

## **The Road to Recovery: A Look at the Past, Present, and Future for the Endangered Mexican Gray Wolf**

The story of the Mexican gray wolf arguably begins in 1973 when Congress passed the Endangered Species Act (“ESA”) in response to the extinction of some of the Nation’s native plants and animals, and the fear that many other species were following the same path.<sup>1</sup> The purpose of the ESA was to protect and recover species in danger of going extinct and to protect the ecosystems upon which these species depend.<sup>2</sup> The Mexican gray wolf, a top predator native to the southwestern United States and Mexico, suffered from extremely low population numbers after deliberate extermination by humans and years of losing natural habitat. The Fish and Wildlife Service (“FWS”) has engaged in efforts to conserve and ensure the survival of the Mexican gray wolf for over 30 years, avoiding the wolf’s immediate extinction by listing the species for protection under the ESA and initiating a captive breeding program from the descendants of seven captured Mexican wolves.<sup>3</sup> The FWS’s development of a long-term recovery plan, however, has been a long and difficult process filled with much scientific debate and controversy. The Final Recovery Plan, issued in November of 2017, focuses on expanding the geographic range of the Mexican wolf, increasing the population size, improving genetic diversity, monitoring wild populations and implementing adaptive management, and collaborating with partners to address social and economic concerns related the recovery of the species.<sup>4</sup> The Recovery Plan is not the final word on Mexican gray wolves, however, as there are continued opportunities to both challenge the Recovery Plan and participate in its implementation via district court litigation, proposed federal legislation, and built-in regulatory review periods.

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<sup>1</sup> 16 U.S.C. § 1531 et. seq.(1973).

<sup>2</sup> *Id.* § 1531(b).

<sup>3</sup> *See* Determination That Two Species of Butterflies Are Threatened Species and Two Species of Mammals Are Endangered Species, 41 Fed. Reg. 17736-01 (Apr. 28, 1976); Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607-01 (Mar. 9, 1978); Endangered and Threatened Wildlife and Plants; Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife and Maintaining Protections for the Mexican Wolf (*Canis lupus baileyi*) by Listing It as Endangered, 78 Fed. Reg. 35664-01 (June 13, 2013); Endangered and Threatened Wildlife and Plants; Endangered Status for the Mexican Wolf, 80 Fed. Reg. 2488 (Jan. 16, 2015).

<sup>4</sup> U.S Fish and Wildlife Service, 2017 Mexican Recovery Plan, First Revision. Region 2, Albuquerque, New Mexico, USA, at ES-1 (Nov. 28, 2017) [hereinafter “2017 Recovery Plan”].

## I. History of the Mexican Wolf Listing and Initial Recovery Efforts

Under the ESA, a species may be listed as either endangered or threatened.<sup>5</sup> *Endangered* means a species is in danger of extinction throughout all or a significant portion of its range while *threatened* means a species is likely to become endangered within the foreseeable future.<sup>6</sup> The Mexican wolf was originally listed as an endangered subspecies on April 28, 1976, in the southwestern United States and Mexico.<sup>7</sup> In 1978, the FWS published a rule classifying the gray wolf as an endangered population at the species level (*Canis lupus*) throughout the contiguous United States and Mexico, except for the Minnesota gray wolf population, which was classified as threatened.<sup>8</sup>

In the Southwest in 2009, the FWS received petitions from the Center of Biological Diversity, WildEarth Guardians, and the Rewilding Institute requesting that the FWS list the Mexican wolf as an endangered subspecies and designate critical habitat.<sup>9</sup> The FWS found that the species was already receiving the protections of the ESA and the petitioned action was not warranted.<sup>10</sup> But then after the FWS completed a five-year study on the listing of the gray wolf (*Canis lupus*), the FWS recommended that the listing should be revised to reflect the distribution and status of the gray wolf populations by removing all areas currently in the range, except where there was a valid species or subspecies.<sup>11</sup> On June 13, 2013, the FWS proposed a rule to remove the gray wolf (*Canis lupus*) as a species from the List of Threatened and Endangered Species and only list the Mexican wolf subspecies.<sup>12</sup> In 2013, the FWS also began developing regulation for the management of the experimental population of Mexican wolves within the Mexican Wolf Experimental Population Area (“MWEPA”), discussed in more detail *infra*.<sup>13</sup> Then in 2015, the

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<sup>5</sup> 16 U.S.C. § 1531 et. seq.

<sup>6</sup> *Id.* § 1532(6)(20).

<sup>7</sup> Determination That Two Species of Butterflies Are Threatened Species and Two Species of Mammals Are Endangered Species, 41 Fed. Reg. 17736-01 (Apr. 28, 1976).

<sup>8</sup> Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607-01 (Mar. 1, 1978).

<sup>9</sup> Endangered and Threatened Wildlife and Plants; 12-Month Finding on Petitions To List the Mexican Gray Wolf as an Endangered Subspecies or Distinct Population Segment With Critical Habitat, 77 Fed. Reg. 61375-01 (Oct. 9, 2012).

<sup>10</sup> *Id.* at 61375.

<sup>11</sup> *Id.*

<sup>12</sup> Endangered and Threatened Wildlife and Plants; Removing the Gray Wolf (*Canis lupus*) From the List of Endangered and Threatened Wildlife and Maintaining Protections for the Mexican Wolf (*Canis lupus baileyi*) by Listing It as Endangered, 78 Fed. Reg. 35664-01 (June 13, 2013).

<sup>13</sup> Endangered and Threatened Wildlife and Plants; Endangered Status for the Mexican Wolf, 80 Fed. Reg. 2488 (Jan. 16, 2015); Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512-01 (Jan 16, 2015).

FWS finalized both the listing and nonessential experimental population of the Mexican wolf under § 10(j) of the ESA.<sup>14</sup>

In addition to its listing efforts, the FWS has engaged in numerous attempts to formulate an adequate recovery plan for the Mexican wolf. Since 1982, the FWS has convened four different recovery teams to develop a comprehensive recovery plan. In 1982, the FWS began writing its first plan.<sup>15</sup> At the time of drafting, the FWS could not imagine full recovery of the species because it was in such dire condition and there were no known wolves in the wild. The plan simply laid out the prime objective of conserving the species and reestablishing a population of 100 Mexican wolves within the wolf's historical range.<sup>16</sup> In 1995, the FWS drafted a recovery plan to supersede the 1982 plan, which was never finalized, but instead was followed by the creation of another recovery team in 2003 and yet another in 2010.<sup>17</sup> The 2010 team drafted a plan ("2013 draft plan") that proposed establishing a minimum of three interconnected populations each with at least 200 wolves, as part of a metapopulation of at least 750 Mexican gray wolves total in the United States.<sup>18</sup> The draft plan focused recovery solely in the United States, specifically in the Grand Canyon, Vermejo Park Ranch, and the Mogollon Rim.<sup>19</sup> The northward extension of the proposed geographic range and the development of criteria for delisting were greatly debated among scientists and the plan was never finalized.<sup>20</sup> Rather, a renewed effort led to the generation of the 2017 Final Recovery Plan, discussed *supra*.

#### **a. ESA Experimental Population § 10(j)**

Closely tied to the development of the recovery plan has been the FWS effort to manage an experimental population of Mexican gray wolves that formed the basis of the now wild population. In 1982, Congress amended the ESA to include § 10(j).<sup>21</sup> Under this section, the Secretary of the Interior may authorize the release of an experimental population of an endangered species outside the species current range if the release will further the conservation of the species.<sup>22</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> Mexican Wolf Recovery Plan, 1982 (USFWS 1982).

<sup>16</sup> 2017 Recovery Plan at 2–3; Mexican Wolf Recovery Plan, 1982 (USFWS 1982).

<sup>17</sup> 2017 Recovery Plan at 3.

<sup>18</sup> U.S. Fish and Wildlife Service, 2013 Proposed Recovery Criteria for the Mexican Wolf.

<sup>19</sup> *Id.*

<sup>20</sup> Eric A. Odell et. al., *Perils of recovering the Mexican wolf outside of its historical range*, Biological Conservation 220 (2018) 290–98.

<sup>21</sup> *Id.*

<sup>22</sup> 16 U.S.C. § 1539(j)(1).

Once designated, an experimental population is treated as threatened under the ESA, which allows the FWS more flexibility to manage the population than an endangered listing would provide.<sup>23</sup> Prior to releasing the population, the Secretary must determine whether the population is essential or nonessential to the continued existence of the species.<sup>24</sup>

In March 1998, 11 wolves were released into the Blue Range Wolf Recovery Area (“BRWRA”), located within the larger MWEPA, and were the first reintroduction of the subspecies into the wild.<sup>25</sup> The FWS designated the population as *nonessential experimental*, a designation that provides management flexibility, allowing the FWS to improve the effectiveness of the reintroduction project.<sup>26</sup> Without this flexibility, the FWS believed that intentional illegal killing of wolves would prevent successful recovery.<sup>27</sup> Under the 1998 § 10(j) rule, authorized agencies could take, remove, or relocate wolves in certain circumstances, and private citizens were allowed to harass wolves for purposes of scaring the wolves away from people, pets, or livestock.<sup>28</sup> The 1998 § 10(j) rule also permitted killing or injuring wolves in defense of human life or livestock.<sup>29</sup>

Litigation in 2010 prompted revision to the 1998 § 10(j) rule.<sup>30</sup> In settlement, the FWS agreed to publish a § 10(j) rule modification by January 16, 2015, and contemporaneously, the FWS also convened another recovery team to develop what would become the 2013 draft recovery plan, as described *supra*.<sup>31</sup> The 2015 § 10(j) rule set a population objective of a single population of 300–325 Mexican wolves within the MWEPA.<sup>32</sup> The rule also expanded the MWEPA to

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<sup>23</sup> 49 Fed. Reg. at 33,885.

<sup>24</sup> Factors that must be considered by the Secretary in making this finding include: (1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere; (2) The likelihood that any such experimental population will become established and survive in the foreseeable future; (3) The relative effects that establishment of an experimental population will have on the recovery of the species; and (4) The extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area. 16 U.S.C. § 1539(j)(2)(B).

<sup>25</sup> Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512–66 (Jan 16, 2015).

<sup>26</sup> *Id.* at 2512.

<sup>27</sup> *Id.* at 2525.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2560.

<sup>30</sup> *Ctr. for Biological Diversity v. Jewell*, No. 1:12-CV-1920 (D.D.C. 2013).

<sup>31</sup> *Id.*; *Ctr. for Biological Diversity v. Jewell*, No. CV-15-00019, 2018 U.S. Dist. LEXIS 56436 (D. Ariz. Mar. 31, 2018).

<sup>32</sup> Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. at 2514–15.

encompass all of Arizona and New Mexico south of Interstate 40, totaling 153,871 square miles.<sup>33</sup> Additionally, the 2015 rule modified the circumstances in which lethal and non-lethal take of a wolf could be authorized.<sup>34</sup> For example, if an Arizona or New Mexico game and fish agency determined that a Mexican wolf created an unacceptable impact on wild ungulate herds, the agency could request that the FWS remove the wolf from the impacted area.<sup>35</sup>

## **II. The 2017 Final Recovery Plan**

The presently governing recovery plan for the Mexican wolf was published by the FWS in November 2017 (“2017 Recovery Plan” or “Recovery Plan”).<sup>36</sup> The Recovery Plan’s primary components include expanding the geographic range of the Mexican wolf, increasing the population size, improving gene diversity, monitoring wild populations and implementing adaptive management, and collaborating with partners to address social and economic concerns related the recovery of the species.<sup>37</sup>

The FWS’s strategy is to establish two populations over a large geographical area of the Mexican wolf’s range.<sup>38</sup> In the United States, the focus will be on one large population of Mexican wolves in the area south of Interstate 40 in Arizona and New Mexico.<sup>39</sup> In Mexico, federal agencies are focusing recovery efforts in the northern Sierra Madre Occidental in Chihuahua and Sonora.<sup>40</sup> Currently, both the United States and Mexico populations are at risk of extinction due to small population size, and therefore both populations will need to increase in size to remove the risk of extinction.<sup>41</sup> To improve genetic diversity, the FWS will release and translocate Mexican wolves from the captive population to the wild populations.<sup>42</sup> The Recovery Plan discusses releasing individual or paired wolves, a pack of wolves, or cross-fostering of pups.<sup>43</sup>

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<sup>33</sup> *Id.* at 2519.

<sup>34</sup> *Id.* at 2562.

<sup>35</sup> *Id.*

<sup>36</sup> *See* 2017 Recovery Plan.

<sup>37</sup> *Id.* at ES-1.

<sup>38</sup> *Id.* at 11.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

### **a. Recovery Criteria**

Recovery criteria serve as objective, measurable guidelines to determine when an endangered species has recovered to the point that it may be downlisted to threatened, or when the protections afforded by the ESA are no longer necessary and a species can be delisted.<sup>44</sup> *Downlisting* is the reclassification of a species from endangered to threatened, while *delisting* is the removal of a species from the Federal Lists of Endangered and Threatened Wildlife and Plants.<sup>45</sup>

#### *i. Downlisting Recovery Criteria*

To be considered for downlisting, the Mexican wolf must meet one of two criteria options. Under the first option, the U.S. population must average over a 4-year period greater than or equal to 320 Mexican wolves and gene diversity available from the captive population must have been incorporated.<sup>46</sup> Alternatively, two populations (one in the United States and one in Mexico) must average, over the same 4-year period, greater than or equal to 150 wolves and gene diversity must have been incorporated into both the U.S. and Mexico populations.<sup>47</sup>

#### *ii. Delisting Recovery Criteria*

The Mexican wolf will be considered for delisting when a minimum of two populations meet all abundance and genetic criteria as follows:

##### *United States:*

- a) The population average over an 8-year period is greater than or equal to 320 wolves
- b) The population must exceed 320 wolves each of the last 3 years of the 8-year period;
- c) The annual population growth rate is stable or increasing; and
- d) Gene diversity available from the captive population has been incorporated and results in 22 released Mexican wolves surviving to breeding age.

##### *Mexico:*

- a) The population average over an 8-year period is greater than or equal to 200 wolves;
- b) The population must exceed 200 wolves each of the last three years of the 8-year period;
- c) The annual population growth rate is stable or increasing; and

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<sup>44</sup> *Id.* at ES-2.

<sup>45</sup> 16 U.S.C. § 1531 et. seq.

<sup>46</sup> 2017 Recovery Plan at 18–19.

<sup>47</sup> *Id.*

d) Gene diversity available from the captive population has been incorporated and results in 37 released Mexican wolves surviving to breeding age.<sup>48</sup>

In addition to these specified abundances and genetic criteria, in order to qualify for delisting, states and tribes must have regulatory mechanisms in place to prohibit or regulate human-caused mortality of Mexican wolves. Mexico must also ensure regulatory mechanisms are in place to protect Mexican wolves from human-caused mortality.<sup>49</sup>

### **b. Recovery Implementation Strategy**

The 2017 Recovery Plan includes general goals and descriptions of the actions needed to be taken to recover the Mexican gray wolf. The recovery implementation strategy is a more specific and detail oriented description of activities that will be taken to implement the Recovery Plan.<sup>50</sup> The implementation strategy can be found on the FWS's website and can be adapted and adjusted if new information should present itself, without having to revisit and modify the Recovery Plan.<sup>51</sup>

### **c. Monitoring and Adaptive Management**

The FWS will conduct ongoing annual monitoring to track population performance and will employ management actions to reduce wolf-livestock and wolf-human conflict.<sup>52</sup> The FWS will use proactive measures to avoid and minimize depredation and will facilitate the provision of compensation for the economic impact of wolves on rural ranching communities.<sup>53</sup> Addressing wolf-livestock conflicts is one of the most important areas for collaborative management of Mexican wolves.<sup>54</sup> Depredation compensation is currently available through the Farm Bill

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<sup>48</sup> *Id.* at 18–20.

<sup>49</sup> *Id.* at 20.

<sup>50</sup> U.S. Fish and Wildlife Service. 2017, Mexican Wolf Recovery Implementation Strategy, Region 2, Albuquerque, New Mexico, USA.

<sup>51</sup> *Id.*

<sup>52</sup> 2017 Recovery Plan at 15.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 16.

Livestock Indemnity Program,<sup>55</sup> the Arizona Livestock Loss Board,<sup>56</sup> and the Mexican Wolf/Livestock Council.<sup>57</sup>

*i. The Farm Bill Livestock Indemnity Program*

The 2014 Farm Bill authorized the Livestock Indemnity Program, which is administered by the U.S. Department of Agriculture and the Farm Services Agency.<sup>58</sup> The Livestock Indemnity Program provides benefits to livestock producers for livestock deaths in excess of normal mortality caused by eligible loss conditions, including predation by wolves.<sup>59</sup> Livestock Indemnity Payments (“LIP”) are equal to 75% of the market value of the applicable livestock on the day before the date of death of the livestock.<sup>60</sup> Producers who suffered livestock death losses should submit a notice of loss and an application for payment to the local FSA office that maintains their farm records.<sup>61</sup> To be eligible, the notice of loss must be submitted within 30 calendar days of when the loss of livestock is first apparent to the producer.<sup>62</sup> Then an application for payment must be filed no later than 90 calendar days after the end of the calendar year during which the eligible loss condition occurred.<sup>63</sup>

*ii. The Arizona Livestock Loss Board*

The Arizona Livestock Loss Board was established to compensate landowners, lessees, or livestock operators for wolf depredation on livestock, and to administer the Livestock Compensation Fund.<sup>64</sup> The Arizona Livestock Loss Board consists of the Director of the Arizona Department of Agriculture, the Director of the Arizona Game and Fish Department, three members

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<sup>55</sup> *Id.*; *Livestock Indemnity Program*, U.S. DEPARTMENT OF AGRICULTURE FARM SERVICE AGENCY, <https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/livestock-indemnity/index> (last visited Apr. 28, 2018).

<sup>56</sup> 2017 Mexican Recovery Plan at 16; *State of Arizona Livestock Loss Board*, ARIZONA GAME AND FISH DEPARTMENT, <https://www.azgfd.com/Agency/LivestockBoard/> (last visited Apr. 28, 2018).

<sup>57</sup> 2017 Recovery Plan at 16; MEXICAN WOLF/LIVESTOCK COEXISTENCE COUNCIL, <http://www.coexistencecouncil.org/> (last visited Apr. 28, 2018).

<sup>58</sup> Supplemental Agricultural Disaster Assistance Programs, Payment Limitations, and Payment Eligibility, 79 Fed. Reg. 21086-118 (Apr. 14, 2014).

<sup>59</sup> *Livestock Indemnity Program*, UNITED STATES DEPARTMENT OF AGRICULTURE FARM SERVICE AGENCY, <https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/livestock-indemnity/index> (last visited Apr. 28, 2018).

<sup>60</sup> *Id.*

<sup>61</sup> Supplemental Agricultural Disaster Assistance Programs, Payment Limitations, and Payment Eligibility, 79 Fed. Reg. 21091 (Apr. 14, 2014).

<sup>62</sup> *Id.*

<sup>63</sup> More information is available at local FSA offices. To find your local FSA office, visit <http://offices.usda.gov>.

<sup>64</sup> *State of Arizona Livestock Loss Board*, ARIZONA GAME AND FISH DEPARTMENT, <https://www.azgfd.com/Agency/LivestockBoard> (last visited Apr. 28, 2018).



representing the livestock industry, two members representing wildlife conservation, one member who is a livestock auction market owner, and one member who is a faculty member at a university.<sup>65</sup> The Arizona Livestock Loss Board addresses the economic impacts of wolves on individual producers by reimbursing confirmed and probable wolf-caused losses.<sup>66</sup> The Board also helps reduce livestock losses by approving and funding programs that discourage and prevent wolves from killing livestock.<sup>67</sup> Established in 2015 and being a relatively new program, the Arizona Livestock Loss Board is presently operating pursuant to an interim policy designed to serve as a remedy until the Board develops and adopts permanent rules.<sup>68</sup> Currently, a commercial producer in Arizona can apply for reimbursement for damages incurred up to \$2,500 for wolf-caused cattle losses.<sup>69</sup>

*iii. The Mexican Wolf/Livestock Counsel*

The FWS in cooperation with the National Fish and Wildlife Foundation established the Mexican Wolf/Livestock Interdiction Trust Fund in 2009.<sup>70</sup> The Mexican Wolf/Livestock Coexistence Counsel consists of ranchers from Arizona and New Mexico, environmental groups, tribes, and two county coalitions that represent counties in New Mexico and Arizona, all of which are dedicated to supporting viable ranching, self-sustaining wolf populations, and healthy western landscapes in the American Southwest.<sup>71</sup> The program provides payments based on a formula that considers the presence of wolves, number of livestock exposed to wolves, and the rancher's participation in proactive conflict avoidance measures.<sup>72</sup> Eligible applicants are those with private lands or grazing allotments within the occupied range of the Mexican wolf and those who are otherwise affected by Mexican wolves.<sup>73</sup> Eligible applicants must fill out and submit the application form provided on the Council's website.<sup>74</sup> The Council will annually review

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* For more information call (632) 236-7281.

<sup>70</sup> MEXICAN WOLF/LIVESTOCK COEXISTENCE COUNCIL, <http://www.coexistencecouncil.org/> (last visited Apr. 28, 2018).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

applications received for the year, apply the formula, and direct disbursement of fund from the Trust.<sup>75</sup> Applications to the Council are due by June 1 of each year.<sup>76</sup>

### III. Next Steps for Stakeholders

Now that the Recovery Plan has been finalized, it has faced heavy criticism from ranchers and environmentalists alike.<sup>77</sup> Yet the long-awaited Recovery Plan is not the final word on Mexican gray wolves, as there are continued opportunities to both challenge the Recovery Plan and participate in its implementation via district court litigation, proposed federal legislation, and built-in regulatory review periods.

#### a. Lawsuits

##### *i. Pending Challenges to the 2017 Recovery Plan*

The primary way for dissatisfied parties to directly challenge the Recovery Plan is by bringing a lawsuit in federal district court against the FWS. Thus far, two lawsuits have been filed against the FWS alleging that the Recovery Plan does not meet the requirements of the ESA.<sup>78</sup> Both lawsuits were filed in the U.S. District Court for the District of Arizona in Tucson on January 30, 2018. The lawsuits, filed by environmentalist groups, similarly allege that the FWS's Recovery Plan fails to meet the requirements of the ESA and the Administrative Procedure Act ("APA"). Plaintiffs in the first lawsuit are Center for Biological Diversity, Defenders of Wildlife, the Endangered Wolf Center, David R. Parsons (wildlife biologist), and the Wolf Conservation Center ("CBD lawsuit").<sup>79</sup> Plaintiffs allege that the FWS violated the ESA by: failing to use the best available science; failing to include site-specific management actions to address illegal killings of wolves; and allowing for a continued decline in genetic diversity within the wolf population.<sup>80</sup> Plaintiffs further allege that because the FWS failed to consider all relevant factors and to connect

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Alex Devoid, *Mexican gray wolf recovery plan criticized for doing too much, too little*, AZ CENTRAL (Nov. 30, 2017, 2:29 PM MST). <https://www.azcentral.com/story/news/local/arizona-environment/2017/11/30/final-endangered-mexican-gray-wolf-recovery-plan-met-scrutiny/724557001/>.

<sup>78</sup> *Ctr. for Biological Diversity v. Zinke*, No. 4:18-cv-00047 (D. Ariz. Jan. 30, 2018); *WildEarth Guardians v. Zinke*, No. 4:18-cv-00048 (D. Ariz. Jan. 30, 2018).

<sup>79</sup> Complaint at 1, *Ctr. for Biological Diversity v. Zinke*, No. 4:18-cv-00047, available at [https://www.biologicaldiversity.org/species/mammals/Mexican\\_gray\\_wolf/pdfs/Center-for-Biological-Diversity-et-al-v-FWS-complaint-1-2018.pdf](https://www.biologicaldiversity.org/species/mammals/Mexican_gray_wolf/pdfs/Center-for-Biological-Diversity-et-al-v-FWS-complaint-1-2018.pdf).

<sup>80</sup> *Id.* at 22–24.

the facts found to its decisions, the Recovery Plan violates the APA by being “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>81</sup>

WildEarth Guardians and Western Watersheds Project are plaintiffs in the second lawsuit.<sup>82</sup> This lawsuit makes essentially the same claims as those in the CBD lawsuit.<sup>83</sup> In both lawsuits, the plaintiffs state a clear preference for the version of the Recovery Plan that was under consideration in 2013, which included more extensive delisting criteria.<sup>84</sup> Claimants in both lawsuits ask the court to: declare that the Recovery Plan violates the ESA and APA; require that the FWS redraft the Recovery Plan; award attorneys fees to the plaintiffs; and provide any additional relief that the court deems just and proper.<sup>85</sup> Both lawsuits are awaiting response by the FWS.

#### *ii. Process for Intervening in Existing Litigation*

Parties who are interested in challenging the Recovery Plan can either bring their own lawsuit in district court or intervene in the ongoing litigation. Separate lawsuits challenging the Recovery Plan will likely be consolidated into one lawsuit for judicial efficiency.<sup>86</sup> An interested party wishing to join the existing lawsuits must demonstrate that it has a right to intervene or otherwise receive permission from the court.<sup>87</sup> A party seeking to intervene can demonstrate its right to do so if it has an interest in the subject of the litigation and existing litigants in the matter do not adequately represent its interests.<sup>88</sup> Alternatively, the court has discretion to permit intervention when the party has a claim that shares a common question of law or fact with the main action.<sup>89</sup> Individuals residing in or near Mexican gray wolf designated habitat whose interests are not synonymous with the plaintiff environmental groups in the existing lawsuits may be able to intervene as a matter of right.

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<sup>81</sup> *Id.* at 25.

<sup>82</sup> Complaint at 1, *WildEarth Guardians v. Zinke*, No. 4:18-cv-00048, available at [http://www.wildearthguardians.org/site/DocServer/2015.07.02\\_MexWolves\\_Complaint\\_FINAL.pdf](http://www.wildearthguardians.org/site/DocServer/2015.07.02_MexWolves_Complaint_FINAL.pdf).

<sup>83</sup> *Id.* at 17–23.

<sup>84</sup> Complaint at 22, *Ctr. for Biological Diversity v. Zinke*, No. 4:18-cv-00047; complaint at 17–18, *WildEarth Guardians v. Zinke*, No. 4:18-cv-00048; see discussion of 2013 draft plan *supra* at 2.

<sup>85</sup> Complaint at 25–26, *Ctr. for Biological Diversity v. Zinke*, No. 4:18-cv-00047; complaint at 23–24, *WildEarth Guardians v. Zinke*, No. 4:18-cv-00048.

<sup>86</sup> See FED. R. CIV. P. 42.

<sup>87</sup> See FED. R. CIV. P. 24.

<sup>88</sup> *Id.* at 24(a)(2).

<sup>89</sup> *Id.* at 24(b)(1)(B).

### *iii. Reviewability of Recovery Plans Under the APA*

However, there is some uncertainty as to whether the Recovery Plan is even challengeable under the APA. In order to challenge a federal agency action under the APA, the action must constitute a *final agency action*.<sup>90</sup> The U.S. Supreme Court has established a two-part test for whether an action is a final agency action: first, the action must be a consummation of agency's decision-making process, rather than merely be tentative or interlocutory in nature; and second, the action must be one from which rights or obligations have been determined or from which legal consequences will flow.<sup>91</sup> It is unclear whether ESA recovery plans are final agency actions under this test because recovery plans provide the broad structure for recovery action as an intermediary guidance step before more specific implementation. As stated by the FWS in the Mexican gray wolf Recovery Plan: "A recovery plan does not commit any entity to implement the recommended strategies or actions contained within it for a particular species, but rather provides guidance for ameliorating threats and implementing proactive conservation measures, as well as providing context for implementation of other sections of the Endangered Species Act."<sup>92</sup>

Recently, a district court in Oregon held that recovery plans are not final agency actions because they do not meet the second prong of the test.<sup>93</sup> There, the court reasoned that although real-world consequences stem from recovery plans, such consequences are not enough to qualify as a final agency action when such recovery plans are not binding authorities.<sup>94</sup> The Ninth Circuit and other courts have previously stated that recovery plans are not binding authorities because they merely provide guidance for conservation of the species, rather than imposing a mandatory course of action on an agency.<sup>95</sup> The Oregon case is currently being appealed to the Ninth Circuit for further review.<sup>96</sup> Because Arizona falls within the Ninth Circuit, the decision on appeal could affect claimants' abilities to challenge the Mexican gray wolf Recovery Plan, at least on APA grounds. However, the ESA does not include any such requirement in its citizen suit provision, so ESA claims may remain viable regardless of the appeal's result.<sup>97</sup>

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<sup>90</sup> 5 U.S.C. § 704.

<sup>91</sup> *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

<sup>92</sup> 2017 Recovery Plan at i.

<sup>93</sup> *Friends of the Wild Swan, Inc. v. Thorson*, 260 F.Supp. 3d 1338, 1344 (D. Or. 2017).

<sup>94</sup> *Id.*

<sup>95</sup> *Conservation Cong. v. Finley*, 774 F.3d 611, 614 (9th Cir. 2014) (citing *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432–34 (D.C. Cir. 2012)).

<sup>96</sup> *Friends of the Wild Swan, Inc. v. Thorson*, No. 17-35572 (9th Cir. July 13, 2017).

<sup>97</sup> 16 U.S.C. § 1540(g).

*iv. Related Challenges to the ESA § 10(j) Rule for Mexican Wolves*

In addition to these challenges to the Recovery Plan, interest groups have recently succeeded in challenging the FWS's 2015 experimental population rule for the Mexican gray wolf under ESA § 10(j).<sup>98</sup> Plaintiffs representing a variety of interests, from environmental to ranching, filed suit alleging that the FWS violated the APA by failing to comply with the ESA in its 10(j) rule.<sup>99</sup> On March 30, 2018, the Arizona district court issued its decision on the matter, holding that the rule does not comply with the ESA.<sup>100</sup> The court found that the rule only provides for short-term survival, rather than focusing on long-term recovery in the wild as required by the ESA.<sup>101</sup> The court also required the FWS to conduct a new essentiality determination because the 2015 rule expands the release range of captive wolves beyond their current range, a change which requires notice-and-comment rulemaking and which must be based on best available science.<sup>102</sup> However, the court rejected plaintiff Safari Club International's argument that the ESA requires a § 10(j) rule to be the product of agreement between state and private stakeholders, finding that although the FWS must consult with stakeholders, it retains independent authority to make decisions in furtherance of the conservation of species.<sup>103</sup>

Accordingly, the court remanded the rule to the FWS so that it may reissue a rule that complies with the court's order within reasonable time.<sup>104</sup> Rather than vacate the 2015 rule, the court held that it will remain in place until the FWS issues a new rule in order to maintain

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<sup>98</sup> *Ctr. for Biological Diversity v. Jewell*, No. CV-15-00019, 2018 BL 115563 (D. Ariz. Mar. 30, 2018); *see* discussion of §10(j) listing *supra* at 3.

<sup>99</sup> *Id.* at \*4. Plaintiffs are: Center for Biological Diversity, Defenders of Wildlife, New Mexico Cattle Growers Association, Gila Livestock Growers, New Mexico Federal Lands Council, New Mexico Wool Growers Incorporated, Southern Arizona Cattlemen's Protective Association, Central Valley Soil and Water Conservation District, Dona Ana Soil and Water Conservation District, Grant Soil and Water Conservation District, Hagerman-Dexter Soil and Water Conservation District, Sierra Soil and Water Conservation District, Hidalgo Soil and Water Conservation District, McKinley Soil and Water Conservation District, Southwest Quay Soil and Water Conservation District, Jim Chilton, White Water Draw Natural Resource Conservation District, Wilcox-San Simon Natural Resource Conservation District, Pima Natural Resource Conservation District, County of Catron, State of New Mexico, County of Socorro, State of New Mexico, New Mexico Trappers Association, Tom Klumker, d/b/a San Francisco River Outfitters, Jane Klumker d/b/a San Francisco River Outfitters, WildEarth Guardians, New Mexico Wilderness Alliance, Friends of Animals, Arizona and New Mexico Coalition of Counties for Economic Growth, Safari Club International, Northern New Mexico Chapter of Safari Club International, Southern New Mexico Chapter of Safari Club International. *Id.* at \*1-\*3.

<sup>100</sup> *Id.* at \*1, \*4.

<sup>101</sup> *Id.* at \*19.

<sup>102</sup> *Id.* at \*24.

<sup>103</sup> *Id.* at \*22-\*23.

<sup>104</sup> *Id.* at \*29.

protections for the Mexican gray wolf rather than setback the species' progress.<sup>105</sup> Because the court's holding requires the FWS to conduct a new essentiality determination, there will be another opportunity for interested stakeholders to voice their concerns through public comment, which will be announced in the Federal Register.<sup>106</sup> However, litigants are currently disputing the proposed schedule for the FWS' issuance of a new 10(j) rule, as well as appropriate relief in the interim, so the exact timeline has yet to be determined.<sup>107</sup>

### **b. Proposed Legislation**

Congressional legislation is another potential avenue to circumvent or modify the application of the Recovery Plan. On January 4, 2018, Senator Jeff Flake introduced a bill that would remove the Mexican gray wolf from any list of endangered species, threatened species, or experimental populations under the ESA if the subspecies has been sufficiently recovered within the United States.<sup>108</sup> The proposed bill would mandate that the subspecies has been sufficiently recovered when there are no fewer than 100 Mexican gray wolves in the United States.<sup>109</sup> If the FWS found that the population of Mexican gray wolves has met this requirement, the management of the Mexican gray wolf would be removed from the FWS and left exclusively to the states.<sup>110</sup>

The FWS estimates that at the end of 2017 there were 114 Mexican gray wolves in the United States.<sup>111</sup> Accordingly, if this bill were to pass, the Mexican gray wolf would immediately qualify as sufficiently recovered and the Recovery Plan would be abandoned. However, the passage of this bill seems unlikely given the political climate and strong opposition. Currently, the bill is being reviewed by the Senate Committee on Environment and Public Works.<sup>112</sup> The bill's 100-wolf threshold is based on criteria from the 1982 Recovery Plan, which was generally intended as a starting point to build upon when more data on Mexican gray wolves became available.<sup>113</sup>

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<sup>105</sup> *Id.* at \*27–\*28.

<sup>106</sup> *Id.* at \*25–\*26.

<sup>107</sup> See Federal Defendants' Response to the Court's March 30, 2018 Order, *Ctr. for Biological Diversity v. Jewell*, No. 4:15-cv-00019.

<sup>108</sup> S. 2277, 115th Cong. (2018).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Alex Devold, *Endangered Mexican gray wolf population remained flat in new count*, AZ CENTRAL (Feb. 22, 2018, 11:10 AM MST), <https://www.azcentral.com/story/news/local/arizona-environment/2018/02/22/endangered-mexican-gray-wolf-population-remained-flat-arizona-new-mexico/360862002/>.

<sup>112</sup> See <https://www.congress.gov/bill/115th-congress/senate-bill/2277> for updates on the status of the bill.

<sup>113</sup> Brandon Loomis, *100 wolves enough? Jeff Flake wants to remove federal protections for Mexican gray wolves*, AZ CENTRAL (Jan. 8, 2018, 1:24 PM MST), <https://www.azcentral.com/story/news/local/arizona->

Critics of the bill argue that a population of 100 wolves is too small to be self-sustaining and would ultimately result in extinction.<sup>114</sup>

### **c. Agency Review Periods**

If the 2017 Recovery Plan survives all litigation and legislative proposals, there will still be opportunity for public input in the future. The Recovery Plan provides for periodic reviews after five and ten years to determine the success of the Plan and its implementation strategies.<sup>115</sup> Such reviews are required by the ESA.<sup>116</sup> The primary purpose of the reviews is to identify the progress towards recovery, and identify and address aspects of population performance needing improvement.<sup>117</sup> Importantly, both of these reviews not only consider the population performance, but also the feasibility of the Recovery Plan.<sup>118</sup> When determining feasibility, the ESA considers timelines, cost, and other relevant factors.<sup>119</sup>

The FWS will announce its review in the Federal Register and request that the public provide any relevant information to inform the review process.<sup>120</sup> In particular, the FWS is interested in information that has become available since its most recent review of the species.<sup>121</sup> The FWS will consider all information submitted, but has a preference for information supported by documentation and analyzed data.<sup>122</sup> For example, this would include studies or reports on species biology, habitat conditions, successful conservation measures, threat status, and trends.<sup>123</sup> The FWS may also choose to solicit additional information from state agencies and other interested parties.<sup>124</sup> The notice will require that this information be provided to the FWS during a 30- to 90-day period.<sup>125</sup> This differs from typical notice-and-comment rulemaking because the purpose is

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environment/2018/01/08/100-wolves-enough-jeff-flake-wants-remove-federal-protections-mexican-gray-wolves/1013782001/.

<sup>114</sup> *Id.*

<sup>115</sup> 2017 Recovery Plan at 26.

<sup>116</sup> 16 U.S.C. § 1533(c)(2); 50 C.F.R. § 424.21.

<sup>117</sup> 2017 Recovery Plan at 26.

<sup>118</sup> *Id.* at 26–27.

<sup>119</sup> *Id.* at 26.

<sup>120</sup> *Five-Year Review of Listed Species*, U.S. FISH AND WILDLIFE SERVICE,

<https://www.fws.gov/southeast/endangered-species-act/five-year-reviews/> (last visited Apr. 13, 2018).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *5-Year Review Guidance: Procedures for Conducting 5-Year Reviews Under the Endangered Species Act*, U.S. FISH AND WILDLIFE SERVICE, 2-3 (2006), [http://www.nmfs.noaa.gov/pr/pdfs/laws/guidance\\_5\\_year\\_review.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/guidance_5_year_review.pdf).

<sup>125</sup> *Id.*

for the public to provide information for the FWS to consider in its review, rather than allowing the public to comment on the adequacy of that review process.<sup>126</sup>

Upon completion of a review, the ESA will either uplist, downlist, delist, or maintain the species' classification while either maintaining or altering its recovery strategies.<sup>127</sup> *Uplisting* is when the FWS increases the level of protection for a species, for example, by changing the species' classification from threatened to endangered.<sup>128</sup> *Downlisting* is the opposite, changing the species to a lower level of protection without completely delisting the species, like from endangered to threatened.<sup>129</sup> However, the review alone will not automatically change the protected status of the species—in order to change the listing, the ESA must following the same rulemaking process it conducted in the initial listing and Recovery Plan.<sup>130</sup> Notice of a proposed change in the listing, i.e. to uplist, downlist, or delist, would be published in the Federal Register and subject to public comment.<sup>131</sup> This would be another opportunity for the public to provide input on the Mexican gray wolf listing and Recovery Plan. However, if following its review the FWS decides to maintain the species' classification, there would be no further notice and comment.

#### **IV. Conclusion**

The listing of the Mexican gray wolf as a protected species under the ESA and the subsequent development of its Recovery Plan have been a long and arduous process, riddled with controversy and scientific debates. The current Plan intends to provide for sustainable population growth, increased genetic diversity, continuous monitoring of wild populations, adaptive management, and collaboration with partners to address social and economic concerns related to Mexican gray wolf recovery, with the hope of recovering the species in 25 to 35 years. While interest groups from all sides of the issue have identified perceived shortcomings with the Recovery Plan, there are a number of ways for interested members of the community to stay or become involved. This includes filing or joining litigation, contacting elected officials about

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<sup>126</sup> *Id.* at 2-2.

<sup>127</sup> *Five-Year Status Reviews Under the Endangered Species Act*, U.S. FISH AND WILDLIFE SERVICE, 1, [https://www.fws.gov/endangered/what-we-do/pdf/5-yr\\_review\\_factsheet.pdf](https://www.fws.gov/endangered/what-we-do/pdf/5-yr_review_factsheet.pdf) (last visited Apr. 13, 2018).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2.

<sup>131</sup> *Id.*



legislative proposals, or providing input during the regulatory review periods. Accordingly, the 2017 Recovery Plan is not the end of the story, but simply the beginning of the next chapter.