



August 17, 2011

***Via Certified Mail, Return Receipt Requested***

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**RE: 60-Day Notice of Intent to Sue for Violations of Section 9 of the Endangered Species Act – Causing Take of Mexican Gray Wolves**

Dear Sirs:

This letter serves as the Center for Biological Diversity's 60-day notice of our intent to sue the New Mexico State Game Commission (the Commission) and the New Mexico Department of Game and Fish (NMDGF) through their directors and administrators for

violations of Section 9 of the Endangered Species Act (ESA). 16 U.S.C. § 1540(g). As described more fully below, the Commission, NMDGF, and the above-listed persons are causing unlawful “take” by negligently and intentionally authorizing trapping that has and will continue to trap, harm, harass, injure, and kill ESA-listed Mexican gray wolves (*Canis lupus baileyi*). *Id.* § 1538(a)(1)(G); 50 C.F.R. § 17.84(k). Specifically, the Commission and NMDGF have lifted a ban on trapping furbearers in wolf habitat and have and/or will issue trapping licenses that the agencies know will continue to take Mexican gray wolves. These actions constitute unlawful take in violation of ESA Section 9.

The Commissioners and the Director of NMDGF must immediately ban all trapping within the Blue Range Wolf Recovery Area until the agencies issue regulations that avoid take of wolves, in order to comply with the ESA. This letter provides notice of our intent to file suit in federal court if you do not remedy these legal violations within the next 60 days.

### **IDENTITY OF ORGANIZATION GIVING NOTICE**

The name, address, and phone number of the organization giving notice of intent to sue under the ESA are:

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### **BACKGROUND**

#### **Mexican gray wolf (*Canis lupus baileyi*)**

The Mexican gray wolf is the smallest and rarest subspecies of gray wolf in North America. The Mexican wolf historically occurred throughout much of New Mexico, Arizona, Texas, and northern Mexico, but was extirpated from the wild in both the U.S. Southwest and Mexico by the 1980s due to U.S. government as well as private trapping and poisoning, and by other forms of persecution and destruction of habitat. The U.S. Fish and Wildlife Service (the Service) listed the subspecies as endangered under the ESA in 1976, trapped wolves in Mexico for captive breeding between 1977 and 1980, and then reclassified the Mexican wolf so as to be listed as part of a broader gray wolf listing in 1978.

In 1998, the Fish and Wildlife Service (the Service) began reintroducing Mexican gray wolves in Arizona and New Mexico by releasing wolves into the Blue Range Wolf Recovery Area (BRWRA), which encompasses the Apache and Gila National Forests. The Service listed the reintroduced wolves as a “nonessential experimental” population under Section 10(j) of the ESA. 63 Fed. Reg. 1752 (Jan. 12, 1998). Despite the Service’s initial goal that 100 wolves would occupy the area by 2006, numerous wolves have been subject to federal predator control, trapping, and other illegal take. At last count in January of this year, only 50 individual wolves could be documented in the wild.

## **STATUTORY FRAMEWORK**

### **A. ESA Section 9 Take Prohibition**

Under Section 9 of the ESA, it is unlawful for any person to “take” an endangered species. 16 U.S.C. § 1538(a)(1)(B). To “take” is defined broadly to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” *Id.* § 1532(19); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1300 (8th Cir. 1989) (“Take is defined in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”).

Under the statute, “harm” means “an act which actually kills or injures wildlife,” and “harass” means “an intentional or negligent act or omission which creates the likelihood of injury . . . by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering.” 50 C.F.R. § 17.3. To “trap” an ESA-listed animal constitutes “take” of that animal regardless of whether the trapping results in actual injury or mortality.

In addition to prohibiting direct take, it is also unlawful for “any person” to “cause [an ESA violation] to be committed.” 16 U.S.C. § 1538(g). The term “person” includes “any officer, employee, agent, department, or instrumentality . . . of any State, municipality, or political subdivision of a State . . . [or] any State, municipality, or political subdivision of a State.” *Id.* § 1532(13). Accordingly, the ESA “bans those acts of a third party that bring about the acts exacting a taking. [A] governmental third party pursuant to whose authority an actor directly exacts a taking . . . may be deemed to have violated the provisions of the ESA.” *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997) (holding Massachusetts official liable under Section 9 for authorizing fishing that injures endangered whales); *see also Palila v. Hawaii Dep’t of Land & Natural Res.*, 639 F.2d 495, 498 (9th Cir. 1981) (state’s “plan” to continue allowing feral sheep in endangered bird habitat causes “take”); *Defenders v. EPA*, 882 F.2d at 1301 (holding EPA liable for registering pesticides that, when administered by third parties, cause take).

Further, an entity’s failure to regulate in a way that avoids take of listed species can constitute prohibited Section 9 take. *See Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231, 1249 (11th Cir. 1998) (holding plaintiff had standing to allege county caused take of listed sea turtles by issuing “‘harmfully’ inadequate regulation” of artificial lighting on beaches); *United States v. Town of Plymouth*, 6 F. Supp. 2d 81, 82 (D. Mass. 1998) (finding town officials who were “responsible for management” of a beach violated Section 9 by their “persistent refusal . . . to undertake adequate and timely precautionary measures” that “create[d] a likelihood” listed birds would be killed).

Lastly, while the statute only specifically prohibits the take of “endangered” species, 16 U.S.C. § 1538(a)(1), pursuant to ESA Section 4, the Service must issue “protective regulations” for any “threatened” species and may apply any Section 9 prohibition to those threatened species. *Id.* § 1533(d). The Service has issued a broad regulation, applying all Section 9 prohibitions to all threatened species, unless the agency adopts a species-specific Section 4 rule. 50 C.F.R. § 17.31(a). Section 9 of the ESA then prohibits any person from “violat[ing] any

regulation pertaining . . . to any threatened species” that was promulgated under Section 4. 16 U.S.C. § 1538(a)(1)(G).

## **B. ESA Section 10(j) Experimental Populations**

In 1982, Congress enacted Section 10(j) of the ESA to address the reintroduction of listed species. Section 10(j) authorizes the Service to release an “experimental population” of any threatened or endangered species to “further the conservation of such species.” 16 U.S.C. § 1539(j)(1), (2). An experimental population “shall be treated as a threatened species,” except typical ESA Section 7 consultation requirements and critical habitat designation requirements do not apply. *Id.* § 1539(j)(2)(C). Accordingly, the Service must issue “protective regulations under section 4(d)” for the experimental population that include all relevant prohibitions and exceptions. 50 C.F.R. § 17.82; 16 U.S.C. § 1533(d); *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000) (under Section 10(j), the Service may “provide control mechanisms (i.e., controlled takings) where the Act would not otherwise permit the exercise of such control measures against listed species”).

## **C. Mexican Gray Wolf 10(j) Rule**

In 1998, the Service issued a 10(j) rule for the Mexican gray wolf to foster wolf reintroduction. 63 Fed. Reg. 1752 (Jan. 12, 1998). The rule authorized reintroduction of captive wolves into the Blue Range Wolf Recovery Area (BRWRA), an area spanning the Apache and Gila National Forests, and deemed all wolves found in the broader Mexican Wolf Experimental Population Area to be a “nonessential experimental population.”<sup>1</sup> 50 C.F.R. § 17.84(k)(1). Accordingly, because the experimental population must be “treated as a threatened species,” 16 U.S.C. § 1539(j), the Service issued a protective regulation prohibiting any “person, agency, or organization” from “tak[ing] . . . any wolf in the wild within the Mexican Wolf Experimental Population Area,” except as specifically provided by the rule. 50 C.F.R. § 17.84(k)(3).

Under the rule, a take that is “unavoidable and unintentional” is exempt from the otherwise applicable take prohibition. *Id.* § 17.84(k)(3)(i). An “unavoidable and unintentional take . . . must be non-negligent and incidental to a legal activity, such as . . . trapping” and must be reported to the Service within 24 hours. *Id.* Further, the regulations define “unavoidable and unintentional take” as:

[A]ccidental, unintentional take . . . which occurs despite reasonable care . . . Examples would be . . . catching a wolf in a trap outside of known, occupied wolf range. Taking a wolf with a trap . . . within occupied wolf range<sup>2</sup> . . . will *not* be

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<sup>1</sup> The Mexican Wolf Experimental Population Area encompasses the BRWRA, as well as large areas outside of the BRWRA, extending to the western Arizona border and the eastern New Mexico border. 50 C.F.R. § 17.84(k)(9)(iii).

<sup>2</sup> The regulations define “occupied Mexican wolf range” to mean “an area of confirmed presence of resident breeding packs or pairs of wolves . . . The Service must confirm or corroborate wolf presence.” Exact delineation of the area will be described by: . . . 3-mile (4.8 km) radius around the convex polygon developed from more than 20 radio locations . . .” 50 C.F.R. § 17.84(k)(15). The Service publishes a map of the wolves’ “occupied range” annually in their Progress Reports. *See e.g.*, 2009 Mexican Wolf

considered unavoidable, accidental, or unintentional take, unless due care was exercised to avoid taking a wolf.

*Id.* § 17.84(k)(15) (emphasis added). The Service noted these exceptions are “narrow.” 63 Fed. Reg. at 1758. Further, in response to comments arguing that the take exception was too vague, the Service stated: “Information on how to avoid unintentional trapping will be made available. The few trappers in these areas will be on notice that *if they do trap a wolf it likely would not be considered ‘unavoidable or unintentional.’*” *Id.* at 1759 (emphases added).

#### **D. Wildlife Protection and Trapping Authority in New Mexico**

Under New Mexico state law, “[n]o resident . . . shall capture, trap or possess any fur-bearing animal or attempt to do so without first procuring a resident trapper’s license.”<sup>3</sup> N.M. STAT. § 17-5-5(A). The statute authorizes and directs the “State game commission . . . to administer” the trapping provisions and “to make such rules and regulations and establish such service as it may deem necessary to carry out” the statute, including regulating “when and by what means fur-bearing animals may be hunted, taken, captured, possessed or killed.” *Id.* §§ 17-5-4; 17-1-26 (also providing Commission broad authority to administer “all the provisions and purposes” of the game code). Additionally, state law prohibits “any person” from “tak[ing]” a state-listed endangered species, including gray wolves. *Id.* §§ 17-2-41(C); 17-2-38 (defining “take” to mean “harass, hunt, capture, or kill”); N.M. ADMIN. CODE § 19.33.6.8(A)(1)(f) (listing gray wolf as endangered). The Commission is also directed to establish regulations it deems necessary to protect state-listed endangered species. N.M. STAT. § 17-2-43.

Further, the New Mexico Department of Game and Fish (NMDGF) is directed to administer the state wildlife and game statute. N.M. STAT. § 17-1-5(A); *see also id.* § 17-3-22 (“The state game and fish department is hereby charged with the proper administration of this act.”). All trappers must seek a trapping license from NMDGF and comply with bag limits and trap style restrictions. *See* N.M. ADMIN. CODE §§ 19.31.3.8(O) (NMDGF license application instructions for trapping); 19.32.2.8, 9, 10 (setting seasons, bag limits, and allowable trapping methods). Further, in addition to its general authority over trapping and hunting, NMDGF also has authority to “manage[ ] . . . threatened and endangered species.” N.M. STAT. §§ 17-2-39; 17-2-42 (authorizing NMDGF to “establish such programs . . . deemed necessary . . . for the management of endangered species”).

#### **E. History of Taking Mexican Gray Wolves in Nongovernmental Traps**

As the Commission and NMDGF are aware, trappers in New Mexico regularly capture Mexican gray wolves. Based on Fish and Wildlife Service reports, there were 15 “known” incidents in which wolves have been trapped, affecting 14 different wolves, between 2002 and

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Recovery Program: Progress Report, at 40. Available at:

<http://www.fws.gov/southwest/es/mexicanwolf/documents.shtml>.

<sup>3</sup> “Fur-bearing animals” include “muskrat, mink, weasel, beaver, otter, nutria, masked or blackfooted ferret, ringtail cat, raccoon, pine marten, coatimundi, badgers, bobcat and all species of foxes.” N.M. STAT. § 17-5-2. Further, non-residents are prohibited from trapping coyotes and skunks without a license. *Id.* § 17-5-5(B).

2009. See Turnbull, et al., *Evaluating Trapping Techniques to Reduce Potential for Injury to Mexican Wolves* (2011), at 4 (noting Female 562 was trapped twice). Seven of these incidents resulted in injury to a wolf:

<b>Date</b>	<b>Wolf</b>	<b>Injury</b>	<b>Notes</b>
Mar. 18, 2002	Male 578	None apparent	Wolf removed by trapper
Winter 2002-03	Female 562	None apparent	Wolf released by trapper
Winter 2002-03	Male 583	None apparent	Wolf self released
Nov. 20, 2003	Female 858	None apparent	
Nov. 22, 2003	Male 859	None apparent	
<b>Oct. 15, 2005</b>	<b>Female 562</b>	<b>Yes</b>	<b>Wolf's toes were amputated and pad of its right foot removed by field team after removing trap</b>
Mar. 26, 2006	Male 1008	None apparent	Wolf released by field team
<b>Oct. 18, 2006</b>	<b>Female 923</b>	<b>Yes</b>	<b>After field team received report that wolf had trap on its foot, wolf was observed limping the same day</b>
<b>Winter 2006-07</b>	<b>Male 1041</b>	<b>Yes</b>	<b>Died of trap-related injury</b>
Jan. 1, 2007 <sup>4</sup>	Uncollared	Unknown	Wolf pulled trap loose, wolf is possibly M1107 who has two missing middle toes "consistent with a small trap capture"
<b>Jan. 19, 2008</b>	<b>Female 1112</b>	<b>Yes</b>	<b>Injury to front foot "consistent with a nonproject trapping incident"</b>
<b>Feb. 10, 2008</b>	<b>Male 1039</b>	<b>Yes</b>	<b>Wolf pulled trap loose, leg amputated</b>
<b>Nov. 16, 2008</b>	<b>Male 922</b>	<b>Yes</b>	<b>Died of trap-related injury</b>
<b>Jan. 23, 2009</b>	<b>Male 871</b>	<b>Yes</b>	<b>Leg amputated due to trap-related injury</b>
Feb. 18, 2009	Female 1106	None apparent	

The continued take of wolves from this small population is impeding the species' recovery and, combined with low reproduction rates and other biological attributes, "is putting the population at risk of failure." FWS, *Mexican Wolf Conservation Assessment* (2010), at 11. Originally, the Service intended the Mexican gray wolf experimental population to reach 100 individuals by 2006, yet the population remains at around just 50 individuals, with only 2 breeding pairs. *Id.* at 78; 63 Fed. Reg. at 1752. Further, as the Service recently recognized for this population, "[t]he loss of any animal, particularly a breeding adult, is important when a population is small in size and has a limited number of breeding adults. That is, mortality not only reduces the size of the population, but can also reduce the population's ability to recover."

<sup>4</sup> Turnbull et al. did not include this incident in its description of trap-related injuries because of "possible double count with this uncollared wolf." Turnbull et al. (2011) at 4.

FWS, *Mexican Wolf Conservation Assessment*, at 61 (emphasis added); *id.* at 11 (“[c]ombined sources of mortality and removal are consistently resulting in failure rates at levels too high for unassisted population growth”).

## **F. Prohibition on Trapping and Lifting the Ban**

In June of 2010, then-Governor Richardson recognized that trapping “negatively impact[s] the Mexican Gray Wolf, as traps and snares do not discriminate between Mexican Gray Wolves and the game animals intended to be taken.” EO 2010-029, *Temporary Ban of Trapping in Blue Range Wolf Recovery Area* (July 28, 2010). The Governor issued an Executive Order banning trapping in the BRWRA and directing NMDGF to study the risks associated with various types of traps and snares on wolves. Upon the study’s completion, the Executive Order then directed NMDGF to issue regulations allowing trapping “*only* by use of traps and snares that pose minimal risk of harm or injury” to wolves. *Id.* (codified at N.M. ADMIN. CODE § 19.32.2.10(B)(10) (“[c]ommencing November 1, 2010, for a minimum of six months, it shall be illegal to place, set or maintain any . . . trap or snare anywhere on public land within the Gila or Apache national forests in New Mexico, unless otherwise allowed by statute. The prohibition shall remain in place until the state game commission takes action based upon a department study to assess the risks to Mexican gray wolves due to trapping *and a determination if some methods of trapping could be allowed that pose minimal risk of injury to the Mexican gray wolf.*”)) (emphases added).

On July 21, 2011, upon recommendation of NMDGF, the Commission voted to lift the trapping ban, purportedly based on the Turnbull study discussed above. *See Draft Minutes*, New Mexico State Game Commission (July 21, 2011) (indicating Commission believed Turnbull study “basically said that regulated furbearer trapping in NM does not have a population level impact on the gray wolf population”).<sup>5</sup> However, as discussed above, the Turnbull study actually confirmed 15 instances in which wolves had been trapped in nongovernmental traps between 2002 and 2009, causing 7 wolf injuries, with 2 of the injuries resulting in amputations and 2 resulting in death. Turnbull *et al.*, at 4 (2011).

## **NOTICE OF VIOLATION**

The Commission and NMDGF are violating and will continue to violate Section 9 of the ESA. As federal caselaw makes clear, a “governmental third party pursuant to whose authority an actor directly exacts a taking . . . may be deemed to have violated the provisions of the ESA.” *Strahan*, 127 F.3d at 163; 16 U.S.C. § 1538(g) (prohibiting any person from “caus[ing an ESA violation] to be committed”).

Here, the Service’s 10(j) regulation governing the Mexican gray wolf experimental population prohibits take – and thus prohibits the Commission and NMDGF from causing take – that is “negligent” or occurs without at least “reasonable care” being taken to avoid the take. 50 C.F.R. § 17.84(k)(3), (15); *see United States v. Hayashi*, 22 F.3d 859, 863 (9th Cir. 1993) (noting lower court found that “firing [a] rifle in waters containing porpoises was a negligent act that created a likelihood of injury to the porpoises” under Marine Mammal Protection Act but

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<sup>5</sup> Available at: <http://www.wildlife.state.nm.us/commission/minutes/index.htm>.

rejecting criminal liability for act) (superseded by statutory amendment); *see also* 63 Fed. Reg. at 1759 (Service stating presumption that trapping a wolf “would not be considered ‘unavoidable or unintentional’”).

By lifting the trapping ban and authorizing trapping without any conditions or restraints *despite clear evidence* that past trapping, done in *precisely* the same manner now authorized, has caused and will continue to cause take, injury, and death to wolves, the Commission and NMDGF are negligently causing take. Both the Commission and NMDGF are well-aware that the previously-authorized trapping program caused wolves to be captured on a regular basis. *See July 21, 2011 Draft Meeting Minutes* (referencing Turnbull study). Yet the Commissioners lifted the trapping ban and NMDGF will issue trapping licenses without any restrictions on the type, location, or number of traps to avoid such take, thereby failing to exhibit “reasonable care.” In addition, by lifting the trapping ban in the BRWRA, which includes large areas of “occupied Mexican wolf range,” 50 C.F.R. § 17.84(k)(15), the Commission and NMDGF have not exercised the “due care” required to avoid take. *Id.* § 17.84(k)(3), (15).

Further, it is clear the Commission and NMDGF have the authority to regulate and restrict trapping activities that will affect state endangered species, like the Mexican gray wolf. *See* N.M. STAT. §§ 17-2-43; 17-2-39. Despite this authority, the Commission and NMDGF have lifted the trapping ban and failed to regulate trapping so as to prevent illegal take of Mexican gray wolves. *See Town of Plymouth*, 6 F. Supp. 2d at 90 (to demonstrate take, plaintiff can show defendant “caused, through action *or inaction*, the illegal taking of” a listed species, and finding town violated Section 9 by their “persistent refusal” to enact mitigation measures) (emphasis added); *see also* 50 C.F.R. § 17.3 (“harass” means any “intentional or *negligent act or omission* which creates the likelihood of injury”) (emphasis added). The actions and inactions of the Commission and NMDGF are therefore the direct and proximate causes of the ongoing unlawful take.

## **CONCLUSION**

We request that the Commission and NMDGF immediately halt trapping in the BRWRA to ensure compliance with federal law. We are hopeful that the Commission and NMDGF will take all necessary measures to avoid the unlawful future taking of Mexican gray wolves, and that the agencies’ representatives will contact us within 60 days to discuss their obligations under the ESA. If you have any questions about the issues raised in this letter, please feel free to contact us at any time.

## **COUNSEL FOR PARTY GIVING NOTICE**

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Sincerely,



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