

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,)	
351 California Street, Suite 600)	
San Francisco, CA 94104)	
)	
Plaintiff,)	Civil Case No: 12-01970
)	
v.)	
)	COMPLAINT FOR
KEN SALAZAR, Secretary,)	DECLARATORY AND
U.S. Department of the Interior)	INJUNCTIVE RELIEF
1849 C Street NW)	
Washington, DC 20240)	
)	
and)	
)	
U.S. FISH AND WILDLIFE SERVICE,)	
1849 C Street NW)	
Washington, DC 20240)	
)	
Defendants.)	
_____)	

INTRODUCTION

1. This case concerns the fate of the Mexican gray wolf (*Canis lupis baileyi*) (“Mexican wolf”), pictured below, an extremely-endangered, subspecies of the gray wolf that balances precipitously on the brink of extinction, with only 58 animals known to be surviving in the wild in the American Southwest as of the last count in January 2012. By this action, Plaintiff Center for Biological Diversity (“Center”) challenges the October 9, 2012 determination by Defendants – Secretary of the Interior Ken Salazar and the U.S. Fish and Wildlife Service (“FWS”) – that listing the Mexican wolf as a subspecies or “distinct population segment” (“DPS”) under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA” or “Act”) is “not warranted.” 77 Fed. Reg. 61,375 (Oct. 9, 2012) (“12-Month Finding”).



2. On August 11, 2009, the Center submitted its Petition to list the Mexican wolf as a subspecies or DPS to FWS, in accordance with the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553(e) the ESA and its implementing regulations, 16 U.S.C. § 1533(a)(3)(A), 50 C.F.R. § 424.12. After the Center challenged FWS’s failure to render the initial “90-day finding” on its Petition and then agreed to a stipulated settlement agreement, *Ctr. for Biological Diversity v. Salazar et al.*, Civ. No. 10-00149 (D.D.C.) (EGS), FWS issued a “90-day” finding on August 4, 2010, in which the agency determined that listing

the Mexican wolf subspecies “may be warranted” due to reduced genetic diversity and inbreeding depression as well as vehicular collisions and illegal shootings. 75 Fed. Reg. 46,896, 46,897 (Aug. 4, 2010) (“90-Day Finding”). FWS acknowledged that these threats comprise “the majority of the deaths within the wild population of Mexican wolves,” and, when factored together with removal of wolves from the wild population for “management purposes,” “ha[ve] resulted in a failure rate ... too high to allow recovery through unassisted population growth.”

Id.

3. However, in the 12-Month Finding on the Center’s Petition – an ESA listing determination required to be issued in Fiscal Year 2012 as part of the Center’s historic “MDL Agreement” with the agency, *In Re Endangered Species Act Section 4 Deadline Litigation*, 1:10-mc-00377-EGS (D.D.C.) – FWS reversed course, and concluded that listing the Mexican wolf under the ESA is “not warranted.” 77 Fed. Reg. 61,375. Although the agency reiterated that the Mexican wolf may qualify as a taxonomic subspecies or as a DPS under the ESA, and that the subspecies may be threatened with extinction as a result of human-caused deaths from vehicular collisions and illegal shootings as well as “removal” from the wild for “management purposes”, *id.* at 61,276, FWS nevertheless determined that issuance of a proposed rule to list the Mexican wolf under the ESA was “not warranted” on the basis that Mexican wolves comprise an “already listed entity”, *id.* at 61,277 – in other words, because Mexican wolves are encompassed within an existing rule, in effect since 1978, that lists the taxonomic species of gray wolf (*Canus lupus*) as “endangered” throughout the lower 48 states. 43 Fed. Reg. 9607 (Mar. 9, 1978) (“1978 Rule”).

4. Although Mexican wolves are currently encompassed within the 1978 Rule, FWS has undertaken a series of formal revisions to this rule, and this revision process is still ongoing without an end date. Following many unsuccessful attempts, in recent years FWS has revised

the 1978 Rule to delineate and delist wolf DPSs in areas of the Northern Rocky Mountains and Great Lakes. 77 Fed. Reg. 55,530 (Sep. 10, 2012); 76 Fed. Reg. 81,666 (Dec. 28, 2011); 76 Fed. Reg. 25,590 (May 5, 2011); 74 Fed. Reg. 15,123 (Apr. 2, 2009). These revisions to the 1978 Rule have rendered the wolf's future in other areas the country uncertain, however, particularly when it comes to one of the ESA's fundamental protections: the requirement that FWS develop and implement "recovery plans" for all listed species. 16 U.S.C. § 1533(f). Thus, although their very survival may be assisted, to some degree, by their "endangered" status under the ESA, Mexican wolves and similarly-situated gray wolves in regions with suitable habitat throughout the lower 48 states (like the Pacific Northwest, Sierra Nevada Mountains, southern Rocky Mountains, Intermountain West, and the northeastern United States) lack clear, measurable objectives to guide their recovery – *i.e.*, the other half of the ESA's fundamental conservation purpose. Notably, FWS did not claim that retaining ESA protections for Mexican wolves pursuant to the 1978 Rule will work better for their recovery and conservation.

5. Indeed, FWS is currently conducting a review of the status of gray wolves in the lower 48 states outside of the Northern Rockies and Great Lakes DPSs as part of a formal rulemaking to revise what remains of the 1978 Rule. 76 Fed. Reg. 81,666; 76 Fed. Reg. 26,086 (May 5, 2011). This rulemaking began in 2008 and is ongoing. 76 Fed. Reg. at 26,089. The intent of this process is to "identify appropriate wolf entities (*i.e.*, listing units) for full status review, anticipating that such review would lead to either confirmation or revision of the existing [1978 Rule]." 76 Fed. Reg. at 81,684. In the 12-Month Finding for the Mexican wolf, FWS suggested that despite the negative determination for the Center's Petition, the agency might still revise the current listing of Mexican wolves – including as a subspecies or DPS, as the Center petitioned – as part of this formal revision of the 1978 Rule.

6. Thus, FWS relied on the 1978 Rule to determine not to list the Mexican wolf as a taxonomic subspecies or DPS – the petitioned entities – even though the 1978 Rule is undergoing a formal revision process that could very well result in revision of the Mexican wolf’s classification as one of those very entities.

7. Because it relies on the 1978 Rule to make a “not warranted” determination for a Mexican wolf subspecies or DPS – the entities for which the Center formally petitioned for endangered status pursuant to section 4(b) of the ESA – the 12-Month Finding is arbitrary and capricious, an abuse of discretion, and contrary to the ESA. The agency’s rationale is also without factual support, because no Mexican wolf subspecies or DPS in fact currently comprises an “already listed entity” under the 1978 Rule or the ESA.

8. Defendants’ “not-warranted” listing determination for the Mexican wolf injures the Center’s procedural interest in a decision on the petitioned entities that are the subject of the Center’s petition, in accordance with the ESA, and delays and unless reversed, would undermine the recovery of the highly-endangered Mexican wolf.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1540(g). The Center formally notified Defendants of its intent to challenge the “not warranted” determination for the Mexican wolf subspecies or DPS by a notice of intent to sue, pursuant to 15 U.S.C. § 1540(g)(2)(C), dated October 9, 2012. Sixty days have passed without a commitment by Defendants to correct the violations set forth of in the Center’s letter. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

10. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit organization dedicated to the conservation of rare and imperiled animals and plants and the habitats on which they depend. The Center is incorporated in California and maintains its headquarters in Tucson, Arizona, with additional offices in New Mexico, Arizona, California, Nevada, Oregon, Washington, Alaska, Minnesota, Vermont, Florida, and Washington, D.C. The Center works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center has almost 39,000 members.

11. The interests of the Center and its members are impaired by FWS's violations of the ESA in responding to the Center's petition to list the Mexican wolf. Because FWS has failed to make a 12-month listing determination based on statutorily-permissible factors in response to the Center's petition to list the Mexican wolf, the Mexican wolf will not gain the ESA's protections as a subspecies or a DPS, including recovery planning in accordance with section 4(f) of the ESA. As a result, the Center's members' ability to observe and study members of the Mexican wolf population in the wild is diminished, and could be extinguished. Their aesthetic, scientific, recreational, and other interests in this species have been, and continue to be, impaired. If FWS were to list the Mexican wolf as a subspecies or DPS under the ESA, the Mexican wolf population would be afforded all of the ESA's protections including the requirement that FWS develop and implement a plan for recovery of the subspecies or DPS, which would make it more likely that the Mexican wolf will succeed in the wild and increase in numbers, and there would be more Mexican wolves for the Center's members to observe and study.

12. Defendant KEN SALAZAR is the Secretary of the U.S. Department of the Interior, and is the official ultimately responsible for implementing the ESA with regard to terrestrial species. Secretary Salazar is sued in his official capacity.

13. Defendant U.S. FISH AND WILDLIFE SERVICE is the federal agency that has been delegated responsibility for implementing the ESA with regard to terrestrial species.

STATUTORY FRAMEWORK AND FACTS
GIVING RISE TO PLAINTIFF'S CLAIM FOR RELIEF

A. RELEVANT STATUTORY AND REGULATORY SCHEME

14. The ESA is a comprehensive federal statute that was enacted to conserve both species in danger of extinction and the ecosystems upon which they depend. 16 U.S.C. § 1531(b).

15. Recognizing that all fish, wildlife, and plant species are “the Nation’s heritage,” Congress enacted the ESA with the purpose of providing both a “means whereby the ecosystems upon which endangered and threatened species may be conserved” and a “program for the conservation of such endangered species.” 16 U.S.C. § 1531(a)(5), (b). The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary,” *i.e.*, delisting, or recovery of the species. *Id.* § 1532(3). Conservation under the ESA has the twin objectives of survival and recovery of listed species, to protect species on the brink of extinction so that they may survive, and to plan and implement measures to provide for their recovery.

16. To this end, ESA section 4 requires the Secretary of the Interior to protect “species” by listing them as either “threatened” or “endangered,” and by designating “critical

habitat” for each species at the time the species is listed. *Id.* § 1533(a). The Secretary has delegated this authority to FWS. 50 C.F.R. § 402.01(b).

17. According to the ESA, a species is “endangered” if it is in “danger of extinction throughout all or a significant portion of its range” and “threatened” if it is “likely to become an endangered species within the foreseeable future” *Id.* §§ 1532(6) and (20). A “species” is defined to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16). FWS policy defines when a population of a vertebrate species may be recognized as a DPS under the ESA. 61 Fed. Reg. 4722 (Feb. 7, 1996).

18. The ESA’s substantive protections apply only after a “species” – *i.e.*, a taxonomic species, subspecies, or DPS – has been listed as endangered or threatened under the Act. For example, section 7 of the ESA requires all federal agencies to ensure that their actions will not likely “jeopardize the continued existence” of any listed species or “result in the destruction or adverse modification” of a species’ critical habitat. 16 U.S.C. § 1536(a)(2). Section 9 of the ESA prohibits, among other things, “any person” from intentionally taking listed species or incidentally taking listed species without a lawful authorization from FWS. *Id.* §§ 1538(a)(1)(B) and 1539. Concurrently with listing a species as endangered or threatened, to the maximum extent practicable FWS must designate the species’ critical habitat, which includes areas that are essential to the conservation of the species. *Id.* §§ 1532(5)(A) and 1533(a)(3)(A).

19. Also among these protections is the requirement in section 4(f) of the Act that FWS, through its delegated authority, “develop and implement plans ... for the conservation and survival of endangered species and threatened species.” *Id.* § 1533(f). A recovery plan is a

species' road map to recovery, and sets forth the "measurable, objective criteria" that define the circumstances when the Act's substantive protections are no longer required. *Id.*

20. Another way in which the ESA provides for the recovery of listed species is the provision in ESA section 10(j), which permits FWS, through its delegated authority, to "authorize the release ... of any population ... of an endangered species or threatened species outside the current range of such species." *Id.* § 1539(j)(2)(A). This is known as a "reintroduction." Before designating a species as experimental and authorizing its reintroduction, FWS must make three findings: (1) that the reintroduction will "further the conservation" of the species; (2) whether the population is "essential to the continued existence" of the species; and (3) that the "population is wholly separate geographically from nonexperimental populations of the same species." *Id.* § 1539(j)(1), (2)(A), (2)(B).

21. To ensure the timely protection of imperiled species, Congress set forth a detailed process whereby citizens may petition to list a species as endangered or threatened. This process includes mandatory, non-discretionary deadlines that FWS must meet, so that species in need of protection receive the ESA's substantive protections in a timely fashion. The three required findings are the 90-day finding, the 12-month finding, and the final listing determination.

22. Upon receipt of a listing petition, FWS must, "to the maximum extent practicable, within 90-days" make an initial finding as to whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." *Id.* § 1533(b)(3)(A). This is known as a 90-day finding.

23. At the 90-day finding stage, FWS assesses whether the petitioned entity is "eligible" for listing as a "species." U.S. Fish and Wildlife Service and National Marine

Fisheries Service, ENDANGERED SPECIES: PETITION MANAGEMENT GUIDANCE (July 1996) (“PMG Policy”) at 12.

24. If FWS finds, at the 90-day finding stage, that the petition does not present substantial information indicating that listing may be warranted, the petition is rejected and the process ends.

25. If FWS determines that a petition does present substantial information indicating that listing the petitioned entity “may be warranted,” FWS must then conduct a full, scientific “status review” of the species’ status. *Id.* § 1533(b)(3)(A). Upon completion of this status review, and within 12-months from the date that the agency received the petition, FWS must make one of three findings: (1) listing is not warranted; (2) listing is warranted; or (3) listing is warranted, but precluded by other pending proposals for listing species, provided certain circumstances are present. *Id.* § 1533(b)(3)(B). A 12-month finding must be based “solely” on the basis of the “best scientific and commercial data available” *Id.* § 1533(b)(1)(A). A 12-month finding must be made “without reference to possible economic or other impacts of such determination.” 50 C.F.R. § 424.11(b).

26. If FWS’s 12-month finding concludes that listing is warranted, it must publish notice of the proposed regulation to list the species as endangered or threatened in the Federal Register, and provide an opportunity for public comment. 16 U.S.C. § 1533(b)(3)(B)(ii). Within one year of the publication of the proposed regulation, the ESA requires FWS to render its final listing determination on the proposal. *Id.* § 1533(b)(6)(A). At such time, FWS must either list the species or withdraw the proposed listing rule, or if there is substantial disagreement about scientific data, may delay a final determination for up to six months to solicit more scientific information. *Id.* §§ 1533(b)(6)(A)(i) and 1533(b)(6)(B)(i).

B. FACTUAL BACKGROUND

(1) The Mexican Wolf

27. The Mexican gray wolf, or “lobo,” is the smallest subspecies of the gray wolf in North America, typically weighing approximately 50 to 90 pounds and reaching 26 to 32 inches in height. The Mexican wolf is a subspecies of *Canus lupus*, the gray wolf species.

28. Mexican wolves live in family packs, and prey primarily on hoofed mammals, or ungulates, such as deer and elk. Historically, the Mexican wolf lived in forest, and possibly desert, regions of the Republic of Mexico and southern New Mexico, Arizona, and Texas.

29. When livestock replaced wild ungulates on the western landscape in the late nineteenth and early twentieth centuries, wolves began preying on livestock. In response, states, counties, and stock associations offered bounties on wolf scalps. In 1915, the U.S. Bureau of Biological Survey (“Biological Survey”) initiated a more efficient program of salaried federal hunters who systematically trapped wolves, poisoned them, and dug up pups from their dens. As a result, resident breeding populations of wolves, including the Mexican wolf, disappeared from the western United States by the late 1920s. In 1945, FWS (formerly the Biological Survey) killed what was likely the last resident wolf in the western United States, in southern Colorado. In 1950, FWS persuaded the Mexican government to allow U.S. Government-salaried wolf hunters to initiate the systematic poisoning of wolves throughout Mexico. By the 1970s, no more Mexican wolves were known to arrive from Mexico.

(2) Listing of the Mexican Wolf’s under the ESA

30. Policies toward Mexican wolves changed with the passage of the ESA in 1973 and FWS’s determination of endangered status for the Mexican wolf as a subspecies on April 28, 1976. 41 Fed. Reg. 17,736 (Apr. 28, 1976). The Mexican wolf’s status was subsequently

revised as part of the 1978 Rule, by which FWS listed all gray wolves throughout the lower 48 states as endangered, except in Minnesota, where the agency designated gray wolves as threatened. 43 Fed. Reg. 9607. From 1977 to 1980, five wolves, comprised of four males and a single female, were captured alive in Mexico for an emergency captive-breeding program.

31. In 1982, FWS and the Director of the Mexican wildlife agency jointly adopted a Recovery Plan for the Mexican wolf to bring it back to its historic range. 1982 Mexican Wolf Recovery Plan (“Recovery Plan”). The “prime objective” of the 1982 Recovery Plan was to maintain a captive breeding program and to re-establish a “viable, self-sustaining population of at least 100 Mexican wolves in the middle to high elevations of a 5,000-square mile area within the Mexican wolf’s historic range.” *Id.* at 28. The Recovery Plan called on FWS to protect Mexican wolves from being killed in predator control and fur-trapping efforts, conduct research concerning the ecology and behavior of Mexican wolves, propagate Mexican wolves in captivity, and release wolves into Mexico and/or adjoining areas in the Southwest. *Id.* at 30-32. FWS now considers the 1982 Recovery Plan to be outdated and in need of revision, but has failed to issue a revised plan.

32. Following its issuance in 1982, FWS did not take steps to implement the Recovery Plan’s direction to reintroduce captive Mexican wolves until over a decade later, and only then as a result of a lawsuit filed by conservation organizations in 1990. In 1993, in a stipulation dismissing the lawsuit, FWS finally agreed to implement the Recovery Plan and to “accomplish the reintroduction of the Mexican Wolf into the wild” as “expeditiously as possible.” Yet, the Mexican wolf continued to cling to survival as “one of the rarest land mammals in the world.” REINTRODUCTION OF THE MEXICAN WOLF WITHIN ITS HISTORIC RANGE

IN THE SOUTHWESTERN UNITED STATES, FINAL ENVIRONMENTAL IMPACT STATEMENT (November 1996) (“EIS”) at iv.

33. In 1998, FWS promulgated a regulation pursuant to section 10(j) of the ESA authorizing the first reintroduction of Mexican wolves into eastern Arizona and southwestern New Mexico. 63 Fed. Reg. 1752 (Jan. 12, 1998). By this point, the only known Mexican wolves lived in captivity, as part of the breeding program implemented by non-profit organizations. The species had become completely extirpated in the wild. EIS at 1-1.

34. The reintroduction program for Mexican wolves proceeded concurrently with a similar reintroduction program for gray wolves in the northern Rocky Mountains. Reintroduction of gray wolves to the northern Rockies led to a resurgence of the gray wolf population in that region. FWS attempted to designate and delist or downlist DPSs of gray wolves in the northern Rockies and Great Lakes region several times, but these rules were rejected by federal courts. In 2011, however, FWS was able to delist a Northern Rockies DPS in response to a congressional appropriations rider, 76 Fed. Reg. 25,590, and recently delisted wolves in Wyoming. 77 Fed. Reg. 55,530 (Sep. 10, 2012). FWS also designated and delisted a Great Lakes DPS in 2011. 76 Fed. Reg. 81,666. Meanwhile, in 2008 FWS initiated a “structured decisionmaking process” to review the status of gray wolves throughout the remainder of the lower 48 states, outside of the northern Rockies and Great Lakes region. Through this process, FWS plans to “identify appropriate wolf entities” or “listing units” and on this basis, either confirm or revise the 1978 Rule. 76 Fed. Reg. at 81,684. This process is ongoing and has no set end date.

35. Yet, recovery of the Mexican wolf has not gone so well, as the Mexican wolf population has clung to survival. FWS’s annual census data for the population shows that there

were only 58 wolves in the wild at the end of 2011. This number is far short of projections – for instance, FWS projected at the start of the reintroduction project that the experimental population would grow to 102 wolves by the end of 2006. One hundred Mexican wolves is the bare minimum population number that FWS determined in the 1982 Recovery Plan is necessary to allow the subspecies to survive and get back on the road to recovery. Yet, even this minimal objective remains unattained. FWS has initiated processes to revise the 1982 Recovery Plan multiple times since the early 1990s that has never been completed. Meanwhile, there have been many calls for reform of the reintroduction program from experts, non-governmental organizations (including the Center), and FWS scientists. Efforts begun by FWS in 2007 to revise the regulations governing the 10(j) reintroduction program have stalled.

36. Mexican wolves have remained at such low population numbers – and far below the minimum population number of 100 – due to vehicular collisions, capture and relocation, illegal killings or poaching, and capture and killing of wolves by FWS or other agencies. Since reintroduction began in 1998, 12 wolves have been shot by FWS or Wildlife Services, 18 wolves have died as a consequence of capture efforts, and 35 wolves have been removed and placed in captivity (and never re-released). The failure of the population to grow significantly has occurred with a continued reduction in the Mexican wolf's genetic diversity (stemming from an already depauperate gene pool in the captive Mexican wolf population), which may further undermine future possibilities for recovery.

- (3) The Center's Petition to List the Mexican Wolf as an Endangered Subspecies or DPS under the ESA and FWS's 90-Day Finding

37. Recognizing that the Mexican wolf is in desperate need of a new listing status as a subspecies or DPS in order to survive and benefit from the ESA's protections – including

recovery planning – on August 11, 2009 the Center submitted a petition to FWS, requesting the agency to list the Mexican wolf as a subspecies or DPS.

38. By letter dated October 22, 2009, FWS responded to the Center, and stated that the Petition met all of the basic requirements for listing petitions under the Act, and that FWS would make a 90-day finding in response to the Petition.

39. After FWS failed to issue the required 90-day finding, the Center brought a deadline suit to secure the overdue finding. *Ctr. for Biological Diversity v. Salazar et al.*, Civ. No. 10-00149 (D.D.C.) (EGS). The Center’s suit was consolidated with other deadline suits pursuant to the Multidistrict Litigation statute, and subsequently dismissed based on a stipulated settlement agreement that required FWS to issue the overdue 90-day finding by July 31, 2010. *In Re Endangered Species Act Section 4 Deadline Litigation*, 1:10-mc-00377-EGS (D.D.C.), Dkt. 6-1.

40. On August 4, 2010, FWS published the Federal Register the 90-Day Finding in response to the Petition. 75 Fed. Reg. 46,894. FWS determined that “reclassifying the Mexican wolf as a separate subspecies may be warranted” and that the Petition presented “substantial scientific or commercial information indicating that the Mexican wolf subspecies may warrant listing.” *Id.* FWS initiated a scientific status review pursuant to the Act and requested public comment, and stated that it would further evaluate whether the Mexican wolf qualifies as a DPS during that review. *Id.* FWS acknowledged that the Mexican wolf may warrant protection as an endangered subspecies due to deaths, predominantly from vehicular collisions and illegal shootings, that, when combined with removal of wolves from the wild for “management purposes,” have “resulted in a failure rate (combined removal and mortality) too high to allow recovery through unassisted population growth.” *Id.* at 46,897.

41. In the 90-Day Finding, FWS never claimed that the Mexican wolf would not be eligible for listing as a subspecies or DPS, *e.g.*, because it is an “already listed entity” under the 1978 Rule.

42. Following the 90-Day Finding, FWS conducted a status review of the Mexican wolf. FWS took comments from the public regarding whether listing the Mexican wolf as a subspecies or DPS is warranted under the ESA’s five listing factors and based on the best scientific data available. However, FWS did not issue a 12-month finding on the Petition by the statutory deadline.

43. On July 12, 2011, the Center and Defendants entered into the MDL Agreement, which defines Defendants’ responsibilities regarding future ESA statutory deadline litigation between the parties. *In Re Endangered Species Act Section 4 Deadline Litigation*, 1:10-mc-00377-EGS (D.D.C.). Pursuant to the settlement, FWS committed to make the overdue 12-month finding for the Mexican wolf by the end of Fiscal Year 2012 (*i.e.*, by September 30, 2012). Dkt. 42. The Court approved this agreement on September 9, 2011. Dkt. 56.

44. On October 9, 2012, FWS published the 12-Month Finding in the Federal Register. In a reversal of course from the 90-Day Finding, FWS determined that listing the Mexican wolf under the ESA is “not warranted.” 77 Fed. Reg. 61,375. FWS reiterated that the Mexican wolf may qualify as a taxonomic subspecies or DPS that it is threatened with extinction as a result of human-caused deaths from vehicular collisions and illegal shootings, as well as “removal” from the wild for “management purposes.” *Id.* at 61,377. Yet, FWS declined to issue a rule proposing to list the Mexican wolf under the ESA for one reason: Mexican wolves comprise an “already listed entity” under the 1978 Rule.

45. In reaching its “not warranted” determination, FWS did not state that Mexican wolf conservation is better achieved through retention of ESA protection pursuant to the 1978 Rule. Rather, FWS claimed that its determination was appropriate solely in light of an economic factor: the agency’s “limited resources.” *Id.* at 61,377. And FWS reiterated that its ongoing review of the status of wolves in the lower 48 states could still lead it to “revise the current listing based on the outcome of that review” and “put a separate listing place” – *i.e.*, for the Mexican wolf as a subspecies or DPS.

PLAINTIFF’S CLAIM FOR RELIEF

Violation of Section 4(a)(1) and 4(b)(1)(A) of the Endangered Species Act: Failure to Make a Lawful 12-Month Finding on the Center’s Petition to List the Mexican Wolf as a Subspecies or DPS

46. Plaintiff hereby incorporates all preceding paragraphs.

47. By issuing the 12-Month Finding on the Center’s Petition to list the Mexican wolf as an endangered subspecies or DPS, FWS has committed agency action that is arbitrary and capricious, an abuse of discretion, and not in accordance with sections 4(a)(1) and 4(b)(1)(A) of the ESA and its implementing regulations, as reviewable under the APA, 5 U.S.C. § 706(2).

48. Defendants’ failure to comply with the ESA in issuing the 12-Month Finding has injured and continues to injure Plaintiff in the manner described in paragraphs 10-11.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

(1) Declare that Defendants have violated sections 4(a) and 4(b)(1)(A) of the ESA by issuing the 12-Month Finding on the Center’s Petition to list the Mexican wolf as an endangered subspecies or DPS;

(2) Order Defendants undertake and conclude the rule-making process to issue a new 12-month finding that complies with the ESA by dates certain that are enforceable by the Court;

(3) Grant such other relief and further relief as the Court may deem just and proper.

DATED: December 10, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'AR Atwood', written in a cursive style.

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