A PETITION TO THE U.S. FOREST SERVICE TO BETTER PROTECT THE MEXICAN GRAY WOLF BY INSTITUTING AN EMERGENCY CLOSURE OF THE GILA NATIONAL FOREST TO TRAPPING AND TO AMEND THE GILA NATIONAL FOREST PLAN 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 regulation of the U.S. Department of Agriculture, 7 C.F.R. § 1.28, WildEarth Guardians, the Rio Grande Chapter of the Sierra Club, Jean Ossorio, and the Southwest Environmental Center (hereafter "Guardians") hereby petition the U.S. Forest Service to better protect the Mexican gray wolf by immediately instituting an emergency closure of the Gila National Forest to trapping and to amend the Gila National Forest Plan to ban the use of all traps and snares within the Gila National Forest. Guardians requests that the Forest Service immediately institute an emergency closure of the Forest to trapping and thereafter initiate a process to amend the Gila National Forest in the manner requested herein within 90 days. In the event that the Agency cannot act within that timeframe, please notify Guardians as soon as practicable of your timeline for taking "prompt" action on this Petition. See 7 C.F.R. § 1.28.

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 the Gila National Forest. Guardians has for years advocated Mexican gray wolf recovery, as contemplated by the Endangered Species Act ("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 of 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.

III. 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, the U.S. Fish and Wildlife Service ("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 has 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 is 95% public land, encompassing the *entirety* of the Gila and Apache National Forests in New Mexico and Arizona. See id. The Forest Service is, therefore, the primary land manager of the BRWRA, and a recognized partner in management of the Mexican wolf reintroduction and recovery project. See Attachment 1 (2003 Memorandum of Understanding ("MOU") creating the Mexican wolf Adaptive Management Oversight Committee ("AMOC"), of which the Forest Service is a "Lead Agency.")

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 to the wild population. FWS and the AMOC manage the wild wolf population in accordance with the terms of 50 C.F.R. § 17.84(k), the Mexican Wolf ESA § 10(j) Rule.[1]

Despite 34 years of ESA protection and 12 years of active reintroduction efforts, the Mexican gray wolf is far from recovering. See generally, FWS 2010 Mexican Wolf

[1] Although the AMOC has no decision-making authority over FWS with regards to the Mexican wolf reintroduction and recovery project, see Defenders of Wildlife v. Tuggle, Civ. No. 08-280 (D. Ariz.), Dkt. 70 (Order Granting Consent Decree), the AMOC continues to function, and that "an interagency partnership of Federal, State, County, and Tribal entities manages the reintroduction." 2010 FWS Mexican Wolf Conservation Assessment, at 7.

Conservation Assessment.[2] 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 and other Lead Agencies, including the Forest Service, manage 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 ON THE GILA NATIONAL FOREST

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 of these wolves were trapped on the BRWRA in New Mexico, i.e., *within the Gila National Forest*, just since 2002. As a result of trapping, several wolves have sustained injuries to their paws or legs. Two wolves have had their legs amputated due to trapping-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.

[2] This document is publicly available at: http://www.fws.gov/southwest/docs/41948WollfConservationAssessment4-2010.pdf.

Table 1[3] Mexican Wolves and Known Non-project Trap Related Incidents				
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.

[3] 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 on the Gila National Forest and beyond. 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 even 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 caused 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 a 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 Sweanor (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.

The Gila National Forest constitutes 75 percent of the BRWRA and contains some of the best wolf habitat available. If the Mexican wolf is ever going to recover as contemplated by the ESA, it *must* have room to roam safely throughout the Gila National Forest. The presence of traps and snares in the Forest is simply antithetical to the notion of wolf refugia from persecution, as they pose an indiscriminate, omnipresent risk of harm and even death.

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

After the 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

[4] 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. Priceless, yet these services are in danger from anthropogenic threats.

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).[5] If allowed to thrive, a healthy population of Mexican gray wolves would bring similar, far-reaching ecological benefits to the Greater Gila Bioregion.

IV. LEGAL BACKGROUND

A. TRAPPING AND SNARING ARE ALLOWED ON THE GILA NATIONAL FOREST

Trapping and snaring are generally allowed on the Gila National Forest. See N.M.S. §§ 17-5-1 – 17-5-9. Traps are common throughout the Gila, 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. Note that the New Mexico policy on traps and snares stands in stark contrast to that in Arizona, where these devices are banned except for use in scientific research projects and relocation efforts. See A.R.S. § 17-301. This discrepancy in state policies creates an artificial dichotomy for the wolf on the BRWRA, whereby it is safe from indiscriminate traps on one side of the state line, but consistently put at risk on the other. Again, because the Gila makes up the vast majority of the BRWRA, Mexican gray wolves are threatened by traps and snares throughout the majority of areas where they live. This is a problem for which the Gila National Forest is uniquely situated to address.

Importantly, whether set by private citizens or our own federal government, those types of traps and snares permitted on public lands in New Mexico 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 State merely encourages trappers to take voluntary measures to help prevent the capture of wolves in legal sets. See 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

[5] 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).

in New Mexico and on the Gila National Forest. Traps and snares threaten not only the number of individual wild 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 one of several "Lead Agencies" on the Mexican wolf reintroduction and recovery project and primary land manager of the BRWRA, the Forest Service must act as necessary to conserve this critically imperiled subspecies. As outlined below, this includes banning the use of traps and snares on the Gila National Forest.

B. THE FOREST SERVICE IS OBLIGATED TO CONSERVE THE WOLF

Section 7(a)(1) of the ESA states that, "all [non-Interior] Federal agencies shall, in consultation with and with the assistance of the Secretary [of Interior], utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species..." 16 U.S.C. § 1536(a)(1). The non-discretionary requirement set forth in ESA § 7(a)(1) is the substantive embodiment of the ESA's policy. See 16 U.S.C. § 1531(c)(1) ("It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species...and shall utilize their authorities in furtherance of the purposes of this Act.")

In its seminal opinion interpreting Section 7, the Supreme Court stated:

> As it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. Its stated purposes were "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..." 16 U.S.C. § 1531(b). In furtherance of these goals, Congress expressly stated in § 2(c) that "all Federal departments and agencies *shall* seek *to conserve endangered species* and threatened species..." 16 U.S.C. § 1531(c). Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined "conserve" as meaning "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." 16 U.S.C. § 1532(2).
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> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.

Tennessee Valley Authority ("TVA") v. Hill, 437 U.S. 153, 180 and 184 (1978) (emphasis in original).

Other courts agree that Section 7(a)(1) requires more than merely ensuring a species' survival. Rather, it is an obligation to further the recovery of listed species.

> It is clear from the face of the [ESA] that [a federal agency] 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…Under the [ESA], the agency has an affirmative duty to increase the population of protected species.

Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 170 (D. D.C. 1977). See also Pyramid Lake Paiute Tribe v. U.S. Department of Navy, 898 F.2d 1410, 1416 (9th Cir.1990) ("conservation," i.e., recovery, is the "key term" of Section 7(a)(1)).

The recovery obligations set forth at Section 7(a)(1) apply to all federal agencies – not just to FWS.

> [Section 7] substantially amplifie[s] the obligation of [federal agencies] to take steps within their power to carry out the purposes of this act...Once this bill is enacted, the appropriate Secretary, whether of Interior, Agriculture or whatever, *will have to take action* to see that [the imperilment of species] is not permitted to worsen, and that these [species] are not driven to extinction. The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and *every agency of government is committed* to see that those purposes are carried out...[T]he agencies of Government can no longer plead they can do nothing about it. *They can, and they must. The law is clear.*

TVA, 473 U.S. at 183-84 and 98 (emphasis in original).

Whether an agency's primary mission includes species recovery is irrelevant when assessing whether the Section 7(a)(1) obligation has been met.

> [T]he legislative history undergirding [the stringent, mandatory language of] § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.

Id., at 183 and 185. See also Pyramid Lake, 898 F.2d at 1417-1418 ("The Court's discussion of the [ESA] in TVA makes clear that…the Navy's 'primary mission' construction is not viable because it understates the Navy's duty to conserve.").

Indeed, the ESA mandates that each federal agency "place conservation above any of the agency's competing interests." House v. U.S. Forest Service, 974 F. Supp. 1022, 1027 (E.D. Ken. 1997) (holding the Forest Service in violation of ESA § 7(a)(1) for failing to prioritize the recovery of an endangered species over the sale of timber).

> While the Court agrees that [under Pyramid Lake,] defendants have some discretionary powers as to the methods of conservation it desires to implement, it does not agree with defendants' assertion that defendants may balance competing

> agency interests with the conservation of endangered species, as this flies smack in the face of the Supreme Court's holding in TVA v. Hill.
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> Thus the Court concludes that defendants are bound by the ESA and their own Forest Plan, to place the Indiana bat, an endangered species, at the top of its priority list. It will become apparent to the reader of this Opinion and Order that defendants have failed to comply with its affirmative duty by placing the sale of 199 acres worth of trees before the protection of an endangered species.

House, at 1027, fn. 8, and 1028.

C. THE FOREST SERVICE CAN CONSERVE THE WOLF THROUGH EMERGENCY CLOSURE AND FOREST PLAN AMENDMENT

Immediately instituting and emergency closure of the Gila National Forest and thereafter commencing a process to amend the Gila National Forest Plan is one way the Forest Service can act to conserve the wolf, as the ESA requires. The Forest Service's authority to institute an emergency closure to better protect the wolf is found at 36 C.F.R. § 261.53(a). The Forest Service's authority to amend the Gila National Forest Plan to better protect the wolf is found in the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 et seq., NFMA's implementing regulations, 36 C.F.R. Part 219, and the current Gila National Forest Plan.

As declared by Congress upon the promulgation of NFMA, "The Forest Service, by virtue of its statutory authority for management of the National Forest System, research and cooperative programs, and its role as an agency in the Department of Agriculture, has both a responsibility and an opportunity to be a leader in assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity." 16 U.S.C. § 1600(6). "As part of the [Renewable Resource] Program…, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies." 16 U.S.C. § 1604(a).

Under NFMA, the Forest Planning process is an ongoing one, "where decisions are adapted, as necessary, to address new issues, new information, and unforeseen events." 36 C.F.R. § 219.2(e). Indeed, land and resource management planning is a "flexible process for fitting solutions to the scope and scale of needed action." Id. § 219.3(a). Forest planning – and plan amendment – "involves engaging the public and applying the best available science." Id.

The Forest planning cycle begins with the identification and consideration of issues which may originate from proposals by organizations, which are interested in, or affected by, National Forest System management. See 36 C.F.R. §§ 219.3(d) and 219.4(a). In considering issues raised by such organizations, the Forest Service should consider the following factors: existing statutory requirements; the scientific basis and

merit of available data; the opinions of interested or affected individuals, organizations, or other entities and the social and cultural values related to an issue; and the extent to which addressing the issue through planning provides opportunities to recover threatened or endangered species and maintain or restore their habitat. See id. § 219.4(b).

If an organization raises an issue of importance to endangered species, the Forest Service may undertake a Forest Plan amendment to address it. "Any amendment decision must be based on the identification and consideration of issues, applicable information, and an analysis of the effects of the proposed amendment." 36 C.F.R. § 219.8(a). "Plan decisions guide or limit uses of National Forest System resources and provide the basis for future agency action. Plan decisions link the requirements of laws, regulations, Executive Orders, policies, and the Forest Service national strategic plan to specific national forests and grasslands." Id. § 219.7

As described above, existing laws require the Forest Service to work towards the recovery of endangered species. This goal of species recovery is already echoed in the Forest Service national strategic plan and the Gila National Forest Plan. Currently, the Gila National Forest Plan states that the Forest will: "Maintain and/or improve habitat for threatened and endangered species and work toward eventual recovery and delisting of species through recovery plans." Gila National Forest Plan at 12. Moreover, the Plan states that, "T&E species will receive priority over other species where needs are identified through approved recovery plans." Id. at 270. While these broad-brush directives set the correct tone for species "management" on the Forest, they are obviously not enough to mitigate or prevent damages to the wolf population from traps and snares.

V. THE FOREST SERVICE MUST INSTITUTE AN EMERGENCY CLOSURE OF THE FOREST TO TRAPS AND AMEND THE FOREST PLAN TO BAN TRAPS AND SNARES

Neither the New Mexico hunting and trapping laws, the Federal Mexican wolf ESA § 10(j) Rule, nor the current Gila National Forest Plan are protecting the wolf from the real, consistent danger posed by traps and snares on the Gila National Forest. 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 it episodes of great pain, suffering, and potential major injuries or death.

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 knowledge that the Mexican wolf population is not increasing, the Forest Service must respond by utilizing 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 [an agency] 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 Forest Service is not utilizing its authorities under ESA § 7(a)(1) to promote the wolf's conservation. One way the Forest Service can begin to address this omission, which is antithetical to the purposes and policy of the ESA, is by banning the use of all traps and snares on the Gila National Forest through a Forest Plan amendment.

Obviously the Forest Service has the authority to undertake an emergency closure pursuant to 36 C.F.R. § 261.53(a), as well as a Forest Plan amendment pursuant to NFMA and its implementing regulations. Indeed, when public interest organizations such as Guardians raise meritorious, scientifically and legally supported issues of concern for endangered species, the Forest Service is under an obligation to act. See 36 C.F.R. § 219.4(b). Trapping and snaring are morally detestable practices to a large faction of society and have been outlawed in several states, including Arizona. The Forest Service is in a unique and powerful position to better the landscape for the Mexican gray wolf by acting now to ban traps from the remainder of the BRWRA where they are currently allowed by the State of New Mexico.

The need for an emergency closure and Forest Plan amendment is paramount, as the State of New Mexico has refused to implement into its hunting and trapping regulations trapping and snaring mitigation measures to prevent harm to the Mexican

wolf. See Attachment 3 (Guardians' August 14, 2009 unaccomodated request to the New Mexico Game Commission). The Forest Service has the authority to ban certain uses on Forest Service land for reasons of non-suitability. See 36 C.F.R. § 219.7. Given the documented record of trapping injuries to endangered wolves on the Gila National Forest, Guardians asks that the Forest Service implements that authority now to declare trapping and snaring unsuitable uses of Forest Service land within the BRWRA, thereby better protecting the Mexican gray wolf.

Specifically, Guardians petitions the Forest Service to issue an emergency closure of the Gila National Forest to trapping pursuant to 36 C.F.R. § 261.53(a). Such a closure should read: "Due to the ongoing risk of harm to the Mexican gray wolf from traps and snares set within the Gila National Forest, the Forest Service hereby institutes an emergency closure of the Forest to all traps and snares to better protect this endangered species. This closure will remain in effect until further notice and strictly prohibits any person from setting a trap or snare of any size or for any duration within the boundary of the Gila National Forest." Guardians further petitions the Forest Service to thereafter promptly initiate a process for amending the Gila National Forest Plan pursuant to NFMA and its implementing regulations. Specifically, Guardians petitions the Forest Service to amend those standards for "Threatened & Endangered Wildlife – General," which are set forth at page 28 of the Gila National Forest Plan, to include the following: "Manage Forest lands in a manner that provides threatened and endangered species with safe refugia from the potential for injury due to traps and snares."

VI. CONCLUSION

The ESA requires the Forest Service 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 on the Gila National Forest causes great harm to individual wolves and breeding pairs, and poses a significant hindrance to Mexican gray wolf recovery. The Forest Service should therefore utilize its authorities to immediately institute a protective emergency closure and thereafter amend the Gila National Forest Plan to ban all traps and snares from the Forest. Such prompt action would surely promote the purposes and policies of the ESA, further the recovery goals of the Mexican wolf 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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