

Steven Sugarman
New Mexico Bar No. 5717
347 County Road 55A
Cerrillos, New Mexico 87010
(505) 672-5082
stevensugarman@hotmail.com

Judy Calman
New Mexico Bar No. 138206
142 Truman Street NE, Suite B-1
Albuquerque, New Mexico 87108
(505) 843-8696
judy@nmwild.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TUCSON DIVISION

WILDEARTH GUARDIANS and NEW
MEXICO WILDERNESS ALLIANCE,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF
JUSTICE

Defendant.

No. 13-392-DCB

**THIRD AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

PRELIMINARY STATEMENT

1. The Mexican gray wolf (*Canis lupus baileyi*) once roamed by the thousands across portions of Arizona, New Mexico, Texas, and the Republic of Mexico. Federal eradication efforts – which were largely prompted by a desire to protect private livestock interests – began in earnest in 1915. After about fifteen years of trapping, shooting, and poisoning of adult wolves, and the “denning” of pup wolves (poisoning wolf pups in their dens or digging them out of dens and killing them), very few Mexican gray wolves remained in the wild in the United States.
2. In 1970, the last surviving Mexican gray wolf known to be living in the wild in the United States was killed in Arizona.
3. In 1976, the Mexican gray wolf was listed as an endangered species under the Endangered Species Act (“ESA”). 41 Fed.Reg. 17736 (April 28, 1976).
4. In the early 1980s, the United States Fish and Wildlife Service (“FWS”) commenced a last-ditch effort to save the endangered Mexican gray wolf from extinction. This effort began with a captive breeding program to establish a “stock” of Mexican wolves for eventual release into the wild.
5. Originally, the goal of the FWS’s Mexican wolf recovery program was to reintroduce captive-bred wolves into the wild in order to establish a viable, self-sustaining population of at least 100 wolves in the species’ historic range in Arizona and New Mexico by 2005. However, in July of 2014 the FWS acknowledged that a population of 100 wolves in the wild is not adequate to support a “viable” or “self-sustaining” population, and that the population must be larger in order to assure the species’ recovery in the wild as required by the ESA.

6. The very tenuous nature of the species' survival at the time that the captive breeding program began – and the very real possibility of extinction – cannot be overstated. At the time that the captive breeding program commenced, there were only five remaining Mexican gray wolves in captivity in the entire United States.
7. The FWS began the “release” – or reintroduction – phase of the recovery program in 1998 as a collaboration between the federal government, the states of Arizona and New Mexico, and the White Mountain Apache Tribe.
8. The FWS selected federal public lands in Greenlee County, Arizona as the “primary recovery zone” for wolves. The primary recovery zone, which is under the land management jurisdiction of the Apache-Sitgreaves National Forest, is the area where captive-born wolves are first freed into the wild.
9. From the beginning, the reintroduction program was met with hostility from individuals and interests who are opposed to wolf reintroduction. In the months following the initial release of eleven wolves into the wild in 1998, five of those wolves were illegally shot and killed in Arizona. The remaining six wolves were brought back to captivity after those initial illegal killings.
10. Since releases began, at least 55 wolves have been illegally killed. These 55 illegally killed wolves account for 55% of all known mortalities of reintroduced Mexican wolves. In 2013 alone, the FWS states that five wolves were illegally killed. This is the highest “illegal kill rate” ever recorded over the history of the reintroduction effort, except for two years when there were seven illegal kills.

11. The most recent population information – more than fifteen years after the first captive wolves were released into the wild – is that only 83 wolves roam the Blue Range Wolf Recovery Area, a complex of public lands in Arizona and New Mexico. The FWS stated in July of 2014 that “[o]ur progress in establishing and growing the population has been much slower than expected.”

12. Biologists are concerned about the species’ continuing viability because there are only five known breeding pairs and there has been a significant amount of inbreeding in the free roaming population.

13. In a “Mexican Wolf Conservation Assessment” of 2010, the FWS wrote that the species “is not thriving.” In that Assessment, the FWS reported that the “illegal shooting of wolves is the single greatest source of wolf mortality in the reintroduced population.” In 2014, the FWS acknowledged that “illegal shooting” of wolves is one of the three factors that are working together – along with inbreeding and inflexible management and regulatory mechanisms – that are “hindering the growth and fitness of the population.”

14. The American Society of Mammologists has recently written that the Mexican gray wolf “is one of the most endangered mammals in North America and its recovery seems to have stalled.”

15. At the time that the Mexican gray wolf reintroduction program was developed, the FWS anticipated that “[p]otential conflicts with the livestock industry” and the associated illegal shooting and trapping of reintroduced wolves represented “a major obstacle to successful wolf recovery.” However, the FWS predicted that “strong law enforcement will keep the abuse levels

low.”

16. The ESA’s “penalties and enforcement” section contains a provision which makes knowing violations of the ESA – including the illegal shooting of listed animals – a misdemeanor criminal offense. 16 U.S.C. §1540(b).

17. The release phase of the FWS’s wolf reintroduction program was the subject of a formal rule-making procedure, and was preceded by public notice and comment.¹ In the Federal Register notice accompanying the Final Rule announcing the FWS’s decision to commence the release of Mexican gray wolves into the wilds of Arizona, the FWS stated that “killing of the wolves would be a violation of the [ESA], and of this rule, and would subject the offenders to severe penalties.” 63 Fed.Reg. 1758 (Jan. 12, 1998). In a similar vein, the Federal Register notice accompanying the Final Rule states that “the [FWS] is committed to vigorous enforcement in appropriate cases where evidence exists that illegal killing occurred.” Id. at 1759.

18. With specific reference to shooting, the FWS’s Federal Register notice accompanying the Final Rule states that shooting a reintroduced wolf by mistake – upon the belief that the target animal was a coyote or some other non-protected species – does not constitute a defense to criminal liability under the Endangered Species Act (“ESA”): “Notice of general wolf locations will be publicized. Hunters (and others) who might shoot a wolf are responsible to identify their targets before shooting.” Id.

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The Mexican gray wolves released into the wild were formally designated as an Experimental Non-Essential Population pursuant to Section 10(j) of the ESA during this rule-making procedure. 16 U.S.C. §1539(j). The species’ Section 10(j) status provides the FWS with more flexibility in managing the population of free roaming wolves than would otherwise exist in the absence of a Section 10(j) designation.

19. The Final Rule itself states that “[t]aking a wolf by shooting will not be considered unavoidable, accidental, or unintentional take. Shooters have the responsibility to be sure of their targets.” 50 C.F.R. §17.84(k)(15).

20. Unfortunately, the FWS’s ability to enforce the ESA’s prohibition on illegal killing of Mexican gray wolves – and other ESA-listed species – through criminal penalties has been hindered by a formal policy of the United States Department of Justice (“DOJ”) which DOJ calls the “McKittrick Policy.”

21. Pursuant to the McKittrick Policy, the DOJ will not charge or prosecute individuals for the illegal killing of ESA-listed species unless the government can prove that the defendant knew the biological identity of the animal he was killing at the time he killed it.

22. The DOJ’s McKittrick Policy marks a substantial departure from controlling law in the Ninth Circuit and in every other federal circuit court of appeals which has addressed the issue. That controlling law holds that the government is *not* required to prove such knowledge since a violation of the ESA is a general intent crime. See United States v. McKittrick, 142 F.3d 1170, 1176-77 (9th Cir. 1998) (the government is *not* required to prove that a defendant knew the biological identity of an animal that he killed in order to establish guilt in a criminal prosecution for illegal killing under the ESA).

23. The DOJ’s McKittrick Policy is a consciously and expressly adopted general policy that is inconsistent with plainly expressed congressional intent, and eviscerates the protective mechanism of the ESA’s criminal sanctions for the illegal killing of ESA-listed species.

24. Insofar as the Mexican wolf is concerned, the DOJ’s McKittrick Policy is also directly

contrary to the FWS's own interpretation of the ESA which is that killing a wolf – even by mistake – constitutes a criminal violation of the ESA.

25. The DOJ's McKittrick Policy has an adverse impact on Mexican wolves because it undermines the ESA's criminal provisions regarding take and, therefore, results in a greater extent of illegal take than would otherwise occur in the absence of the Policy.

26. In light of the Policy's adverse effect on Mexican wolves, the DOJ has a mandatory duty under ESA Section 7(a)(2), 16 U.S.C. §1536(a)(2), to enter into a formal consultation with the FWS as to the nature and the extent of the effect of the Policy on Mexican wolves. The DOJ has not commenced – or completed – this consultation.

27. Furthermore, the DOJ's McKittrick Policy is a consciously and expressly adopted general enforcement policy that is so extreme that it amounts to an express abdication of DOJ's statutory responsibility to prosecute criminal violations of the ESA as general intent crimes. This policy imperils the government's efforts to conserve and protect Mexican wolves from extinction. In this regard, the on-going implementation of the DOJ's policy is arbitrary and capricious and violates the Administrative Procedures Act ("APA"). 5 U.S.C. §§701-706. See Heckler v. Chaney, 105 S.Ct. 1649, 1656 n. 4 (1985) (noting that the presumption of non-reviewability of enforcement decisions does not apply in cases where an agency has "consciously and expressly adopted a general [enforcement] policy that is so extreme as to amount to an abdication of its statutory responsibilities").

28. With this lawsuit which is brought pursuant to the ESA and the APA, Plaintiffs WildEarth Guardians and New Mexico Wilderness Alliance seek (1) an order requiring the FWS

to commence a consultation with the FWS pursuant to the requirements of ESA Section 7(a)(2) as to the impacts of the McKittrick Policy on the survival and recovery of Mexican wolves and (2) an order enjoining the DOJ from further application of the McKittrick Policy in connection with the illegal killing of Mexican wolves.

JURISDICTION AND VENUE

29. The Court has jurisdiction over this action under 16 U.S.C. §1540(g)(1) (ESA citizen's suit provision), 5 U.S.C. §704 (APA provision for judicial review), 28 U.S.C. §1331 (federal question jurisdiction), 28 U.S.C. §2201 (declaratory judgment), and 28 U.S.C. §2202 (injunctive relief).

30. Venue is proper in this judicial district pursuant to 16 U.S.C. §1540(g)(3) and 28 U.S.C. §1391(e) because this is an action against an agency of the United States and because the cause of action arises in Arizona.

31. There exists now between the parties hereto an actual and justiciable controversy in which WildEarth Guardians and New Mexico Wilderness Alliance are entitled to have a declaration of their rights and of DOJ's obligations and further relief because of the facts and circumstances hereafter setout.

PARTIES

32. Plaintiff WildEarth Guardians is a non-profit corporation with more than 7,500 members nation-wide. WildEarth Guardians maintains offices in Tucson, Arizona, Santa Fe, New Mexico, and Denver, Colorado. WildEarth Guardians' mission is to protect and restore wildlife, wild places, and wild rivers throughout the United States. WildEarth Guardians has an active

endangered species protection campaign. As part of this campaign, WildEarth Guardians actively works to assure that the Mexican gray wolf does not go extinct and to assure that the federal government's wolf reintroduction program is successful. WildEarth Guardians' efforts in this regard take the form of public education and outreach, commenting on all federal and state government actions affecting the Mexican gray wolf, and political advocacy to promote Mexican gray wolf conservation. WildEarth Guardians has a long history of litigation against federal and state governments in connection with protection of the Mexican gray wolf. Furthermore, WildEarth Guardians' members frequently recreate in the national forests of Arizona and New Mexico where they enjoy listening to the howls of the elusive wolf and hope for opportunities to view the wolf in the wild. WildEarth Guardians' members intend to continue their use and enjoyment of national forest lands for this purpose in the future. WildEarth Guardians is injured by the DOJ's failure to comply with the ESA, and the APA in the manners set forth below. WildEarth Guardians and its members have a substantial interest in this matter and are adversely affected by DOJ's violations of the ESA, and the APA. The relief requested in this Complaint will redress WildEarth Guardians' and its members' injuries.

33. Plaintiff New Mexico Wilderness Alliance is a non-profit environmental organization dedicated to the protection, restoration, and continued enjoyment of New Mexico's native wildlife, wild lands and wilderness areas. New Mexico Wilderness Alliance has approximately 5,000 members. As part of its work on maintaining healthy ecosystems in the southwestern United States, for the past several years New Mexico Wilderness Alliance has worked on issues affecting the area's endangered wildlife, with a particular emphasis on the Mexican gray wolf.

New Mexico Wilderness Alliance's wildlife work has included urging the agencies responsible for both federal land and wildlife management to increase protection for endangered species. With respect to the wolf, this has consisted of interactions with both FWS and the United States Forest Service. New Mexico Wilderness Alliance also comments actively on the Mexican gray wolf recovery program and makes a concerted effort to improve the wolf's habitat through participation in the land use planning process for national forest lands. New Mexico Wilderness Alliance comments on proposed actions which may affect the wolf, issues updates, newsletters and alerts to all its members, and engages the public in administrative processes affecting the wolf. New Mexico Wilderness Alliance also organizes backpacking trips and hikes in the Greater Gila area for its members, and many of its members enjoy the area on their own and strive to experience wolves firsthand. New Mexico Wilderness Alliance's members intend to continue their use and enjoyment of lands in the Greater Gila region for this purpose in the future. New Mexico Wilderness Alliance is injured by the DOJ's failure to comply with the ESA and the APA in the manners set forth below. New Mexico Wilderness Alliance and its members have a substantial interest in this matter and are adversely affected by DOJ's violations of the ESA, and the APA. The relief requested in this Complaint will redress New Mexico Wilderness Alliance's and its members' injuries.

34. Defendant United States Department of Justice is a federal government entity which, amongst other activities, prosecutes violations of federal laws including criminal violations of the ESA. In discharging this responsibility, the Department of Justice has responsibility for making decisions as to which criminal violations will be prosecuted and which criminal violations will

not be prosecuted. While the Department of Justice has broad prosecutorial discretion in making specific enforcement decisions, it does not have the authority to adopt policies which constitute an abdication of its statutory responsibility. The Department of Justice also has a mandatory obligation to comply with the mandatory requirements of the ESA and the APA.

FACTUAL ALLEGATIONS

A. Relevant Provisions of the ESA

35. When it enacted the ESA in 1973, Congress “intended endangered species to be afforded the highest of priorities.” Tennessee Valley Authority v. Hill, 437 U.S. 153, 174, 115 S.Ct. 2407 (1995). The Act “is a comprehensive scheme with the ‘broad purpose’ of protecting endangered and threatened species.” Center for Biological Diversity v. U.S. Bureau of Land Management, 698 F.3d 1101, 1107 (9th Cir. 2012).

36. One of the expressed purposes of the ESA is “to provide a program for the conservation [of] endangered species and threatened species.” 16 U.S.C. §1531(b).

37. The FWS is the federal agency charged by Congress with administration of the ESA insofar as terrestrial species are concerned. National Association of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 651, 127 S.Ct. 2518 (2007).

38. Pursuant to the ESA, the FWS has the duty to list imperiled species as threatened or endangered on the basis of biological criteria. 16 U.S.C. §1533(c).

39. Once a species is listed as threatened or endangered under the ESA, “[t]wo interlocking provisions” of the Act – Section 7 and Section 9 – come into play. Center for Biological Diversity, 698 F.3d at 1107 citing 16 U.S.C. §§1536, 1538.

40. Section 7(a)(1) of the ESA imposes important obligations on all federal agencies to “conserve” listed species. 16 U.S.C. §1536(a)(1). For purposes of ESA compliance, the duty to “conserve” requires that federal agencies use their authorities to assure the survival of threatened and endangered species, to protect their critical habitats, and to promote the recovery of the species to the point at which they no longer require the protections of the ESA. These obligations are known as the “Section 7 substantive duties.”

41. In order to assure that federal agencies comply with their Section 7 substantive duties, Section 7(a)(2) of the ESA mandates a “consultation” process in which federal agencies are required to engage in consultation with the FWS to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species” 16 U.S.C. §1536(a)(2). The duties set out in Section 7(a)(2) are known as the “Section 7 procedural duties.”

42. Section 7 procedural duties are triggered whenever a federal agency proposes to take discretionary action that “may affect” threatened and endangered species.

43. As used in the ESA, the term “action” is broadly construed to encompass all federal agency actions and programs over which federal agencies exercise discretionary control. Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1054-55 (9th Cir. 1994) ,50 C.F.R. §402.02(d).

44. As described herein in this Complaint, the DOJ’s adoption and on-going implementation of the McKittrick Policy “may affect” various threatened and endangered species in an adverse way.

45. Accordingly, DOJ's adoption and on-going implementation of the McKittrick Policy are agency actions which trigger Section 7 substantive and procedural duties.

46. In cases where an agency action may adversely affect one or more ESA-listed species, as in this case, Federal agencies must undertake a "formal consultation" with the FWS.

47. The formal consultation process concludes with the issuance of a Biological Opinion ("BiOp") by the FWS. Id.

48. In the BiOp that it issues at the conclusion of a formal consultation process, the FWS determines whether a proposed agency action comports with Section 7 substantive duties and provides suggestions for the modifications of agency action that will promote and enhance the survival and recovery of threatened and endangered species. Id.

49. ESA Section 9 protects individual members of threatened and endangered species. Section 9 prohibits the "take" of any member of a listed species. See 16 U.S.C. §1538(a)(1)(B) (rendering it illegal for "any person" to "take" any species listed as endangered), 50 C.F.R. §17.31 (expanding the take prohibition to those species listed as threatened).²

50. Congress has provided for both civil and criminal penalties for violations of Section 9's prohibition on "take" in ESA Section 11. 16 U.S.C. §§1540(a), (b).

51. In 1978, Congress amended the criminal enforcement provision of ESA Section 11 to make criminal violation of the ESA "a general rather than a specific intent crime." 1978 U.S.C.C.A.N. 9453, 9476.

²

To "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §1532(19).

52. Whereas the pre-1978 Section 11 provided that only “willful” violations of the ESA constitute a criminal offense, the amended Act provides that “knowing” violations of the ESA are criminal offenses.

53. Criminal violations of the ESA are misdemeanor offenses.

54. All federal courts of appeal which have construed the ESA’s post-1978 criminal enforcement provision in light of the contemporaneous legislative history – including the Ninth Circuit Court of Appeals – have found that a person violates the ESA and is subject to criminal penalties if he kills an ESA-listed species, regardless of whether he knew the biological identity or the protected status of the animal he killed at the time that he killed it. United States v. McKittrick, 142 F.3d 1170, 1176-77 (9th Cir. 1998), United States v. Grigsby, 111 F.3d 806, 817 (11th Cir. 1997), United States v. Nguyen, 916 F.2d 1016, 1017-18 (5th Cir. 1990).

55. A person who knowingly violates Section 9's take provision by taking a listed species is subject to a penalty of up to \$50,000 and one year imprisonment if the species is endangered, or a penalty of up to \$25,000 and six months imprisonment if the species is threatened. 16 U.S.C. §1540(b)(1).³

B. The Department of Justice’s adoption of the “McKittrick Policy”

56. The Ninth Circuit’s McKittrick decision arose from the prosecution of an individual who had been charged with a criminal violation of Section 9 as a result of killing an endangered gray

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As an endangered species, an individual who illegally shoots and kills a Mexican wolf would ordinarily be subject to a \$50,000 penalty and one year’s imprisonment. However, under the species’ Section 10(j) designation the illegal shooting of a Mexican wolf is treated as the killing of a threatened – rather than endangered – species.

wolf in Montana. As a result of this illegal killing, the defendant in that case – Chad McKittrick – was charged with three counts, including one count of illegal take in violation of 16 U.S.C. §1538(a)(1)(G) and 16 U.S.C. §1540(b)(1).

57. At trial, Mr. McKittrick testified that he did not know that the animal he killed was an ESA-protected gray wolf. He further testified that he thought that the animal he killed was a rabid dog, and offered this “mistaken identity” argument as a defense to the ESA illegal take count.

58. The jury convicted Mr. McKittrick of all three counts, and he was sentenced to six months imprisonment.

59. At Mr. McKittrick’s sentencing hearing, the presiding judge reviewed Mr. McKittrick’s trial testimony as to his “mistaken identity” defense, and found that his trial testimony as to this issue was not credible.

60. Mr. McKittrick appealed his conviction to the Ninth Circuit, raising various claims of error including “that his taking of the wolf was not ‘knowing’ because he did not realize what he was shooting.” McKittrick, 142 F.3d at 1173.

61. In the Ninth Circuit, the DOJ argued that the government need not prove that a criminal defendant knew the biological identity of an animal that he killed in order to prove a criminal violation of the ESA. In its Opening Brief in that case, the DOJ wrote as follows: “In a prosecution for violation of the take prohibitions of the Act, the government should not be required to prove the defendant knew the biological identity of the animal in question. It is only required to prove that the defendant knowingly shot an animal and that the animal was protected

under the Act.”

62. The Ninth Circuit agreed with the DOJ’s interpretation of the ESA and affirmed Mr. McKittrick’s conviction. In so affirming, the Ninth Circuit specifically and expressly rejected Mr. McKittrick’s argument that establishing a criminal violation of the ESA arising from illegal take requires proof that the defendant knew the biological identity of the species he killed at the time he killed it. McKittrick, 142 F.3d at 1176-77. The Ninth Circuit reviewed the legislative history of Section 9 and case law construing Section 9, and held that the ESA’s criminal penalties provision “requires only that McKittrick knew he was shooting an animal, and that the animal turned out to be a protected gray wolf.” McKittrick, 142 F.3d at 1177.

63. Subsequently, Mr. McKittrick submitted a petition for a writ of certiorari to the United States Supreme Court in which he again sought to overturn his conviction on a number of grounds, including the fact of his alleged “mistake” in killing the gray wolf.

64. In response to the petition, the Solicitor General submitted a responsive brief to the Supreme Court in which he stated that DOJ would no longer utilize the specific jury instruction which was used during the trial of Mr. McKittrick. This jury instruction – which had been approved by the Ninth Circuit – instructed the jury that the government need *not* prove that the defendant knew the biological identity of an animal that he killed in order to establish criminal liability under the ESA.

65. The Supreme Court denied Mr. McKittrick’s petition for a writ of certiorari.

66. In a memorandum authored by FWS personnel regarding the Solicitor General’s response to Mr. McKittrick’s petition for certiorari, the FWS states that “the Solicitor General has changed

its position concerning the definition of ‘knowingly’ under the ESA.”

67. Subsequently, and as a result of the Solicitor General’s representations to the Supreme Court in the McKittrick case regarding the specific jury instruction at issue therein, the DOJ adopted and issued the McKittrick Policy.

68. Upon information and belief, the DOJ did not seek FWS’s input on the proposed McKittrick Policy.

69. DOJ’s adoption and issuance of the McKittrick Policy was formalized by circulation of an internal memorandum to all United States Attorneys, First Assistant United States Attorneys, Criminal Chiefs, and Civil Chiefs entitled “Knowing Instruction in Endangered Species Cases,” along with an attachment entitled “Federal Prosecutors May Not Use Knowledge Instruction Upheld in United States v. McKittrick.” The attachment explained that the jury instruction used in the McKittrick case “stated . . . that the government was not required to prove the defendant knew the biological identity of the animal at the time he shot it.” According to the memorandum, “[a]ll Department prosecutors are instructed not to request, and to object to, the use of the knowledge instruction at issue in McKittrick.”

70. The McKittrick Policy was explained by DOJ employees in an article that appeared in the July 2011 edition of the “United States Attorneys’ Bulletin.” The article explains:

Knowing violations of the ESA are punishable criminally. 16 U.S.C. §1540(b)(1) (2011). ESA criminal violations are thus general intent crimes; it is not necessary that the defendant know the legal status of the animal (for example, that it was listed as endangered or threatened) or intend to violate a law. However, the position of the government is that the defendant must know the biological identity of the animal at issue. Prosecutors need to be aware of this Department of Justice requirement as it does not appear in the available case law For more information, see the Department’s *McKittrick* Policy, available at [a URL which is

no longer active on the Department of Justice's website].

71. Even the DOJ recognizes that its formal policy with respect to the enforcement of the ESA's criminal provisions – as set out in the McKittrick Policy – is inconsistent with the scienter requirements of the criminal provisions themselves. For example, in a 2000 brief to the Ninth Circuit relating to criminal enforcement of the Archaeological Resources Protection Act – which brief was filed *after* the adoption of the McKittrick Policy – DOJ represented to the Ninth Circuit that “[in order to establish criminal liability for illegal take] under the Endangered Species Act, it only need be shown that the defendant knew of the act he was performing – shooting at an animal – not what exactly he was shooting.” United States v. Lynch, Appeal No. 99-30325, March 21, 2000 Brief for the United States.

72. DOJ's McKittrick Policy is inconsistent with the FWS's own interpretation of the ESA's criminal provision.

73. For example, with respect to the Mexican wolf, the FWS has adopted a regulation which states that “[t]aking a wolf by shooting will not be considered unavoidable, accidental, or unintentional take. Shooters have the responsibility to be sure of their targets.” 50 C.F.R. §17.84(k)(15).

C. Criticism of the McKittrick Policy by federal and state wildlife officials and prosecutors

74. DOJ's McKittrick Policy remains in effect, despite the fact that it has been criticized by officials in federal and state wildlife agencies, including the FWS and the AzDGF, and by federal prosecutors, including former U.S. Attorney for Wyoming David Freudenthal and the former Assistance Chief of DOJ's Environmental Crimes Section.

75. The gist of this criticism is that the McKittrick Policy hampers criminal prosecutions under the ESA and, accordingly, the protection and conservation of ESA-listed species.

76. Indeed, objections to the McKittrick Policy came from the highest levels of the FWS who unsuccessfully endeavored to have the Policy rescinded.

77. At the time that she was the Director of the FWS, Ms. Jamie Rappaport Clark wrote as follows to the Solicitor of the Department of the Interior:

As feared, this “specific intent” *mens rea* requirement [required by the DOJ’s McKittrick Policy] has precluded criminal prosecution in direct taking (shooting) cases throughout the country. In many ways, the new *mens rea* instruction has rendered the species protection provisions in Section 9 of the ESA unenforceable. Service law enforcement personnel, as well as prosecuting attorneys working in States with grizzly bears and wolves, believe the new “specific intent” jury instruction has “crippled” their efforts to protect the bears and wolves from careless hunters

We request that your office, in conjunction with DOJ, take all steps necessary to remedy this situation. The full resources of the Service are at your disposal to assist with this endeavor. **Failure to successfully resolve this problem will result in little to no protection for this Nation’s most critically endangered species.**

(Emphasis added.)

78. An internal FWS memorandum written contemporaneously with the memorandum discussed in the paragraph immediately preceding states that “[t]he new specific intent jury instructions have had a particularly crippling effect on Service efforts to protect grizzly bears and wolves in the West,” and that “the Service [has] concluded that the new jury instructions have rendered ESA prohibitions on taking endangered species virtually unenforceable, precluding criminal prosecutions in shooting cases throughout the country.”

(Emphases added.)

79. FWS law enforcement agents “on the ground” have been similarly critical of the Policy. For example, Mr. Dominic Domenici – FWS’s Senior Resident Agent in Wyoming at the time – authored a memorandum in which he criticized the policy’s adverse impact on the FWS’s effort to conserve endangered grizzly bears. He wrote, with obvious sarcasm and disdain for the policy: “As soon as word about this policy gets around the west the ability for the average person to distinguish a grizzly bear from a black bear or a wolf from a coyote will decline sharply.

Under this policy a hen mallard is afforded more protection than any of the animals listed as endangered.” (Emphasis added.)

80. As another example, a second FWS law enforcement employee wrote as follows with respect to the McKittrick Policy’s adverse impact on the federal government’s effort to protect the protected gray wolf population in the Great Lakes region:

It appears the [McKittrick Policy] provide[s] anyone wanting to kill wolves with a snare the excuse to avoid criminal prosecution under the ESA. An individual setting a snare can claim, “I set the snares for coyotes and I didn’t know a wolf would get caught in my snare.” There is no federal deterrent to killing this listed species with illegal snares [as a result of the McKittrick Policy].

(Emphasis added.)

81. Even federal prosecutors have criticized the policy. In a letter of October 12, 2000, then U.S. Attorney for the District of Wyoming David Freudenthal wrote to the Solicitor General, and urged that the McKittrick Policy be rescinded. In his letter, he stated that the Policy violates the fundamental rule of hunting which is that one never pulls the trigger until the target has been positively identified as a legal game species.

82. In a memorandum discussing the McKittrick Policy, the Assistant Chief of the DOJ’s

Environmental Crimes Section – Mr. John Webb – wrote as follows:

Objections about this policy have been raised by the United States Fish and Wildlife Service, Office of Law Enforcement because of the impact on prosecuting grizzly bear poaching cases in Wyoming and in the adjoining districts of Montana and Idaho where hunters now have the ready defense that they mistook the threatened grizzly bear for an unlisted black bear. Furthermore, a number of similar “defenses” are available where listed species have a look alike unlisted counterpart: gray wolves and coyotes, California condors and turkey vultures, whooping cranes and snow geese; to name some of them

[P]erpetrators can and do escape any criminal punishment under the ESA when, for instance, they take an endangered species in violation of [ESA Section 9].

(Emphasis added.)

83. At the State level, the Endangered Species Coordinator for the Arizona Department of Game and Fish (AzDGF) has criticized the McKittrick Policy, stating that it “has prevented filing of charges under the ESA in dozens of cases around the country” and that “Arizona is advocating for a change in the policy to make it more feasible to seek criminal prosecutions, and penalties.”

84. Arizona’s Endangered Species Coordinator further explained that the position of AzDGF is that a change to the McKittrick Policy “is necessary to reduce illegal killing (shooting) of endangered Mexican wolves and other endangered species.” He also stated that AzDGF officials had sought modifications to the McKittrick Policy “to make it more feasible to seek criminal prosecutions,” but that “neither the Bush or Obama administrations have been persuaded to review and change the policy.”

D. Application of the McKittrick Policy adversely affects the Fish and Wildlife Service’s effort to conserve and recover endangered Mexican wolves

85. When the Mexican gray wolf reintroduction program was developed, FWS officials knew

that illegal killings of wolves was likely to obstruct achievement of the program's goals. In the Environmental Impact Statement ("EIS") which the FWS wrote to assess the environmental impacts of the program, the FWS wrote that "[p]otential conflicts with the livestock industry represent a major obstacle to recovery; the emphasis on avoiding or mitigating these conflicts is for the purpose of reducing illegal killing of wolves."

86. The EIS further states that "[w]e anticipate some level of abuse of provisions for taking wolves, but believe that extensive public education efforts, as well as strong law enforcement, will keep the abuse levels low."

87. In anticipation of possible illegal killings of Mexican gray wolves under the pretext of "mistaken identity," the Federal Register notice accompanying the FWS's Final Rule adopting the reintroduction program states that shooting a reintroduced wolf by mistake – upon the belief that the target animal was a coyote or some other non-protected species – would not constitute a defense to criminal liability under the ESA: "Notice of general wolf locations will be publicized. Hunters (and others) who might shoot a wolf are responsible to identify their targets before shooting."

88. At the time that the Final Rule approving the reintroduction phase of the Mexican wolf recovery program was issued on January 12, 1998, DOJ had not yet promulgated the McKittrick Policy.

89. Unfortunately, DOJ's subsequent adoption of the McKittrick Policy precludes the "strong law enforcement" contemplated by the FWS at the time that it developed and approved the Mexican gray wolf reintroduction program.

90. Application of the McKittrick Policy, in the case of the Mexican gray wolf, creates a situation in which illegal shootings hamper the FWS's reintroduction effort because the vast majority of Mexican gray wolf illegal killings go unprosecuted, even in those cases where the killer admits to illegally shooting a wolf.

91. Since the Mexican gray wolf reintroduction program began in 1998, the FWS has catalogued 55 wolves that have been the victims of illegal killings. These 55 illegally killed wolves account for 55% of all reintroduced Mexican gray wolf mortalities since the time that the reintroduction program began.

92. In 2013, the latest year for which full-year statistics are available, the FWS states that a total of seven Mexican wolves died in the wild. Of these seven mortalities, the FWS states that five were caused by illegal killing. This is a higher "illegal kill rate" than in any year except two, since the reintroduction program commenced in 1998.

93. The frequency of illegal Mexican gray wolf shootings has had a significant adverse impact on the species, as there are still very few Mexican gray wolves in the wild. In fact, the FWS stated as follows in July of 2014: "Our progress in establishing and growing the population has been much slower than expected We expected to reach a population size of at least 100 wolves in 2006. We have yet to reach that objective based on our end-of-year minimum population counts."

94. The FWS's "Mexican Wolf Conservation Assessment" – prepared in 2010 – states that illegal shooting of wolves is one of the primary "[t]hreats hindering the biological progress of the population and the recovery program."

95. The July 16, 2014 “Draft Environmental Impact Statement for the Proposed Revision to the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*)” identifies illegal killing as the single largest cause of Mexican wolf mortality in the wild. As noted above, the FWS states that 55% of all Mexican wolf mortalities since the reintroduction program began (55 of 100 total mortalities) are attributable to illegal killing. The second largest cause of mortality is “natural causes,” which account for only 18% of Mexican wolf mortalities (18 of 100 total mortalities).

96. The McKittrick Policy has the practical effect of removing the threat of criminal prosecution for would-be wolf killers who are opposed to the reintroduction of the Mexican gray wolf. The loss of this deterrent leads to high levels of illegal shootings, and to a corresponding threat to the success of the Mexican gray wolf reintroduction program.

97. The McKittrick Policy is plainly contrary to congressional intent, plainly inconsistent with controlling law in the Ninth Circuit and other federal circuits, plainly inconsistent with the FWS’s own interpretation of the ESA’s criminal enforcement provision, and plainly inconsistent with the DOJ’s own understanding of the scienter requirements of the ESA’s criminal enforcement provision.

E. Plaintiffs learn of the existence of the McKittrick Policy in 2012

98. DOJ never informed the public of adoption of the McKittrick Policy by publication of the Policy in the Federal Register, or by any other means.

99. Moreover, and as set out above, DOJ continued to cite to the Ninth Circuit’s McKittrick decision regarding the elements of a criminal take violation of the ESA *even after* DOJ had

repudiated the Ninth Circuit's decision on the scienter requirements of an ESA criminal prosecution for illegal take.

100. For example, DOJ's March 21, 2000 Brief to the Ninth Circuit in United States v. Lynch, Appeal No. 99-30325, states that "[in order to establish criminal liability for illegal take] under the Endangered Species Act, it only need be shown that the defendant knew of the act he was performing – shooting at an animal – not what exactly he was shooting."

101. DOJ's citations to the Ninth Circuit's McKittrick decision, even after DOJ repudiated that decision by adoption of the McKittrick Policy, conveys the misimpression to the public that DOJ continues to adhere to and utilize the scienter requirements that were set out by the Ninth Circuit in McKittrick in ESA criminal prosecutions arising from illegal take. This impression is misleading, as DOJ does not continue to adhere to and utilize the scienter requirements set out by the Ninth Circuit in McKittrick.

102. The extreme obscurity of the McKittrick Policy was acknowledged by DOJ itself in the July 2011 United States Attorneys' Bulletin referenced above at Paragraph 70 of this Third Amended Complaint. There, the DOJ authors of an article on criminal prosecutions under the ESA note that "the position of the government is that the defendant must know the biological identity of the animal at issue," but go on to admit that "this Department of Justice requirement . . . does not appear in the case law." (Emphasis added.)

103. Both WildEarth Guardians and New Mexico Wilderness Alliance are deeply involved in the federal government's efforts to reintroduce the Mexican wolf, and have been so involved since the Mexican wolf reintroduction effort began.

104. Employees of WildEarth Guardians and New Mexico Wilderness Alliance regularly communicate with the FWS regarding all facets of Mexican wolf conservation – including but not limited to reintroduction issues, federal and state management issues, captive breeding issues, and Recovery Plan issues – through means such as informal correspondence, informal communications, formal commenting on proposals for rule-makings, attendance at hearings and public meetings, Freedom of Information Act requests, and litigation. Employees of WildEarth Guardians also continuously monitor the status of the Mexican wolf reintroduction effort, and are particularly attentive to the rate and causes of mortality of wolves that have been reintroduced to the wild.

105. Despite this significant level of involvement in Mexican wolf conservation and reintroduction, neither WildEarth Guardians or New Mexico Wilderness Alliance had any awareness of the existence of the McKittrick Policy until 2012 when an employee of New Mexico Wilderness Alliance learned – from a response to a Freedom of Information Act request sent to FWS – that there were anomalously low levels of criminal prosecutions of individuals who illegally killed Mexican wolves. Upon further investigation, that employee learned of the existence of the McKittrick Policy.

106. Upon learning of the McKittrick Policy, that employee of New Mexico Wilderness Alliance informed a colleague at WildEarth Guardians of the Policy's existence. That WildEarth Guardians employee had never before heard of the Policy, or of any other repudiation by DOJ of the Ninth Circuit's explication of the elements of a criminal violation of the ESA.

107. Promptly upon learning of the existence of the McKittrick Policy in 2012, employees of

WildEarth Guardians and New Mexico Wilderness Alliance contacted an attorney to assist them in a legal challenge to adoption and on-going implementation of the Policy.

CLAIMS FOR RELIEF

First Claim for Relief

(Violation of the Endangered Species Act)

108. Plaintiffs incorporate the preceding paragraphs by reference as if fully set out herein.

109. Adoption and on-going application of DOJ's McKittrick Policy constitute "actions" which may adversely effect the Mexican wolf, within the contemplation of ESA Section 7.

Accordingly, DOJ's failure to conduct a Section 7 consultation with the FWS as to the effects of the adoption and on-going implementation of the McKittrick Policy on Mexican wolves constitutes a violation of the ESA.

Second Claim for Relief

(Violation of the Administrative Procedures Act)

110. Plaintiffs incorporate the preceding paragraphs by reference as if fully set out herein.

111. DOJ's adoption and on-going implementation of the McKittrick Policy violates the APA because it is a consciously and expressly adopted general policy that is so extreme as to amount to an abdication of DOJ's statutory responsibilities to enforce the criminal penalties provision of the ESA as intended by Congress.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request the following relief:

1. An order declaring that DOJ is in violation of its mandatory duties under the ESA the APA.

2. An order declaring that DOJ's McKittrick Policy is invalid, insofar as the McKittrick Policy guides and constrains the criminal enforcement of illegal killings of Mexican wolves.
3. An order enjoining DOJ from continuing to implement the McKittrick Policy in connection with the criminal enforcement of illegal killings of Mexican wolves.
4. An order awarding Plaintiffs their reasonable costs in this action, including attorneys' fees.
5. Such other relief as this Court determines is just and proper.

Dated: August 14, 2015

Respectfully submitted,

/s/ Steven Sugarman

Steven Sugarman
347 County Road 55A
Cerrillos, New Mexico 87010
Telephone: (505) 672-5082

/s/ Judy Calman

Judy Calman
142 Truman Street NE, Suite B-1
Albuquerque, New Mexico 87108
Telephone: (505) 843-8696

Attorneys for Plaintiffs

