

A PETITION TO THE U.S. FISH AND WILDLIFE SERVICE
TO AMEND THE 1998 MEXICAN WOLF SECTION 10(J) RULE
SO AS TO BAN ALL TRAPS AND SNARES



SUBMITTED BY



WILDEARTH GUARDIANS

THE SIERRA CLUB
RIO GRANDE CHAPTER

JEAN OSSORIO
AND

THE SOUTHWEST ENVIRONMENTAL CENTER

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I. INTRODUCTION

Pursuant to Section 553(e) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(e), and the implementing regulations of the U.S. Department of Interior, 43 C.F.R. Part 14, WildEarth Guardians, the Rio Grande Chapter of the Sierra Club, Jean Ossorio, and the Southwest Environmental Center (hereafter “Guardians”) hereby petition the U.S. Fish and Wildlife Service (“FWS”) to immediately amend the current Mexican gray wolf Endangered Species Act (“ESA”) Section 10(j) Rule, 50 C.F.R. § 17.84(k), to ban the use of all traps and snares within the Mexican Wolf Experimental Population Area Boundary. In accordance with 43 C.F.R. § 14.2, please find attached the text of the proposed amendment. Guardians requests that FWS initiate a rulemaking process to amend 50 C.F.R. § 17.84(k) in the manner requested herein within 90 days. In the event that FWS cannot act within that timeframe, please notify Guardians as soon as practicable of your timeline for taking “prompt” action on this Petition. See 43 C.F.R. § 14.3.

II. PETITIONERS

WildEarth Guardians is a Section 501(c)(3) non-profit organization incorporated under the laws of New Mexico. Guardians protects and restores the wildlife, wild rivers, and wild places of the American West. Guardians’ members and staff have both a personal and professional interest in America’s wildlands and wildlife, including the Mexican gray wolf and those portions of Arizona and New Mexico that fall within the Mexican Wolf Experimental Population Area Boundary. Guardians has for years advocated Mexican gray wolf recovery, as contemplated by the ESA, 16 U.S.C. § 1531 et seq. Guardians’ work on this issue has occurred, and continues to occur, on myriad levels ranging from grassroots organizing to garner widespread public support for the wolf program to federal litigation aimed at heightened protections – and enforcement of those protections – for the wild wolf population. Guardians submits this Petition as part of its continued advocacy for Mexican gray wolf recovery.

The Rio Grande Chapter of the Sierra Club has members throughout New Mexico and part of West Texas. The Rio Grande Chapter’s stated policy and practice is to “vigorously support strong and vibrant federal and state endangered species acts and related laws as well as recovery programs that protect wildlife, plants, and natural ecosystems.” Moreover, the Rio Grande Chapter outing leaders frequently take groups of members and nonmembers alike on day hikes and backpack trips into the Mexican wolf recovery area where the possibility of seeing and hearing wolves and even wolf tracks or sign is extremely important. The Sierra Club adds its name to this Petition to further the return and recovery of this keystone species.

Jean Ossorio is a citizen activist on behalf of the Mexican gray wolf. Since the initial releases of Mexican gray wolves in 1998, Ms. Ossorio has spent over 200 nights camping in the Mexican wolf Blue Range Wolf Recovery Area (“BRWRA”), and has led numerous hiking and camping trips into this area. Ms. Ossorio has participated as a volunteer on five service trips in the BRWRA, engaging in activities including removing

pre-release pens, removing unneeded fencing, posting Mexican wolf information signs, and assisting with proactive measures to prevent conflicts between Mexican wolves and livestock. During her time in the BRWRA, Ms. Ossorio has observed 40 wild Mexican wolves, photographed and made casts of Mexican wolf tracks, and photographed Mexican wolves in the wild on three occasions. Additionally, Ms. Ossorio has given educational presentations on Mexican gray wolves to children and adults in person and on the radio, has spent hundreds of hours distributing information on Mexican gray wolves to the public, and writes frequent updates on packs and individual Mexican wolves for an internet website. Ms. Ossorio keeps extensive records on individual wild Mexican gray wolves, including records of release dates, years of birth, pack affiliations, genetic lineages, dates of death, causes of death in cases where causes have been determined, dates of removal, and dates of last known observations of wolves declared “lost to follow up” by Mexican wolf reintroduction project officials. Ms. Ossorio has attended and/or testified at public meetings regarding Mexican wolf reintroduction issues since 2000. She has also served as a member of the stakeholder panel of the Southwestern Gray Wolf DPS Recovery Team and as a member of Governor Bill Richardson’s Catron County Wolf Task Force. Ms. Ossorio advocates for the recovery of the Mexican gray wolf to advance her aesthetic, ecologic, and recreational interests.

The Southwest Environmental Center (“SWEC”) is a non-profit conservation organization based in Las Cruces, New Mexico. SWEC’s mission is to protect and restore native wildlife and their habitats in the Southwestern borderlands through education, advocacy, and on-the-ground projects. With respect to the Gila region, SWEC has been involved with efforts to bring Mexican gray wolves back to their historic range for more than a decade. SWEC has spearheaded efforts to increase public acceptance of this endangered predator, through outreach, education, student contests, promotion of wolf-based ecotourism, promotion of a Mexican Wolf Center, and other methods. SWEC is a membership organization. SWEC’s approximately 1000 members are mostly residents of southern New Mexico. These members enjoy using the Gila National Forest for a variety of activities, including hiking, camping, birdwatching, hunting, fishing, rafting, and wildlife viewing. SWEC’s members share the organization’s concern for the wildlife of the Gila and support SWEC’s efforts financially and by volunteering their time.

II. FACTUAL BACKGROUND

A. THE MEXICAN WOLF REINTRODUCTION AND RECOVERY PROJECT

The Mexican gray wolf (*Canis lupus baileyi*) is the smallest, rarest, and most genetically distinct subspecies of gray wolf (*Canis lupus*). Although once roaming by the thousands across portions of Arizona, New Mexico, Texas, and the Republic of Mexico, the Mexican wolf declined – and was eventually exterminated – as a direct result of concerted federal eradication efforts undertaken on behalf of American livestock interests. The Mexican wolf was completely eradicated from the United States by 1970, and suffered a similar fate in Mexico by the early 1980s. The Mexican wolf was at that

time, and remains today, one of the rarest land mammals – and most endangered wolf – anywhere in the world.

In order to rescue the subspecies from extinction, FWS listed the Mexican wolf as endangered on April 28, 1976, under the ESA. See 41 Fed. Reg. 17742 (1976). Although the Mexican wolf subspecies listing was subsumed by FWS’s 1978 listing of the entire gray wolf species, FWS offered “the firmest assurance that it will continue to recognize valid biological subspecies for purposes of its research and conservation programs.” 43 Fed. Reg. 9607, 9610 (1978). FWS began actively conserving the Mexican gray wolf between 1977 and 1980, when the Agency trapped the last known remaining wolves (four males and one pregnant female) from Durango and Chihuahua, Mexico in order to launch an emergency captive breeding program for eventual reintroduction to the wild. All known Mexican wolves alive today are descendant of this ongoing captive breeding effort.

Pursuant to ESA § 4, FWS issued the Mexican Wolf Recovery Plan in 1982. The primary objective of this plan is “to conserve and ensure the survival of *Canis lupus baileyi* by maintaining a captive breeding program and re-establishing a viable, self-sustaining population of at least 100 Mexican wolves...within [their] historic range.” FWS further defined this benchmark for wolf recovery in its 1996 Final Environmental Impact Statement for Reintroduction of the Mexican Wolf Within its Historic Range in the Southwestern United States (“FEIS”). In the FEIS, FWS predicted that by the ninth year following initial wolf releases (by the end of 2006), 102 wolves and 18 breeding pairs would inhabit the wild.

Pursuant to ESA § 10(j), FWS formally authorized via Final Rule the release of an “experimental, nonessential” population of Mexican gray wolves into a 4.4 million-acre area known as the Blue Range Wolf Recovery Area (“BRWRA”). See 63 Fed. Reg. 1752 (1998). The BRWRA encompasses the entirety of the Gila and Apache National Forests in New Mexico and Arizona and sits wholly inside the Mexican Wolf Experimental Population Area (“MWEPA”). The MWEPA includes that portion of Arizona lying north of I-10 and south of I-40; that portion of New Mexico lying north of I-10 in the west, north of the New Mexico-Texas border in the east, and south of I-40; and that portion of Texas lying north of U.S. 62/180 and south of the Texas-New Mexico boundary. See 50 C.F.R. § 17.84(k)(9) Figure 5.

FWS began the Mexican wolf reintroduction project with the release of eleven wolves into the BRWRA in March 1998. Since that time, FWS has released 98 wolves into the wild. FWS manages the wild wolf population in accordance with the terms of 50 C.F.R. § 17.84(k), the Mexican Wolf ESA § 10(j) Rule.

Despite 34 years of ESA protection and 12 years of active reintroduction efforts, the Mexican gray wolf is far from recovering. See generally, 2010 Mexican Wolf Conservation Assessment. Latest population counts reveal that just 42 individual wolves and 2 breeding pairs currently inhabit the BRWRA. These numbers fall far short of FWS’s original projections for recovery progress, and reflect the urgent need for reform

in the way FWS manages the wild wolf population. The Mexican gray wolf remains endangered by multiple threats, all of which are human-caused and most of which are completely avoidable. One such threat to the wolf's recovery is the persistence of trapping and snaring throughout the MWEPA.

B. THE WILD WOLF POPULATION IS HARMED BY TRAPS AND SNARES

While 50 C.F.R. 17.84(k)(3)(xi) allows authorized wolf project personnel to use leghold traps and any other effective device or method for capturing or controlling wolves in order to carry out FWS-approved management measures, 14 Mexican wolves have been trapped by other persons or entities totally outside of project directives. Eight wolves have been trapped on the BRWRA in New Mexico, with an additional six animals trapped outside of the BRWRA – four in New Mexico and two in Arizona. As a result of trapping, several wolves sustained injuries to their paws or legs. One wolf living on the BRWRA, M871, and one wolf living outside of the BRWRA in New Mexico, m1039, had legs amputated after sustaining trap-related injuries. Four others sustained injuries to feet or legs from traps. Table 1, which is shown on the following page, documents all known trapping incidents unrelated to project activities as of April 26, 2010.

| Date | Animal | Location | Reported Injury | Notes |
|------------------|---------------|--------------------|------------------------|---|
| 3/18/02 | M578 | Outside BRWRA - NM | None apparent | Wolf removed by trapper, relocated by project personnel in the BRWRA. |
| Winter 2002-2003 | F562 | BRWRA - NM | None apparent | Wolf released by trapper. |
| Winter 2002-2003 | M583 | BRWRA - NM | None apparent | Wolf self-released. |
| 11/20/03 | F858 | Outside BRWRA -AZ | None apparent | Wolf relocated by project personnel into the BRWRA. |
| 11/22/03 | M859 | Outside BRWRA - AZ | None apparent | Wolf relocated by project personnel into the BRWRA. |
| 10/15/05 | F562 | BRWRA - NM | Yes | IFT observed animal with trap on its foot. Captured via helicopter 2 days later to remove trap and treat the injured foot. |
| 3/26/06 | M1008 | Outside BRWRA - NM | None apparent | Wolf removed by project personnel. |
| 10/18/06 | F923 | BRWRA - NM | Yes | IFT received reports of a wolf with a trap on its foot. F923 was observed the same day in the same area limping (no trap on foot). |
| Winter 2006-2007 | M1041 | BRWRA - NM | Yes | Resident of Catron County observed m1041 with a trap on its foot in the winter 2006-2007. Upon necropsy (at death in May 2007) a lesion was noted to the right front foot suggestive of a steel trap type wound. |
| 1/1/07 | Un-collared | Outside BRWRA - NM | Unknown | Wolf pulled loose with trap. (This wolf may be M1107. M1107 was first captured by project personnel in November of 2007 and was missing two middle toes, which would be consistent with a small trap capture. M1107 was not included in this compilation because of unknown status of injury and possible double count with this uncollared wolf in the vicinity of the two capture locations.) |
| 1/19/08 | F1112 | BRWRA - NM | Yes | Animal first captured during helicopter survey and had old (healed) injury to front foot consistent with a non-project trapping incident. |
| 1/23/09 | M871 | BRWRA - NM | Yes | Captured during helicopter survey to replace radio collar - a portion of the front foot was missing consistent with a non-project trapping incident. Leg was amputated by project veterinarian. |
| 2/10/08 | m1039 | Outside BRWRA - NM | Yes | Wolf pulled loose with trap. Captured via helicopter on 2/17/2008, leg was amputated by project veterinarian. |
| 2/18/09 | F1106 | BRWRA - NM | None apparent | Wolf removed by trapper, released by project personnel. |

¹ Guardians obtained all data in Table 1 via FWS informal request to FWS. Within the context of Table 1, “M” means alpha male, “F” means alpha female, “m” means male, and “IFT” means Mexican Wolf Interagency Field Team.

Two notable cases of trap-related injuries involve AM871 and m1039, each pictured below courtesy of the Mexican Wolf Interagency Field Team (“IFT”). Each wolf sustained leg amputations following serious injuries from traps set within the MWEPA (one inside the BRWRA and one outside the BRWRA). Note that Mexican wolf AM871 (featured in the black and white photo) is the alpha male of the Middle Fork Pack, one of only a few pairs with one or more pups currently living in the wild population. Both the alpha male and alpha female of the Middle Fork Pack have just three legs remaining due to injuries.



The plight of the Middle Fork Pack illustrates well how predators disabled by trapping-related injuries may be impeded from hunting wild prey, and thus more likely to conflict with livestock. In August and September of 2009 alone, FWS attributed ten depredations to the pack’s alpha pair, AM871 and AF861. This high level of “strikes” against the Middle Fork alpha pair is no doubt a direct consequence of their stunted predation abilities. Indeed, broken teeth or missing claws can inhibit carnivores’ ability to catch prey and may actually increase the risk of livestock predation because domestic stock are easier to capture than more desirable native prey. See Harris et al. (2005).



C. TRAPS AND SNARES ARE INHERENTLY NON-SELECTIVE AND CRUEL

Traps are cruel and non-selective and have harmed Mexican wolves. See Table 1. As we discuss here, the use of traps is highly contested among people, nations, and U.S. wildlife professionals. In a survey of 3,127 conservation professionals as to whether leg-hold traps should be banned, respondents indicated yes by 46 percent, no by 39 percent, and no opinion by 15 percent. See Muth et al. (2006). The professionals cited pain, stress, and harm to non-target species as the primary reasons for favoring a trapping ban. Secondary reasons included trapping's non-necessity, unsportingness, conflicts with public values, and concerns about trapping's unethical nature.

Animals frequently sustain injuries from restraining traps, such as physiological trauma, dehydration, exposure to weather, and predation by other animals. See Harris et al. (2005). Animals released from restraining traps may later die from injuries and/or reduced ability to hunt or forage for food. See id.

Iossa et al. (2007) assessed injuries associated with animals restrained by traps using standards set by the International Organization for Standardization ("ISO"). The ISO assessed trauma levels and assigned points, on a scale to 34, for the most common trap injuries. The ISO's scale ranges from mild trauma to death. Examples from the scale are: mild injuries include a claw loss; moderate injuries include permanent tooth fracture; moderately severe injuries include compression fractures; severe injuries include the amputation of three or more digits; and death. See Iossa et al. (2007). The major drawback to the ISO standards, however, is their failure to assess pain.

While a broken tooth may be low on the trauma score, for humans teeth-related pain is often considered excruciating and unbearable. See Harris et al. (2005); Iossa et al. (2007). Broken teeth or missing claws can inhibit carnivores' ability to catch prey and may actually increase the risk of livestock predation because domestic stock are easier to capture than more desirable native prey. See Harris et al. (2005). In addition, foot swelling from foot-snare injuries, while receiving a low scoring on the ISO scale, may be under-rated because even temporary injuries may affect an individual negatively. See Iossa et al. (2007). Moreover, pain and distress, if prolonged, can affect animals' health and ability to survive. See Harris et al. (2005). In studies reviewed by Harris et al. (2005), physiological changes from trapping injuries often go unassessed. Trapped animals respond in two ways from traps: psychological stress and or pain; and secondarily from exertion. See id. The former can significantly alter hormones, enzymes, and electrolytes, as well as lead to long-term muscle damage. See id.

Even padded leg-hold traps cause minor and major injuries. See Iossa et al. (2007). Animals restrained in leg-hold traps suffer stress, and because of poor selectivity in captures, traps can reduce the survivability of released animals. See id. In a study by the USDA-National Wildlife Research Center, Shivik et al. (2000) found that traps that had the greatest success for capturing animals were the least selective, caught the most non-target species, and caused the most injuries.

Leg-hold traps are considered inhumane by a number of countries and are banned in 80 countries, including the European Union. See Iossa et al. (2007). In the United States, traps are banned or limited in some states, including Arizona (through 1994 initiative), California (through 1998 initiative), Colorado (through 1996 initiative), Florida (through 1972 regulation), Massachusetts (through 1996 initiative), New Jersey (through 1984 legislation), Rhode Island (through 1977 legislation), and Washington (through 2000 initiative). See Jones and Rodriguez (2003).

D. WOLVES NEED REFUGIA FROM THREATS LIKE TRAPS AND SNARES

Carnivores require adequate prey and freedom from the threat of human persecution in order to persist. See Noss et al. (1996). As Weaver et al. (1996) write: “the powerful role of refugia in population persistence has emerged as one of the most robust concepts of modern ecology” (p. 972). Refugia should serve as source areas to feed other populations, maximize natality, and minimize mortality. For large carnivores such as Mexican gray wolves to endure, however, human-caused disturbance must be restrained so that populations can remain resilient. See Noss et al. (1996); Weaver et al. (1996).

Large carnivores require vast, connected habitats for finding adequate food – especially in arid climates, but also for gene flow within the metapopulation. Biologists define “metapopulation” as “a network of semi-isolated populations with some level of regular or intermittent migration and gene flow among them, in which individual populations may go extinct but can then be recolonized from other populations.” See Logan and Swenor (2001), quoting Meffe and Carroll (1997), at 176. Gene flow is key to persistence in all species, including the Mexican wolf. Without gene flow, populations of Mexican wolves are not ecologically functional and cannot play their keystone roles in ecosystems.

E. WHEN ALLOWED TO THRIVE, WOLVES CREATE ECOLOGIC VALUE

It is vital to recover the Mexican wolf for its own value and to fulfill the purpose of the ESA. In addition, myriad studies show that carnivores increase both the richness and complexity of animal life and indirectly contribute to better ecosystem function, free work known as “ecosystem services.”² Apex carnivores significantly influence biological diversity and ecosystem function, see e.g., Beschta and Ripple (2009) and Ritchie and Johnson (2009), and increase biological diversity by checking effects of mesopredators. See e.g., Crooks and Soule (1999); Ritchie and Johnson (2009). In one system, for example, coyotes indirectly protect rare sage-grouse by reducing mesocarnivores, see Mezquida et al. (2006), while in another, wolves indirectly protect pronghorn by killing coyotes. See Berger et al. (2008). The effects from predation

² Ecosystem services are the resources and processes that are supplied by the natural world. The benefits are many, but include clean air and water, functioning soil systems, decomposition of waste, moderation of weather and other stochastic events, pollination, and seed dispersal to name a few. These services are priceless, yet in danger from anthropogenic threats.

cascade through all the trophic layers – through the herbivores to the producers – and can even influence riparian systems, as the following example shows.

After gray wolf reintroduction into Yellowstone National Park in 1995, elk, which had previously decimated willow and aspen stands, were forced to be more mobile to avoid predation. With decreased herbivory from sedentary elk herds, willow communities returned. Beavers followed and used the new trees and shrubs to build their dams and lodges. Those structures not only brought water from underground to the surface, but made water flow more dependable. As a result, populations of neotropical and water-wading birds and moose increased. See Smith et al. (2003).³

IV. LEGAL BACKGROUND

A. TRAPPING IS CURRENTLY ALLOWED IN THE MWEPA

Trapping and snaring is currently legal within the MWEPA. While private citizen trapping and snaring on public lands in Arizona is limited to scientific research projects and relocation efforts, see A.R.S. § 17-301, private citizen trapping and snaring on public lands in New Mexico – including the Gila National Forest – is generally allowed. See N.M.S. §§ 17-5-1 – 17-5-9. Traps are common in the MWEPA, especially in New Mexico, where they are set both by private citizen trappers and USDA APHIS-Wildlife Services (“WS”). See e.g., WS June 2005 Environmental Assessment (“EA”) for Predator Damage Management in New Mexico, at 114-115; WS January 2006 EA for Predator Damage Management in New Mexico, at 13-14.

Importantly, whether set by private citizens or our own federal government, those types of traps and snares permitted in New Mexico and Arizona have the capacity to capture, injure, and even kill Mexican gray wolves. See Table 1. Although intentional trapping of wolves is unlawful under both federal and state law, the incidental trapping of wolves is not. See 50 C.F.R. § 17.84(k)(3)(i) (unavoidable and unintentional take of Mexican wolves is not prohibited so long as such take is non-negligent and incidental to a legal activity such as trapping, and the take is reported to FWS within 24 hours). Instead, the states merely encourage trappers to take voluntary measures to help prevent the capture of wolves in legal sets. See e.g., 2010 New Mexico Big Game and Trapper Rules and Information, at 57 (“Trappers should consider double staking traps and/or using heavier drags in order to minimize injury to accidentally captured Mexican wolves.”).

As evidenced by the 14 incidents detailed above, current state and federal regulations are simply not protecting Mexican wolves from traps and snares, particularly in New Mexico. Traps and snares threaten not only the number of individual wild

³ These trophic effects are not limited to wolves. For example, the presence of mountain lions in desert ecosystems can have several top-down effects. Mountain lions increase biological diversity in both plant and animal communities and increase the functionality of precious western riparian systems. By modulating deer populations, lions prevent overgrazing near riparian systems, which sustain 75 to 80 percent of western wildlife. The result: more cottonwoods, rushes, cattails, wildflowers, amphibians, lizards, and butterflies, and deeper, but narrower, colder stream channels necessary for native fishes. See Ripple and Beschta (2006).

wolves, but also the number of breeding pairs, as demonstrated by the trap-related injuries sustained by the three-legged Middle Fork Pack. The threat to the Mexican wolf is additive to all other anthropogenic threats still faced by this subspecies and, as such, poses a risk of real harm to the wolf's recovery. As that Agency charged with the conservation of the Mexican gray wolf, FWS must take all actions necessary to conserve this critically imperiled subspecies. As outlined below, this includes banning the use of traps and snares in the MWEPA.

B. FWS'S DUTY TO CONSERVE AND AUTHORITY TO PROHIBIT TAKE

The ESA requires FWS to utilize all of its resources to conserve endangered species so that they can recover to the point where they no longer need the protections of the ESA. See 16 U.S.C. §§ 1536(a)(1) (requiring agencies to “utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species”); 1531(b) (purposes of the ESA are “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...species”); 1531(c)(1) (“It is...the policy of Congress that all Federal...agencies shall seek to conserve endangered species...and shall utilize their authorities in furtherance of the purposes of this Act.”); 1532(2) (defining “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species...to the point at which the measures provided [in the ESA] are no longer necessary”). See also Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 170 (D. D.C. 1977) (“It is clear from the face of the [ESA] that FWS must do far more than merely avoid the elimination of protected species. It must bring these species back from the brink so that they may be removed from the protected class, and it must use all methods necessary to do so...[T]he agency has an affirmative duty to increase the population of protected species.”)

Of course one way FWS may choose to conserve species is through the reintroduction of experimental populations, as it has done with the Mexican gray wolf. See 16 U.S.C. § 1539(j). Importantly, however, the management flexibility afforded FWS by virtue of experimental designations under ESA § 10(j) is not limitless. Rather, it is tempered by the conservation standard of the ESA generally and of Section 10(j) specifically. See id. § 1539(j)(2)(A) (authorizing only those reintroductions that actually “further the conservation” of the species). See also 63 Fed. Reg. 1752, 1758 (“The provisions [in 50 C.F.R. § 17.84(k)] on allowable take and harassment of wolves are narrowly drawn so that they are only to be used in ways that enhance wolf recovery.”) Thus, the management flexibility found in the provisions of the Mexican wolf Section 10(j) Rule remain justified only so long as they serve wolf recovery. This includes 50 C.F.R. § 17.84(k)(3)(i), which currently allows the “unavoidable and unintentional take of Mexican wolves” by trapping.

50 C.F.R. § 17.84(k)(3)(i) is a deviation from the otherwise capacious prohibition on take found at ESA § 9 – the heart of FWS's duty to protect endangered species. Under Section 9, it is unlawful for any person to “take” an endangered species. 16 U.S.C. § 1538(a)(1)(B). To “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” Id. § 1532(19)

(emphasis added). The ESA take prohibition is prospective as well as retrospective, and “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.3d 1294, 1300 (8th Cir.1989). Liability for take under the ESA is strict, meaning that only the intent to set the trap – not the intent to trap an endangered species – is required to establish the violation. See U.S. v. McKittrick, 142 F.3d 1170, 1177 (9th Cir.1998). That a take was “unavoidable and unintentional” is no defense to a charge of ESA § 9 liability. Thus, 50 C.F.R. § 17.84(k)(3)(i) constitutes a marked decrease in protection for the wild Mexican gray wolf population.

V. FWS MUST AMEND THE SECTION 10(J) RULE TO PROTECT WOLVES FROM TRAPPING INJURIES AND MORTALITIES

Neither the current State laws allowing trapping and snaring in the MWEPA, nor the Federal Section 10(j) Rule, which dismisses “unavoidable and unintentional” take by trapping, are furthering the conservation of the Mexican gray wolf, as required by ESA § 10(j) and 63 Fed. Reg. 1752. As demonstrated by Table 1 above, at least 14 wolves have been injured by non-project related trapping just since 2002. Guardians points out that most if not all of these wolves were trapped as non-target species, and points out that *any* type of instant kill or restraining trap or snare has the capacity to capture a Mexican gray wolf or wolf pup, causing great pain, suffering, and potentially major injuries.

With only 42 individual wolves and two breeding pairs in the wild wolf population, the Mexican gray wolf simply cannot withstand the additive injury and/or mortality of incidental trapping or snaring. As FWS recently stated in its Mexican Wolf Conservation Assessment:

The assessment has not identified any individual threats that are so severe as to put the population at immediate risk of extinction, although *management and regulatory mechanisms*, illegal shooting, and inbreeding are identified as threats that are hindering the growth and fitness of the Blue Range population. However, the population does not experience a single threat in absence of the others, but rather all threats simultaneously or at least within a spatial or temporal proximity to one another. As a rule of thumb, an overall mortality rate of 0.34 (34 percent) has been estimated as the inflection point for wolf populations, with populations increasing naturally when mortality rates are below this average and decreasing when mortality rates are above it. Combined sources of mortality and removal are consistently resulting in failure rates at levels too high for unassisted population growth. The Mexican wolf is more susceptible to population decline at a given mortality rate than other gray wolf populations because of lower reproductive rates, smaller litter sizes, less genetic diversity, lack of immigration from other populations, and potential low pup recruitment. *Thus the cumulative impact of identified threats to the Blue Range population, coupled with its biological attributes, is putting the population at risk of failure.*

FWS Mexican Wolf Conservation Assessment (2010) at 11 (emphasis added).

Upon admitting that the Mexican wolf population is not increasing, FWS must respond by utilizing all of its authorities to further the wolf's conservation. See 16 U.S.C. § 1536(a)(1) (requiring agencies to “utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species”); Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 170 (D. D.C. 1977) (“It is clear from the face of the [ESA] that FWS must do far more than merely avoid the elimination of protected species. It must bring these species back from the brink so that they may be removed from the protected class, and it must use all methods necessary to do so...[T]he agency has an affirmative duty to increase the population of protected species.”). Currently, the Agency is not utilizing its authorities under ESA §§ 7(a)(1), 9(a)(1)(B), and 10(j) to regulate the wild Mexican gray wolf population in a manner that promotes the subspecies' recovery. This omission is antithetical to the purposes and policy of the ESA, as well as to the primary mission of FWS.

Obviously FWS has the authority to set the management parameters for the wild wolf population, as demonstrated by 50 C.F.R § 17.84(k). Unfortunately, that amount of flexibility currently found in the Section 10(j) Rule has failed the Mexican wolf. Because an increase in protection, which is allowed under the Mexican wolf's current endangered status, would better serve the subspecies, FWS should amend the Section 10(j) Rule to reflect such an increase. The need for a federal amendment is paramount, as the State of New Mexico, wherein trapping is liberally allowed, has refused to implement into its hunting and trapping regulations trapping and snaring mitigation measures to prevent harm to the Mexican wolf. See Attachment 1 (Guardians' August 14, 2009 unaccommodated request to the New Mexico Game Commission).

Guardians is aware that FWS is currently undertaking analysis pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. 4331 et seq., related to either an amendment or repeal of 50 C.F.R. § 17.84(k). Guardians appreciates that process, but understands that due to the scope of the potential regulatory changes, this process could take years to complete. Because of the low Mexican wolf population numbers and high incidents of trapping-related injuries, Guardians asserts that the Mexican gray wolf needs the leadership of FWS on the issue of trapping now. Guardians therefore petitions FWS to immediately amend 50 C.F.R. § 17.84(k) to protect the Mexican gray wolf from trapping related injuries and mortalities.

Specifically, Guardians petitions FWS to amend the language of 50 C.F.R. § 17.84(k) to protect wolves both by removing the take exception for incidental trapping and by banning all traps and snares from the MWEPA.

Currently, 50 C.F.R. § 17.84(k)(3)(i) reads:

Throughout the Mexican Wolf Experimental Population Area, you will not be in violation of the Act or this rule for “unavoidable and unintentional take” [see definition in paragraph (k)(15) of this section] of a wolf. Such take must be non-negligent and incidental to a legal activity, such as military training and testing, trapping, driving, or recreational activities. You must report the take within 24

hours to the Service's Mexican Wolf Recovery Coordinator or to a designated representative of the Service.

Currently, 50 C.F.R. § 17.84(k)(15) reads:

Unavoidable and unintentional take means accidental, unintentional take (see definition of "Take") which occurs despite reasonable care, is incidental to an otherwise lawful activity, and is not done on purpose. Examples would be striking a wolf with an automobile and catching a wolf in a trap outside of known occupied wolf range. Taking a wolf with a trap, snare, or other type of capture device within occupied wolf range (except as authorized in paragraph (k)(3)(ix) and (x) of this section) will not be considered unavoidable, accidental, or unintentional take, unless due care was exercised to avoid taking a wolf. Taking a wolf by shooting will not be considered unavoidable, accidental, or unintentional take. Shooters have the responsibility to be sure of their targets.

Guardians herein petitions FWS to amend 50 C.F.R. § 17.84(k)(3)(i) to read as follows:

Throughout the Mexican Wolf Experimental Population Area, you will not be in violation of the Act or this rule for "unavoidable and unintentional take" [see definition in paragraph (k)(15) of this section] of a wolf. Such take must be non-negligent and incidental to a legal activity, such as military training and testing, driving, or recreational activities exclusive of trapping activities. You must report the take within 24 hours to the Service's Mexican Wolf Recovery Coordinator or to a designated representative of the Service.

Guardians further petitions FWS to amend 50 C.F.R. § 17.84(k)(15) to read as follows:

Unavoidable and unintentional take means accidental, unintentional take (see definition of "Take"), which occurs despite reasonable care, is incidental to an otherwise lawful activity, and is not done on purpose. An example would be unintentionally striking a wolf with an automobile. Taking a wolf by shooting will not be considered unavoidable, accidental, or unintentional take. Shooters have the responsibility to be sure of their targets. Taking a wolf with a trap, snare, or other type of capture device within the Mexican Wolf Experimental Population Area will not be considered unavoidable, accidental, or unintentional take. Traps and snares are by nature indiscriminate, and therefore pose an inherent risk of harm to Mexican wolves. The use of any trap, snare, or other type of capture device within the Mexican Wolf Experimental Population Area is prohibited.

VI. CONCLUSION

The ESA requires FWS to further the conservation of the Mexican gray wolf by increasing the number of wolves making up its one wild population. Currently, the Mexican gray wolf reintroduction and recovery project is on a trajectory for failure. That failure is due to a number of threats, which work in tandem to artificially suppress what could be a thriving, healthy population of apex carnivores in the American Southwest. The presence of lawful traps and snares in the MWEPA causes great suffering to individual wolves and breeding pairs, and poses a significant hindrance to Mexican gray wolf recovery. FWS must therefore utilize its authorities to increase the prohibition on take of Mexican wolves as currently set forth in 50 C.F.R. § 17.84(k) to more closely resemble that of 16 U.S.C. § 1538(a)(1)(B). FWS may effectively do so by immediately undertaking a rulemaking process specifically targeted to amend the Mexican wolf Section 10(j) Rule in the way proposed herein. Such prompt action would surely promote the purposes and policies of the ESA, further the recovery goals of the BRWRA reintroduction project, and encourage ecological benefit to the Greater Gila Bioregion.

Guardians thanks you for your time in consideration of this Petition. Please address confirmation of your receipt, as well as any questions, ideas, or concerns, to Wendy Keefover-Ring, Carnivore Protection Director, at the address listed below.

Respectfully submitted,



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