue to be under the current rules and regulations, trapped and subsequently injured or killed.

8. Guardians’ members and staff use and enjoy, and will continue to use and enjoy, New Mexico’s occupied wolf range for wolf watching, other wildlife viewing, and for recreational, aesthetic, professional, and scientific activities. Guardians and its members are particularly concerned with the survival and recovery of the Mexican gray wolf, as well as the ecosystem on which it depends. Guardians’ and its members’ substantial interest in this matter is heightened by the critical imperilment of the Mexican gray wolf, whose wild population is

estimated at approximately 50 individuals. Guardians and its members are adversely affected by the Director's and Chairman's failure to comply with the ESA in this case. The requested declaratory and injunctive relief will redress those injuries.

9. Defendant, JAMES LANE, is sued in his official capacity as the Director of the New Mexico Game and Fish Department. As the Director, Mr. Lane is charged with enforcing and administering New Mexico's laws and regulations relating to game, fish, and outdoor recreation as set forth at N.M.S.A. §§ 17-1-1 et seq., which includes the laws and regulations governing trapping throughout the State. Until June of 2011, the Director was also charged with actively contributing on behalf of the New Mexico Game and Fish Department, one of five "Lead Agencies" on the wolf Project, toward the recovery of the Mexican gray wolf in the wild. Because the New Mexico Game and Fish Department has withdrawn its support of, and participation in, the wolf Project, Mr. Lane has recently abandoned this role.

10. Defendant, JIM MCCLINTOC, is sued in his official capacity as the Chairman of the New Mexico State Game Commission. As the Chairman, Mr. McClintic is charged with promulgating those rules and regulations necessary for carrying out N.M.S.A. §§ 17-1-1 et seq., including the rules and regulations governing trapping throughout the State.

#### **STATUTORY FRAMEWORK OF THE ENDANGERED SPECIES ACT**

11. The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species ...." 16 U.S.C. § 1531(b). The ESA defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the

measures provided pursuant to [the ESA] are no longer necessary.” Id. § 1532(3). Accordingly, the ultimate goal of the ESA is not only to temporarily save endangered and threatened species from extinction, but also to recover these species to the point where they are no longer in danger of extinction and thus no longer need ESA protection.

12. The ESA promotes species recovery in myriad ways, including the protection of individual animals. Principal among these is the Section 9 prohibition on take. See 16 U.S.C. § 1538(a)(1)(B) (rendering it illegal for “any person” to “take” any species listed as endangered). See also 50 C.F.R. §17.31 (expanding the take prohibition to those species listed as threatened).

13. Within the context of the ESA, the term “person” includes “any officer, employee, agent, department, or instrumentality...of any State, municipality, or political subdivision of a State...[or] any State, municipality, or political subdivision of a State...” 16 U.S.C. § 1532(13).

14. To “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, *trap*, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19) (emphasis added). “Take is defined in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” Defenders of Wildlife v. Administrator, EPA, 882 F.2d 1294, 1300 (8<sup>th</sup> Cir.1989). “Take” includes direct as well as indirect harm and need not be purposeful. See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 704 (1995). A take may even be the result of an accident. See National Wildlife Federation v. Burlington Northern Railroad, 23 F.3d 1508, 1512 (9<sup>th</sup> Cir.1994).

15. The ESA not only prohibits any person from directly taking wildlife, but also prohibits any person from causing an ESA violation to be committed. See 16 U.S.C. § 1538(g).

See also Strahan v. Coxe, 127 F.3d 155, 163 (1<sup>st</sup> Cir.1997) (the ESA “not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking”). A “governmental third party pursuant to whose authority an actor directly exacts a taking...may be deemed to have violated the provisions of the ESA.”

Strahan, 127 F.3d at 163. See also Defenders of Wildlife, 882 F.2d at 1301; Loggerhead Turtle v. County Council of Volusia Co., 148 F.3d 1231 (11<sup>th</sup> Cir.1998), cert. denied, 526 U.S. 1081 (1999); Sierra Club v. Lyng, 694 F.Supp. 1260 (E.D. Tex. 1988), aff'd Sierra Club v. Yeutter, 926 F.2d 429 (5<sup>th</sup> Cir.1991); U.S. v. Town of Plymouth, Mass., 6 F.Supp.2d 81 (D. Mass. 1998); Animal Protection Institute v. Holsten, 2008 WL 5481122 (D. Minn.).

16. The ESA take prohibition applies to all listed species, including those like the Mexican gray wolf, which are reintroduced to the wild pursuant to ESA § 10(j), 16 U.S.C. § 1539(j).

17. Section 10(j) allows FWS to authorize the release of any population of threatened or endangered species into an area outside of that species' current range. See 16 U.S.C. § 1539(j)(2)(A); 50 C.F.R. § 17.81(a). For each population so released, FWS must by regulation delineate a population boundary and determine whether that population is “experimental” and whether it is “essential to the continued existence” of the species in the wild. 16 U.S.C. § 1539(j)(3); 50 C.F.R. § 17.81(c)(2). FWS has labeled every population of endangered species ever reintroduced pursuant to ESA § 10(j) as “experimental, nonessential” (“ENE”).

18. FWS has more flexibility in managing ENE populations than it does in managing naturally occurring populations. FWS sets forth any alterations to the ESA protections otherwise afforded an ENE population through a species-specific Section 10(j) Rule. See 50 C.F.R. §

17.81(e). Although a Section 10(j) Rule may narrow the Section 9 prohibition on take, any alterations to an ENE population’s ESA protections are meant only to encourage reintroduction and to secure the restoration of listed species to their native ecosystems. See H.R. Rep. No. 97-597 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2833. See also 16 U.S.C. § 1539(j)(2)(A); 50 C.F.R. 17.81(b) (requiring that all ENE populations be managed so as to “further the conservation of the species”).

19. Any take of an individual belonging to an ENE population, which falls outside the scope of allowable take as set forth in the relevant Section 10(j) Rule, is a violation of ESA § 9.

#### STATEMENT OF FACTS

##### **The Endangered Mexican Gray Wolf**



20. The Mexican gray wolf is the smallest, rarest, and most genetically distinct subspecies of the gray wolf species (*Canis lupus*). The Mexican gray wolf once roamed by the thousands across portions of Arizona, New Mexico, Texas, and the Republic of Mexico. The Mexican wolf declined, and was eventually exterminated, largely as result of concerted federal eradication efforts undertaken on behalf of American livestock interests. By 1970, the Mexican

wolf had been completely exterminated from the United States and suffered a similar fate in Mexico by the early 1980s.

21. Because of its critical imperilment, FWS listed the Mexican gray wolf subspecies as endangered pursuant to the ESA on April 28, 1976. See 46 Fed. Reg. 17736 (1976). In 1982, FWS developed a recovery plan for the Mexican wolf and, in 1996, developed a final environmental impact statement for the release of a wild population of Mexican gray wolves into the Southwestern United States. In 1998, FWS established via final rule, an ENE population of Mexican gray wolves. See generally 50 C.F.R. § 17.94(k) (“Mexican gray wolf Section 10(j) Rule”).

22. Through the Section 10(j) Rule, FWS established the Mexican Wolf Experimental Population Area (“MWEPA”). See 50 C.F.R. § 17.84(k)(9)(iii). The MWEPA consists of that portion of Arizona lying north of Interstate Highway 10 and south of Interstate Highway 40; that portion of New Mexico lying north of Interstate Highway 10 in the west, north of the New Mexico-Texas border in the east, and south of Interstate Highway 40; and that portion of Texas lying north of United States Highway 62/180 and south of the Texas-New Mexico border. FWS also established within the MWEPA, a core area for wolf reestablishment known as the Blue Range Wolf Recovery Area (“BRWRA”). See id. at § 17.84(k)(9)(i). The BRWRA includes all of the Gila National Forest in west-central New Mexico and all of the Apache National Forest in east-central Arizona. FWS began releasing Mexican gray wolves into the BRWRA in 1998. Since that time, any wolf found outside of the BRWRA boundary, but within the MWEPA, has been considered part of the ENE population. Any wolf found outside of the MWEPA is presumed to be of wild origin. See 50 C.F.R. § 17.84(k)(9)(iii).



23. The Mexican gray wolf Section 10(j) Rule also sets forth the parameters for managing the ENE population within the MWEPA. The Section 10(j) Rule alters the Section 9 take prohibition to provide only narrow exceptions for legalized take. As it relates to trapping, the Section 10(j) Rule, which exempts “unavoidable and unintentional” take, expressly states that: “Taking a wolf with a trap, snare, or other type of capture device within occupied wolf range...will not be considered unavoidable, accidental, or unintentional take, unless due care was exercised to avoid taking a wolf.” 50 C.F.R. § 17.84(k)(15).

24. Between March 2002 and February 2009, 14 individual wolves were captured 15 times in foothold traps set by persons other than Project personnel.<sup>1</sup> Thirteen of these incidents occurred in New Mexico. Within the course of these New Mexico trappings, at least seven wolves incurred injuries. Two wolves sustained injuries severe enough to require leg amputations. One wolf had toes amputated and the pad removed from his right foot. Two wolves died as a result of trap-related injuries. Many of these wolves were caught in traps allegedly set for coyotes.

25. The 13 New Mexico wolf-trapping incidents are as follows:

a. On or about March 18, 2002, Male 578 (“M578”)<sup>2</sup> was caught in an unknown trap type allegedly set for a coyote outside of the BRWRA. No associated injuries to this wolf were documented. M578 was subsequently removed from the wild population by Project personnel.

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<sup>1</sup> This discrepancy reflects the fact that female wolf 562 (“F562”) was trapped twice.

<sup>2</sup> Male wolves are identified with their Project-given number preceded by an “M,” and female wolves are identified with their Project-given number preceded by an “F.” Guardians uses this convention throughout this Complaint.

b. During the winter of 2002 – 2003, F562 was caught in an unknown trap type within the BRWRA. No associated injuries to this wolf were documented. As described below in subparagraph “d,” F562 was trapped again in 2005. The fate of F562 is currently unknown.

c. During the winter of 2002 – 2003, M583 was caught in an unknown trap type within the BRWRA. No associated injuries to this wolf were documented. M583 was found dead in May 2008.

d. On or about October 15, 2005, F562 was again caught in a foot-hold or leg hold trap within the BRWRA. On or about October 17, 2005, F562 was retrieved via helicopter by Project personnel, who subsequently released her from the trap. F562 suffered apparent injuries from this trapping incident. To address these injuries, Project veterinarians amputated two or more of F562’s toes and removed the pad from her right foot. F562 is believed to have lived until June 2008. The current status of F562 is unknown.

e. On or about March 26, 2006, M1008 was caught in an unknown trap type allegedly set for a coyote outside of the BRWRA. No associated injuries to this wolf were documented. M1008 was killed via illegal shooting in August 2008.

f. On or about October 18, 2006, F923 was caught in a foot-hold or leg hold trap within the BRWRA. This trapping incident resulted in injuries to F923’s foot and/or leg, which caused her to limp. F923 was known to be alive as of April 2011.

g. During the winter of 2006 – 2007, M1041 was caught in a steel-jawed foot-hold or leg hold trap within the BRWRA. M1041 sustained a trap-induced lesion on his right front foot and subsequently died of this injury.

h. On or about January 1, 2007, an un-collared wolf was caught in an unknown trap type outside of the BRWRA. Whether this wolf sustained associated injuries is unknown. The fate of this wolf is also unknown.

i. On or about January 19, 2008, F1112 was found by Project personnel with a healed trap-related injury to her front foot. These injuries were documented as related to a non-Project trapping incident. F1112 was killed via illegal shooting in April 2008.

j. On or about February 10, 2008, M1039 was caught in a foot-hold or leg hold trap allegedly set for a coyote outside of the BRWRA. M1039 is pictured below courtesy of FWS and the Interagency Mexican Wolf Recovery Team. On or about February 17, 2008,



M1039 was retrieved via helicopter by Project personnel. M1039 suffered apparent injuries as a result of this trapping incident. To address these injuries, Project veterinarians amputated M1039's right front leg. M1039 was known to be alive until January 2009. The fate of F562 has been unknown since February 2009.

k. On or about November 16, 2008, M922 was found dead within the BRWRA. M922 had suffered injuries from a non-Project related trapping incident. M922 died from those trap-related injuries.

l. On or about January 23, 2009, M871 was found by Project personnel with a portion of his front foot missing. This injury occurred from a non-Project related trapping incident. Project personnel subsequently amputated M871's leg. As of April 2011, M871 was known to be alive.

m. On or about February 18, 2009, F1106 was caught in an unspecified trap type within the BRWRA. F1106 was found dead in November of 2010. Her death was caused by intestinal blockage.

26. Irrespective of the degree of injury, all wolves caught in traps suffer physically and psychologically. Even a wolf that appears "unhurt," may, upon release from a trap, be dehydrated, exhausted, or suffering from reduced fitness to hunt resulting from bruising, soreness, or undetected ligament or muscular injury. Wolves hunt solely, in pairs, and in packs. Wolves are "coursing" carnivores, meaning that they take down swift moving prey after giving prolonged chase. Given that wolves require mobility for chasing their native wild prey such as deer and elk, injuries, even unapparent injuries, can affect an individual's fitness and ability to hunt and thus survive. Injuries to an appendage (including the digits, feet, and legs) may render wolves more likely to kill domestic livestock, which have poorer predator avoidance skills than wild animals. Wolves that die as a direct result of trapping may cause their packs to disband or leave orphaned pups, which, in turn, leads to additional indirect wolf mortality. Each wolf

mortality depletes those genetic materials available for overall population viability and resilience.

### **Defendants' Unlawful Trapping Authorization**

27. Since 1998 when the Mexican gray wolf reintroduction and recovery project began, the New Mexico Department of Game and Fish has sold 21,734 resident trapping licenses and 313 non-resident trapping licenses. These licenses permit individuals to place land sets, water sets, body-gripping traps, cubby sets, padded and non-padded steel leg- or foot-hold traps, and snares on any lands in New Mexico, including the MWEPA, in order to capture “furbearers.” See N.M.A.C. § 19.32.2. The trap types encompass both restraining traps and kill traps. Traps do not discriminate between species. Thus, “non-target” animals are often caught, regardless of a trapper’s subjective intentions.

28. Most if not all of the trap types currently allowed in New Mexico have the capacity to capture, injure, or kill a Mexican gray wolf. Despite the fact that these traps are set in accordance with existing regulations, some of these trap types have trapped, and are likely to continue trapping, Mexican gray wolves. Neither the Director, the Chairman, nor any existing New Mexico regulation requires any licensed trapper to take any measure to avoid capturing a wolf in any trap type set for a furbearer. Therefore, neither the Director nor the Chairman has, as required by 50 C.F.R. § 17.84(k)(15), exercised “due care” to avoid taking a wolf before authorizing individual trappers to set traps for furbearers within occupied wolf range. Indeed, because New Mexico’s trapping regulations are completely silent on this issue, neither the Director nor the Chairman has exercised any level of “due care” whatsoever.

29. In New Mexico, a coyote is not considered a “furbearer.” See N.M.S.A. § 17-5-2; N.M.A.C. § 19.32.2.7. Thus, the setting of a trap for a coyote is a completely unregulated activity on any lands in New Mexico, including the MWEPA. Any trap with the capacity to capture a coyote likewise has the capacity to capture a Mexican gray wolf. Traps allegedly set for coyotes have captured Mexican gray wolves. Neither the Director, the Chairman, nor any New Mexico regulation requires any person to obtain a license to set a trap intended for a coyote or to take any measure to avoid capturing a wolf in any trap type set for a coyote. Therefore, neither the Director nor the Chairman has, as required by 50 C.F.R. § 17.84(k)(15), exercised any level of “due care” to avoid taking a wolf before authorizing the free-for-all trapping of coyotes within occupied wolf range.

30. A skunk is also not a “furbearer” under New Mexico law. See N.M.S.A. § 17-5-2; N.M.A.C. § 19.32.2.7. Thus, as is true for coyote traps, the setting of a trap for a skunk is a completely unregulated activity on any lands in New Mexico, including the MWEPA. Some trap types commonly set for skunks have the capacity to capture Mexican gray wolves. This is especially true of foothold traps, that trap type which poses the greatest danger to wolves in the MWEPA. Neither the Director, the Chairman, nor any New Mexico trapping regulation requires any person to obtain a license to set a trap intended for a skunk or to take any measure to avoid capturing a Mexican gray wolf in any trap type set for a skunk. Therefore, neither the Director nor the Chairman has, as required by 50 C.F.R. § 17.84(k)(15), exercised any level of “due care” to avoid taking a wolf before authorizing free-for-all trapping of skunks within occupied wolf range.

### **CLAIM FOR RELIEF**

31. The allegations of all preceding paragraphs of this Complaint are incorporated herein by reference.

32. As currently promulgated by the Chairman and carried out by the Director, the rules and regulations governing trapping on New Mexico's lands have resulted in the trapping of at least twelve endangered Mexican gray wolves within the MWEPA. This is because the current rules and regulations do not in any way require trappers to avoid capturing a wolf before setting traps with the capacity to do so. By continuing to authorize trapping within occupied wolf range without first exercising due care to avoid taking a wolf, both the Director and Chairman have committed, and are continuing to commit, unlawful take in violation of the ESA § 9 prohibition, 16 U.S.C. § 1538(a)(1)(B), as modified by the Mexican gray wolf Section 10(j) Rule, 50 C.F.R. § 17.84(k)(15).

### **REQUEST FOR RELIEF**

WHEREFORE, Guardians requests that this Court enter judgment providing the following relief:

(A) A declaration that the Director has violated, and is continuing to violate, both 16 U.S.C. § 1538(a)(1)(B) and 50 C.F.R. § 17.84(k) by authorizing trapping within occupied wolf range without first exercising due care to avoid taking a Mexican gray wolf;

(B) A declaration that the Chairman has violated, and is continuing to violate, both 16 U.S.C. § 1538(a)(1)(B) and 50 C.F.R. § 17.84(k) by authorizing trapping within occupied wolf range without first exercising due care to avoid taking a Mexican gray wolf;

(C) An injunctive order requiring that the Director and Chairman exercise due care to avoid taking Mexican gray wolves before authorizing any trapping within occupied wolf range;

(D) An order awarding Guardians its costs of litigation including reasonable attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g); and

(E) Such other further relief as the Court deems just and proper.

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Respectfully submitted,

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