

1 JOHN C. CRUDEN, Assistant Attorney General
Environment & Natural Resources Division
2 NICOLE M. SMITH, Trial Attorney
3 CA Bar Number 303629
U.S. Department of Justice
4 Environment & Natural Resources Division
Wildlife & Marine Resources Section
5 Ben Franklin Station, P.O. Box 7611
6 Washington, D.C. 20044-7611
Telephone: (202) 305-0368
7 Email: nicole.m.smith@usdoj.gov
8 *Attorneys for Defendants*

9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**
11 **TUCSON DIVISION**

13 Defenders of Wildlife, et al.,)
14 Plaintiffs,)
15 v.)
16 S.M.R. Jewell, et al.,)
17 Defendants,)
18 and;)
19 Protect Americans Now, et al.,)
20 Defendant-Intervenors.)

No. 4:14-cv-02472-JGZ

STIPULATED SETTLEMENT
AGREEMENT

21 State of Arizona,)
22 Plaintiff,)
23 and;)
24 State of Colorado, New Mexico)
Department of Game and Fish, and)
25 State of Utah,)
26 Plaintiff-Intervenors;)
v.)
S.M.R. Jewell, et al.,)
27 Defendants.)

No. 4:15-cv-00245-JGZ

1
2 This Stipulated Settlement Agreement (“Agreement”) is entered into by and between
3 Plaintiffs Defenders of Wildlife, Center for Biological Diversity, Endangered Wolf Center,
4 David R. Parsons, Wolf Conservation Center and the State of Arizona (collectively,
5 “Plaintiffs”), Plaintiff Intervenor State of Utah (“State of Utah”), and Defendants S.M.R. Jewell,
6 in her official capacity as Secretary of the United States Department of the Interior; and the
7 United States Fish and Wildlife Service (collectively, “Defendants”) who, by and through their
8 undersigned counsel, state as follows:

9 WHEREAS, in 1976 the United States Fish and Wildlife Service (“Service”) listed the
10 Mexican wolf (*Canis lupus baileyi*) as endangered (41 Fed. Reg. 17,736);

11 WHEREAS, in 1978, the Service published a rule classifying the gray wolf (*Canis*
12 *lupus*) as an endangered population at the species level, thereby subsuming the separate
13 Mexican wolf listing into the listing for the gray wolf in the contiguous United States and
14 Mexico (43 Fed. Reg. 9,607);

15 WHEREAS, on January 16, 2015, the Service reclassified the Mexican wolf as an
16 endangered subspecies of the gray wolf (80 Fed. Reg. 2,488);

17 WHEREAS, the Endangered Species Act (“ESA”) requires the Service to develop and
18 implement plans for the conservation and survival of endangered and threatened species unless
19 the Service finds that such a plan will not promote the conservation of the species, 16 U.S.C. §
20 1533(f);

21 WHEREAS, in 1982 the Service issued a document entitled the “Mexican Gray Wolf
22 Recovery Plan”;

23 WHEREAS, Defenders of Wildlife, Center for Biological Diversity, Endangered Wolf
24 Center, David R. Parsons, and Wolf Conservation Center sent a letter to Defendants on
25 September 10, 2014 stating their intent to file suit to compel the Service to issue a recovery plan
26 pursuant to 16 U.S.C. § 1533(f)(1);

27 WHEREAS, on November 12, 2014, Defenders of Wildlife, Center for Biological
28 Diversity, Endangered Wolf Center, David R. Parsons, and Wolf Conservation Center filed

1 *Defenders of Wildlife et al. v. Jewell et al.*, 4:14-cv-02472-JGZ, alleging that the Service’s
2 failure to prepare a recovery plan for the Mexican wolf, pursuant to ESA Section 4(f), 16
3 U.S.C. § 1533(f), violates the ESA and/or the Administrative Procedure Act (“APA”), 5 U.S.C.
4 § 706(1);

5 WHEREAS, on January 29, 2015, Protect Americans Now, Colorado Farm Bureau,
6 New Mexico Farm and Livestock Bureau, Utah Farm Bureau, and Coalition for Arizona and
7 New Mexico Communities for Stable Economic Growth filed a motion to intervene in
8 *Defenders of Wildlife et al. v. Jewell et al.*, 4:14-cv-02472-JGZ, which was granted on July 13,
9 2015;

10 WHEREAS, on January 30, 2015, Defendants filed a motion to dismiss in *Defenders of*
11 *Wildlife et al. v. Jewell et al.*, 4:14-cv-02472-JGZ, which was denied on September 30, 2015;

12 WHEREAS, the State of Arizona Game and Fish Department sent a letter to Defendants
13 on January 6, 2015, stating its intent to file suit to compel the Service to issue a recovery plan
14 pursuant to 16 U.S.C. § 1533(f);

15 WHEREAS, on June 8, 2015, the State of Arizona filed *State of Arizona v. Jewell et al.*,
16 4:15-cv-00245-JGZ, alleging that the Service’s failure to prepare a new recovery plan for the
17 Mexican wolf, pursuant to ESA Section 4(f), 16 U.S.C. § 1533(f), violates the ESA and/or the
18 Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1);

19 WHEREAS, on September 1, 2015, the New Mexico Department of Game and Fish sent
20 a letter to Defendants S.M.R. Jewell and Daniel Ashe stating its intent to file suit to compel
21 Defendants to include the State of New Mexico in ongoing settlement discussion;

22 WHEREAS, on September 4, 2015, the New Mexico Department of Game and Fish
23 filed a motion to intervene in *State of Arizona v. Jewell et al.*, 4:15-cv-00245-JGZ, which was
24 granted on October 23, 2015;

25 WHEREAS, on September 1, 2015, the State of Colorado sent a letter to Defendants
26 Sally Jewell and Daniel M. Ashe notifying them of the State’s intent to file suit to compel
27 Defendants to comply with Section 4(f) of the ESA with regard to the Mexican wolf;

28

1 WHEREAS, on September 16, 2015, the State of Colorado filed a motion to intervene in
2 *State of Arizona v. Jewell et al.*, 4:15-cv-00245-JGZ, which was granted on October 23, 2015;

3 WHEREAS, the New Mexico Department of Game and Fish and the State of Colorado
4 decline to join the Agreement because they object to the final recovery plan deadline reflected
5 in Paragraph 1, but both parties have represented to the settling parties that they will not oppose
6 approval of the Agreement and intend to voluntarily dismiss their claims pursuant to Fed. R.
7 Civ. P. 41(a)(1)(A) within 7 days of the Court’s approval of this Agreement;

8 WHEREAS, on November 30, 2015, the State of Utah filed a motion to intervene in
9 *State of Arizona v. Jewell et al.*, 4:15-cv-00245-JGZ, which was granted on January 25, 2016;

10 WHEREAS, based on the available information, the Service believes that preparation of
11 a recovery plan for the Mexican wolf pursuant to Section 4(f) of the ESA, 16 U.S.C. § 1533(f),
12 will promote the conservation of the species;

13 WHEREAS, Plaintiffs, the State of Utah, and Defendants, through their authorized
14 representatives, and without any admission or final adjudication of the issues of fact or law with
15 respect to Plaintiffs’ and the State of Utah’s claims, have reached a settlement that they consider
16 to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiffs and the
17 State of Utah’s complaints;

18 WHEREAS, Plaintiffs, the State of Utah, and Defendants agree that settlement of this
19 action in this manner is in the public interest and is an appropriate way to resolve the dispute
20 between them;

21 NOW, THEREFORE, Plaintiffs, the State of Utah, and Defendants hereby stipulate and
22 agree as follows:

23 1. Pursuant to Section 4(f) of the ESA, 16 U.S.C. § 1533(f), as amended, the Service
24 agrees to complete a final recovery plan for the Mexican wolf and submit for publication in the
25 Federal Register a notice of availability of the recovery plan by November 30, 2017.

26 2. The Service agrees to complete an independent peer review of the draft recovery plan,
27 consistent with Section A(2) of the Department of Interior and Department of Commerce
28 Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities (“Peer

1 Review Policy”), 59 Fed. Reg. 34,270 (July 1, 1994). Consistent with the Peer Review Policy,
2 the Service agrees to solicit and consider all available scientific and commercial information
3 from appropriate State agencies and other entities specified in Section A(2)(a) of the Peer
4 Review Policy, including but not limited to the State of Arizona, the State of New Mexico, the
5 State of Colorado, and the State of Utah.

6 3. In the interim period until the final recovery plan issues as specified in Paragraph 1, the
7 Service agrees to submit reports on the status of the recovery planning process to the Court and
8 to the parties at six-month intervals. The first status report will be due six months after approval
9 of this Agreement by the Court.

10 4. The Order entering this Agreement may be modified by the Court upon good cause
11 shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between
12 Plaintiffs, the State of Utah, and Defendants filed with and approved by the Court, or upon
13 written motion filed by one of the parties to the Agreement and granted by the Court. In the
14 event that any party to this Agreement seeks to modify the terms of this Agreement, including
15 the deadline specified in Paragraph 1, or in the event of a dispute arising out of or relating to
16 this Agreement, or in the event that any party to this Agreement believes that any other party
17 has failed to comply with any term or condition of this Agreement, the party seeking the
18 modification, raising the dispute, or seeking enforcement shall provide the other parties to this
19 Agreement with notice of the claim or modification. The parties to this Agreement agree that
20 they will meet and confer (either telephonically or in person) at the earliest possible time in a
21 good-faith effort to resolve the claim before seeking relief from the Court. If the parties to this
22 Agreement are unable to resolve the claim themselves, the aggrieved party may seek relief from
23 the Court. In the event that Defendants fail to meet the deadline in Paragraph 1 and have not
24 sought to modify it, the Plaintiffs and the State of Utah’s first remedy shall be a motion to
25 enforce the terms of this Agreement. This Agreement shall not, in the first instance, be
26 enforceable through a proceeding for contempt of court.

27 5. Defendants agree to pay Plaintiffs Defenders of Wildlife, Center for Biological
28 Diversity, Endangered Wolf Center, David R. Parsons, and Wolf Conservation Center’s

1 reasonable attorneys' fees and costs incurred in connection with their complaint and opposition
2 to the motion to dismiss, pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g), in the
3 amount of \$56,467.07. Plaintiffs agree to accept this amount in full satisfaction of any and all
4 claims, demands, rights, and causes of action for attorneys' fees and costs incurred in
5 connection with the above-captioned litigation pursuant to the ESA, 16 U.S.C. § 1540(g), and/or
6 any other statute and/or common law theory, through and including the date of this agreement.
7 Plaintiffs Defenders of Wildlife, Center for Biological Diversity, Endangered Wolf Center,
8 David R. Parsons, and Wolf Conservation Center agree that receipt of this payment from
9 Defendants shall operate as a release of Plaintiffs' claims for attorneys' fees and costs in this
10 matter, through and including the date of this agreement.

11 6. Plaintiff State of Arizona and Plaintiff Intervenor State of Utah agree to release any and
12 all claims for attorneys' fees and costs that they may have against Defendants under any
13 authority with respect to this litigation through and including the date of dismissal.

14 7. Plaintiffs' and the State of Utah's releases set forth in paragraphs 5-6 are expressly
15 limited to the above-captioned actions and do not apply to any other litigation including, but not
16 limited to, any ongoing and/or future litigation regarding the Mexican wolf recovery plan. By
17 this Agreement, Defendants do not waive any right to contest attorneys' fees claimed by
18 Plaintiffs, Intervenors, or their respective counsel, including hourly rates, in any future
19 litigation, or continuation of the present actions. Further, this Agreement has no precedential
20 value and shall not be used as evidence in any other attorneys' fees litigation.

21 8. Plaintiffs Defenders of Wildlife, Center for Biological Diversity, Endangered Wolf
22 Center, David R. Parsons, and Wolf Conservation Center agree to furnish Defendants with the
23 information necessary to effectuate the payment specified in paragraph 5 above. Defendants
24 agree to submit all necessary paperwork for the processing of the attorneys' fees award to the
25 Department of the Treasury's Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within
26 ten (10) days of the receipt of the necessary information from Plaintiffs Defenders of Wildlife,
27 Center for Biological Diversity, Endangered Wolf Center, David R. Parsons, and Wolf
28 Conservation Center or the approval of this Agreement by the Court, whichever is later.

1 Plaintiffs Defenders of Wildlife, Center for Biological Diversity, Endangered Wolf Center,
2 David R. Parsons, and Wolf Conservation Center's attorneys agree to send confirmation of the
3 receipt of the payment to counsel for Defendants within 14 days of such payment.

4 9. Plaintiffs, the State of Utah, and Defendants agree that this Agreement was negotiated
5 and entered into in good faith and that it constitutes a settlement of claims that were vigorously
6 contested, denied, and disputed. By entering into this Agreement, neither Plaintiffs, the State of
7 Utah, nor Defendants waive any claim or defense, except as expressly provided herein.

8 10. No provision of this Agreement shall be interpreted as, or constitutes, a commitment or
9 requirement that Defendants are obligated to spend funds in violation of the Anti-Deficiency
10 Act, 31 U.S.C. § 1341, or any other law or regulation.

11 11. No provision of this Agreement shall be interpreted to or constitute a commitment or
12 requirement that the Defendants take action in contravention of the ESA, the APA, or any other
13 law or regulation, either substantive or procedural. With respect to the procedures to be
14 followed in developing the final recovery plan and with respect to the substance of the final
15 recovery plan, nothing in this Agreement shall be construed to limit or modify the discretion
16 accorded to the Service by the ESA, APA, or general principals of administrative law. To
17 challenge any recovery plan issued pursuant to Paragraph 1, Plaintiffs and the State of Utah
18 must file a separate action. Defendants reserve the right to raise any applicable claims or
19 defenses to any substantive challenge raised by any party. The parties to this Agreement agree
20 that this paragraph shall be construed in a manner that is consistent with the provisions of
21 Paragraphs 1-3, *supra*, and not to negate the provisions of those paragraphs.

22 12. The Agreement contains all of the agreement between Plaintiffs, the State of Utah, and
23 Defendants, and is intended to be the final and sole agreement between them. Plaintiffs, the
24 State of Utah, and Defendants agree that any prior or contemporaneous representations or
25 understanding not explicitly contained in this written Agreement, whether written or oral, are of
26 no further legal or equitable force or effect.

27 13. The terms of this Agreement shall become effective upon entry of an order by the Court
28 (similar in substance to the attached Proposed Order) approving the Agreement.

1 14. Upon approval of this Agreement by the Court, all counts of Plaintiffs' and the State of
2 Utah's complaints shall be dismissed with prejudice. Notwithstanding the dismissal of
3 Plaintiffs' and the State of Utah's complaints, however, the parties to this Agreement hereby
4 stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with
5 the terms of this Agreement and to resolve any motions to modify such terms. *See Kokkonen v.*
6 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

7 15. The undersigned representatives of each party certify that they are fully authorized by
8 the party or parties they represent to agree to the Court's entry of the terms and conditions of the
9 Agreement and do hereby agree to the terms herein.

10
11 DATED: April 26, 2016

12 Respectfully submitted,

13 JOHN C. CRUDEN
Assistant Attorney General

14
15 /s/ Nicole M. Smith
NICOLE M. SMITH, Trial Attorney
16 CA Bar Number 303629
U.S. Department of Justice
17 Environment & Natural Resources Division
Wildlife & Marine Resources Section
18 Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
19 Telephone: (202) 305-0368
20 Email: nicole.m.smith@usdoj.gov

21 Attorneys for Defendants in Case Nos. 4:14-
22 cv-02472-JGZ and 4:15-cv-00245-JGZ

23 /s/ Timothy J. Preso (with permission)

24 TIMOTHY J. PRESO
Earthjustice - Bozeman, MT
25 313 E Main St.
Bozeman, MT 59715
26 Tele: (406) 586-9699
27 Fax: (406) 586-9695
28 Email: tpreso@earthjustice.org

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Attorney for Plaintiffs in Case
No. 4:14-cv-02472-JGZ

/s/ James Frederick Odenkirk (with
permission)

James Frederick Odenkirk
State of Arizona
Office of the Attorney General
1275 W Washington
Phoenix, AZ 85007-2997
Tele: (602) 542-7787
Fax: (602) 542-7798
Email: james.odenkirk@azag.gov

Attorney for Plaintiff in Case No. 4:15-cv-
00245-JGZ

/s/ Martin B. Bushman (with permission)

Martin B. Bushman
State of Utah
Office of the Attorney General
P.O. Box 140856
Salt Lake City, UT 84114-0856
Tele: (801)538-7227
Fax: (801) 538-7440
Email: martinbushman@utah.gov

Attorneys for the State of Utah in Case No.
4:15-cv-00245-JGZ

1 JOHN C. CRUDEN, Assistant Attorney General
 2 Environment & Natural Resources Division
 3 NICOLE M. SMITH, Trial Attorney
 4 CA Bar Number 303629
 5 U.S. Department of Justice
 6 Environment & Natural Resources Division
 7 Wildlife & Marine Resources Section
 8 Ben Franklin Station, P.O. Box 7611
 9 Washington, D.C. 20044-7611
 10 Telephone: (202) 305-0368
 11 Email: nicole.m.smith@usdoj.gov
 12 *Attorneys for Defendants*

13
 14 **IN THE UNITED STATES DISTRICT COURT**
 15 **FOR THE DISTRICT OF ARIZONA**
 16 **TUCSON DIVISION**

14	Defenders of Wildlife, et al.,)	
	Plaintiffs,)	No. 4:14-cv-02472-JGZ
15	v.)	
16	S.M.R. Jewell, et al.,)	
	Federal Defendants,)	
17	and;)	JOINT MOTION TO ENTER
18	Protect Americans Now, et al.,)	STIPULATED SETTLEMENT
	Defendant-Intervenors.)	AGREEMENT (OPPOSED)
19)	
20	<hr/>		
	State of Arizona,)	
21	Plaintiff,)	
22	and;)	
	State of Colorado, New Mexico)	
23	Department of Game and Fish, and)	No. 4:15-cv-00245-JGZ
24	State of Utah,)	
	Plaintiff-Intervenors;)	
25	v.)	
26	S.M.R. Jewell, et al.,)	
27	Defendants.)	
28			

1
2 **JOINT MOTION TO ENTER STIPULATED SETTLEMENT AGREEMENT**

3 Plaintiffs and Federal Defendants in the above-captioned actions¹ jointly move
4 this Court to enter the attached Stipulated Settlement Agreement (“Agreement”) as an
5 order of the Court. The State of Utah, Plaintiff-Intervenor in Case No. 4:15-cv-00245-
6 JGZ, is a party to the Agreement and joins in this motion. Defendant-Intervenors in
7 Case No. 4:14-cv-02472-JGZ² declined to join in the Agreement and have indicated that
8 they oppose this motion and intend to file an opposition brief. The State of Colorado
9 and the New Mexico Department of Fish and Game, Plaintiff-Intervenors in Case No.
10 4:15-cv-00245-JGZ, also declined to join in the Agreement, but have indicated that they
11 do not oppose entry of the Agreement and will voluntarily dismiss their claims within
12 seven days of the Court’s approval of the Agreement.

13 Plaintiffs in both actions, along with Plaintiff-Intervenors in Case No. 4:15-cv-
14 00245-JGZ, allege that the U.S. Fish and Wildlife Service (“Service”) has violated
15 Section 4(f) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533(f), by failing to
16 prepare a legally adequate recovery plan for the Mexican gray wolf, an endangered
17 species. The Agreement would resolve the Plaintiffs’ claims in both actions, as well as
18 the related claims of the State of Utah, Plaintiff-Intervenor in Case No. 4:15-cv-00245-
19 JGZ, by requiring the Service to prepare a new recovery plan for the species by
20 November 30, 2017. As stated above, the remaining Plaintiff-Intervenors in Case No.
21

22
23 ¹ Plaintiffs in Case No. 4:14-cv-02472-JGZ are Defenders of Wildlife, Center for
24 Biological Diversity, Endangered Wolf Center, David R. Parsons, and Wolf Conservation
25 Center. Plaintiff in Case No. 4:15-cv-00245-JGZ is the State of Arizona. Federal
26 Defendants in both cases are S.M.R. Jewell, Secretary of the United States Department of
27 the Interior, and the United States Fish and Wildlife Service.

28 ² Defendant-Intervenors in Case No. 4:14-cv-02472-JGZ are Protect Americans Now,
Colorado Farm Bureau, New Mexico Farm and Livestock Bureau, Utah Farm Bureau,
and Coalition for Arizona and New Mexico Communities for Stable Economic Growth.

1 4:15-cv-00245-JGZ have agreed to promptly dismiss their claims after the Court
2 approves the Agreement, at which point both lawsuits will be fully resolved.

3 As demonstrated below, the Agreement is fair, reasonable, consistent with the
4 ESA, and the product of good-faith negotiations involving all parties. The Agreement
5 also will not prejudice any of the non-signing parties, including Defendant-Intervenors
6 in Case No. 4:14-cv-02474-JGZ. Because the Service is required to publish a draft
7 recovery plan for public comment, the non-signing parties will have an opportunity to
8 submit their views on the draft plan (including any objections) to the Service. The
9 Agreement also has no effect on any party's right to bring a challenge to the final
10 recovery plan. Therefore, and for the additional reasons stated below, the Court should
11 grant this motion and enter the Agreement as an order of the Court. A proposed order
12 accompanies this motion.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. STATUTORY BACKGROUND**

15 Congress enacted the ESA "to provide a means whereby the ecosystems upon
16 which endangered species and threatened species depend may be conserved, [and] to
17 provide a program for the conservation of such endangered species and threatened
18 species." 16 U.S.C. § 1531(b). In furtherance of this purpose, Section 4(f) of the ESA
19 provides that the Secretary³ "shall develop and implement . . . recovery plans . . . for the
20 conservation and survival of endangered species and threatened species listed pursuant
21 to the [ESA], unless [she] finds that such a plan will not promote the conservation of the
22 species." *Id.* § 1533(f)(1). In 1988, Congress amended the ESA to require that recovery
23 plans include certain provisions, to the maximum extent practicable. *See* Pub. L. 100-
24 478, § 1003, 102 Stat. 2306 (Oct. 7, 1988). Specifically, recovery plans must

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26
27 ³ Depending on the species involved, the Secretary referred to is either the Secretary of
28 the Interior or the Secretary of Commerce. 16 U.S.C. § 1532(15). The Mexican wolf falls
under the jurisdiction of the Department of the Interior.

1 incorporate, to the maximum extent practicable, “site-specific management actions”
2 necessary for “conservation and survival of the species,” measurable criteria for
3 attaining recovery of the species and removal from the list of threatened or endangered
4 species, and estimates of the time and cost necessary to achieve recovery of the species.
5 *See id.* § 1533(f)(1)(B)(i)-(iii). Prior to final approval of a new or revised recovery plan,
6 the Service must provide public notice and an opportunity for public comment on the
7 plan, and must consider all information presented during the public comment period. 16
8 U.S.C.A. § 1533(f)(4).

9 II. FACTUAL BACKGROUND

10 The Service listed the Mexican gray wolf (*Canis lupus baileyi*) as an endangered
11 subspecies of gray wolf in 1976. 41 Fed. Reg. 17,736 (Apr. 28, 1976). In 1978, the
12 Service listed the entire gray wolf species in North America (south of Canada) as
13 endangered, except in Minnesota where it was listed as threatened. This 1978 listing at
14 the species level subsumed the previous Mexican wolf subspecies listing. 43 Fed. Reg.
15 9,607 (March 9, 1978). However, the 1978 listing rule made clear that the Service would
16 continue to recognize the Mexican wolf as a valid biological subspecies for purposes of
17 research and conservation. *Id.* On January 16, 2015, the Service reclassified the Mexican
18 wolf as an endangered subspecies of the gray wolf. 80 Fed. Reg. 2,488.

19 The Service issued a document entitled the “Mexican Wolf Recovery Plan” in
20 1982, six years before the ESA Amendments requiring recovery plans to include
21 “objective and measurable criteria” for attaining recovery of the species. The 1982
22 recovery plan “did not provide recovery criteria, but recommended an initial two-pronged
23 approach to recovery to establish a captive-breeding program and reintroduce captive
24 Mexican wolves to the wild.” 80 Fed. Reg. 2512-01 (Jan. 16, 2015). The Service has
25 publicly indicated that it intends to issue a new recovery plan for the subspecies
26 containing objective and measurable recovery criteria. *See, e.g.*, 80 Fed. Reg. at 2,494,
27 2496, 2524.

28

1 On November 12, 2014, Plaintiffs Defenders of Wildlife, Center for Biological
2 Diversity, Endangered Wolf Center, David R. Parsons, and Wolf Conservation Center
3 (collectively “Defenders of Wildlife”) filed *Defenders of Wildlife et al. v. Jewell et al.*,
4 4:14-cv-02472-JGZ, alleging that the Service’s failure to prepare a recovery plan for the
5 Mexican wolf in compliance with ESA Section 4(f), 16 U.S.C. § 1533(f), violates the
6 ESA and the Administrative Procedure Act (“APA”). The Court subsequently allowed
7 Protect Americans Now, Colorado Farm Bureau, New Mexico Farm and Livestock
8 Bureau, Utah Farm Bureau, and Coalition of Arizona and New Mexico Communities for
9 Stable Economic Growth to intervene as Defendant-Intervenors. Federal Defendants filed
10 a motion to dismiss the complaint for failure to state a claim and lack of jurisdiction on
11 January 30, 2015 (14-cv-2472-JGZ, Doc. No. 18), which was denied by this Court on
12 September 30, 2015 (14-cv-2472-JGZ, Doc. No. 35). Defendant- Intervenors also filed a
13 motion to dismiss, which was denied on July 13, 2015 (14-cv-2472-JGZ, Doc. No. 30).

14 On June 8, 2015, the State of Arizona filed *State of Arizona v. Jewell, et al.*, 4:15-
15 cv-00245-JGZ, alleging that the Service’s failure to prepare a new recovery plan for the
16 Mexican wolf, pursuant to ESA Section 4(f), 16 U.S.C. § 1533(f), violates the ESA
17 and/or the APA. The Court subsequently allowed the States of New Mexico, Colorado,
18 and Utah to intervene as Plaintiff-Intervenors.

19 In order to facilitate ongoing settlement talks, this Court granted several motions
20 in both cases to stay the litigation and for extensions of time. *See* 14-cv-2472-JGZ, Doc.
21 Nos. 39, 41, 43, 46, 49; 15-cv-245-JGZ, Doc. Nos. 10, 22, 36, 41, 43. During this time,
22 the parties engaged in a number of teleconferences, exchanged proposals, and
23 independently conferred with their respective clients. After nearly six months of
24 settlement discussions, and fourteen months after Defenders of Wildlife filed their initial
25 Complaint, Plaintiffs in both actions, Plaintiff-Intervenor the State of Utah, and Federal
26 Defendants reached a settlement memorialized in the attached Agreement.

27 Under the terms of the Agreement, the Service would commit to: (1) complete a
28 final recovery plan for the Mexican wolf by November 30, 2017; (2) complete an

1 independent peer review of the draft recovery plan, consistent with Section A(2) of the
2 Department of Interior and Department of Commerce Interagency Cooperative Policy
3 for Peer Review in Endangered Species Activities, 59 Fed. Reg. 34,270 (July 1, 1994);
4 (3) submit reports on the status of the recovery planning process to the Court and the
5 parties at six-month intervals until the final recovery plan issues; and (4) pay Defenders
6 of Wildlife, et al. \$56,467.07 to settle all of their claims for costs and attorneys' fees in
7 this matter. *See* Attachment 1, ¶¶ 1-3, 5. In turn, upon approval of the Agreement by the
8 Court, all counts of Plaintiffs' and the State of Utah's complaints will be dismissed with
9 prejudice, while preserving their right to bring a challenge to the final recovery plan.
10 *Id.*, ¶¶ 7, 14.

11 Defendant-Intervenors in Case No. 4:14-cv-02472-JGZ are not signatories to the
12 Agreement and have indicated that they oppose the instant motion. *Id.* The State of
13 Colorado and the New Mexico Department of Game and Fish, Plaintiff-Intervenors in
14 Case No. 4:14-cv-00245-JGZ, have declined to join the settlement but have indicated
15 that they do not oppose entry of the Agreement and will voluntarily dismiss their claims
16 after the Agreement within seven days of the Court approving the Agreement. *Id.*

17 III. LEGAL STANDARD

18 It is settled law that consent decrees should be approved when a court determines
19 that the consent decree is "fair, reasonable and equitable and does not violate the law or
20 public policy." *Sierra Club, Inc. v. Electronic Controls Design Inc.*, 909 F.2d 1350,
21 1355 (9th Cir. 1990); *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990)
22 ("Before approving a consent decree, a district court must be satisfied that it is at least
23 fundamentally fair, adequate and reasonable.").

24 "Settlement is the offspring of compromise; the question [to] address is not
25 whether the final product could be prettier, smarter or snazzier, but whether it is fair,
26 adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th
27 Cir. 1998). While a court must conduct a heightened scrutiny of a consent decree
28 affecting the public interest, "the court need not require that that the decree be 'in the

1 public's best interest' if it is otherwise reasonable." *Oregon*, 913 F.2d at 581 (citing *SEC*
2 *v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984)). Indeed, the court's approval "is nothing
3 more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d
4 615, 625 (9th Cir. 1982) (quotation omitted). And, as here, "when a government agency
5 charged with protecting the public interest has pulled the laboring oar in constructing the
6 proposed settlement," a reviewing court may appropriately accord more deference to the
7 parties' agreement. *United States v. Montrose Chem. Corp.*, 50 F. 3d 741, 746 (9th Cir.
8 1995) (citation omitted). As set forth below, the Agreement submitted to the Court in
9 these cases amply satisfies these threshold requirements for judicial approval.

11 IV. ARGUMENT

12 The Agreement currently before the Court is "fair, reasonable and equitable and
13 does not violate the law or public policy." *Sierra Club*, 909 F.2d at 1355. Accordingly,
14 the parties to this motion respectfully ask that the Court adopt the Agreement as an Order
15 of the Court.

16 A. The Negotiation Process Was Procedurally Fair.

17 "The court must look to the negotiation process and 'attempt to gauge its candor,
18 openness, and bargaining balance'" when examining the procedural fairness of the
19 agreement. *State of Ariz. ex rel. Woods v. Nucor Corp.*, 825 F. Supp. 1452, 1456 (D.
20 Ariz. 1992) (quotation omitted) *aff'd sub nom. State of Ariz. v. Components Inc.*, 66 F.3d
21 223 (9th Cir. 1995). "If the decree is the product of 'good faith, arms-length
22 negotiations,' it is presumptively valid." *Turtle Island Restoration Network v. U.S. Dep't*
23 *of Commerce*, 834 F. Supp. 2d 1004, 1017 (D. Haw. 2011) (quotations omitted) *aff'd*
24 672 F.3d 1160 (D. Haw. 2012).

25 The Agreement is the product of exactly this type of rigorous, good-faith
26 negotiation. Since shortly after the State of Arizona filed its complaint, the parties
27 actively negotiated the Agreement's proposed terms. Over the course of nearly six-
28 months, the parties in both lawsuits engaged in a number of meetings via teleconference

1 and exchanged proposed additions or modifications to the terms of the Agreement. All
2 parties in both cases were given a fair and equal opportunity to participate, and were
3 apprised of each iteration of the Agreement as the negotiation process unfolded. In short,
4 the Agreement was the product of good faith, arms-length negotiation, and as such, is
5 presumptively valid. *Turtle Island*, 834 F. Supp. 2d. at 1017.

6 **B. The Settlement Is Substantively Fair.**

7 The Court must also examine the substantive fairness of the proposal. *Turtle*
8 *Island*, 834 F. Supp. 2d at 1017. With respect to substantive fairness, the court does not
9 determine whether “the settlement is one which the court itself might have fashioned, or
10 considers ideal. Rather, substantive fairness ‘mirrors the requirement that the [consent]
11 decree be equitable.’” *Id.* (quotations omitted). “The court need only be satisfied that the
12 decree represents a reasonable factual and legal determination.” *Oregon*, 913 F.2d at 581
13 (internal quotations omitted).

14 As described above, under the terms of the Agreement, the Service will commit
15 to: (1) complete a final recovery plan for the Mexican wolf by November 30, 2017; (2)
16 complete an independent peer review of the draft recovery plan, consistent with Section
17 A(2) of the Department of Interior and Department of Commerce Interagency
18 Cooperative Policy for Peer Review in Endangered Species Activities, 59 Fed. Reg.
19 34,270 (July 1, 1994); (3) submit reports on the status of the recovery planning process
20 to the Court and the parties at six-month intervals until the final recovery plan issues;
21 and (4) pay Defenders of Wildlife, et al. \$56,467.07 to settle all of their claims for costs
22 and attorneys’ fees in this matter. *See* Attachment 1. In return, upon the Court’s approval
23 of the Agreement, all counts of Plaintiffs’ and the State of Utah’s complaints shall be
24 dismissed with prejudice. *Id.*, ¶ 14.

25 This arrangement is substantively fair to all parties. First, Plaintiffs and the State
26 of Utah obtain some measure of the relief sought in their Complaints in that the Service
27 will complete a new recovery plan for the Mexican wolf by November 30, 2017.
28 Meanwhile, the Agreement provides the Service with a manageable schedule for

1 completing the recovery plan that accounts for its workload and other priorities. Finally,
2 the Agreement does not prejudice or impose any hardship on the non-signing parties,
3 including Defendant Intervenors. The Agreement does not require any action on the part
4 of non-signing parties. Nor does it affect their right to submit comments on the draft
5 recovery plan, see 16 U.S.C. § 1533(f)(4), or to bring a challenge to the final recovery
6 plan in Court. Indeed, the Agreement affords certain protections to the non-signing
7 parties, and to the public more generally, by ensuring that the Service's recovery plan
8 will be subjected to a specified peer-review process that is designed to ensure its
9 scientific integrity, and by calling for submission by the Service to the parties and the
10 Court of periodic reports on the status of its recovery planning process that would not
11 otherwise be publicly available.

12 If the parties, including Defendant Intervenors, opted to continue litigation, the
13 outcome would be uncertain. The Service could have been compelled to complete the
14 recovery plan on a shorter schedule, or this Court may have found that the Service's
15 actions were reasonable under the circumstances and set a timetable of the Service's
16 choosing, or further, the Court may have dismissed the action altogether. This balancing
17 of litigation risk to arrive at a resolution is precisely the type of settlement that courts
18 deem fair. *See United States v. Armour & Co*, 402 U.S. 673, 681 (1971) ("in exchange
19 for the saving of cost and the elimination of risk, the parties each give up something they
20 might have won had they proceeded with the litigation").

21 **C. The Settlement is Reasonable.**

22 For the reasons already discussed above the Agreement is also reasonable. The
23 primary effect of the Agreement is to establish a reasonable deadline for the Service's
24 completion of a new recovery plan for the Mexican wolf. Moreover, the Agreement
25 provides each party with some, but not all, of the outcomes that each desired.

26 Furthermore, the alternative to the proposed Agreement is litigation to adjudicate the
27 merits of the Plaintiffs' and Plaintiff Intervenors' respective complaints. Instead,
28 Plaintiffs, the State of Utah, and Federal Defendants negotiated at arm's-length and have

1 reached a settlement agreement that provides each party with some benefit. Indeed,
2 voluntary settlement is often the preferable course of action to conserve each party's
3 resources, not to mention valuable judicial resources. *See Ahern v. Central Pac. Freight*
4 *Lines*, 846 F.2d 47, 48 (9th Cir. 1988).

5 **D. The Settlement is Consistent with the ESA and in the Public Interest.**

6 "Whether a consent decree is within the public interest in part depends on
7 whether it is 'consistent with the statute that the judgement was meant to enforce.'" *Turtle Island*, 834 F. Supp. 2d at 1019 (citing *Citizens for a Better Env't v Gorsuch*, 718
8 F.2d 1117, 1128 (D.C. Cir. 1983). Here, the Agreement furthers the goals of the ESA by
9 setting a date by which the Service will complete a new recovery plan for the Mexican
10 wolf.
11

12 The purpose of the ESA is to conserve threatened and endangered species. 16
13 U.S.C. § 1531(b); *see also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978) (It
14 is consistent with the Congressional intent to afford endangered species "the highest of
15 priorities"). In furtherance of these policies, the Agreement provides a date by which the
16 Service will complete a new recovery plan for the Mexican wolf. The role of recovery
17 plans, once issued, is to provide a "basic road map to recovery, i.e., the process that
18 stops or reverses the decline of a species and neutralizes threats to its existence." *Ctr.*
19 *for Biological Diversity v. Kempthorne*, 607 F. Supp. 2d 1078, 1088 (D. Ariz. 2009)
20 (quoting *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001)).
21 Thus, a recovery plan for the Mexican wolf will further the goals of the ESA by
22 providing a guide to recovering the Mexican wolf and ultimately removing the wolf
23 from the endangered species list. The Service's commitment to prepare a recovery plan
24 is also consistent with its statements to the public that "[a] recovery strategy, including
25 delisting criteria, will be developed in a revised recovery plan for the Mexican wolf." 80
26 Fed. Reg. at 2,494, 2,496, 2,524.

27 By advancing the goals of the ESA, the Agreement also benefits the public
28 interest. Moreover, the Ninth Circuit is clear that preserving environmental resources

1 serves the public interest. *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir.
2 2008) (en banc). Finally, the Service's agreement to complete a recovery plan in no way
3 impedes the interests of the non-signing parties or other members of the public.

4 **V. CONCLUSION**

5 For the reasons discussed above, the Agreement is fair, reasonable and equitable,
6 and in the public interest. Accordingly, the undersigned movants respectfully request
7 that this Court enter the Agreement as an order of the Court.

8
9 DATED: April 26, 2016

10
11 Respectfully submitted,

12 JOHN C. CRUDEN
13 Assistant Attorney General

14 /s/ Nicole M. Smith
15 NICOLE M. SMITH, Trial Attorney
16 CA Bar Number 303629
17 U.S. Department of Justice
18 Environment & Natural Resources Division

19 Wildlife & Marine Resources Section
20 Ben Franklin Station, P.O. Box 7611
21 Washington, D.C. 20044-7611
22 Telephone: (202) 305-0368
23 Email: nicole.m.smith@usdoj.gov

24 Attorneys for Defendants in Case Nos.
25 4:14-cv-02472-JGZ and 4:15-cv-00245-
26 JGZ

27 /s/ Timothy J. Preso (with permission)
28 TIMOTHY J. PRESO
Earthjustice - Bozeman, MT
313 E Main St.
Bozeman, MT 59715
Tele: (406) 586-9699
Fax: (406) 586-9695

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Email: tpreso@earthjustice.org

Attorney for Plaintiffs in Case
No. 4:14-cv-02472-JGZ

/s/ James Frederick Odenkirk (with
permission)

James Frederick Odenkirk
State of Arizona
Office of the Attorney General
1275 W Washington
Phoenix, AZ 85007-2997
Tele: (602) 542-7787
Fax: (602) 542-7798
Email: james.odenkirk@azag.gov

Attorney for Plaintiff in Case No. 4:15-cv-
00245-JGZ

/s/ Martin B. Bushman (with permission)

Martin B. Bushman
State of Utah
Office of the Attorney General
P.O. Box 140856
Salt Lake City, UT 84114-0856
Tele: (801)538-7227
Fax: (801) 538-7440
Email: martinbushman@utah.gov

Attorneys for the State of Utah in Case No.
4:15-cv-00245-JGZ

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CERTIFICATE OF SERVICE

I hereby certify that, this 26th day of April, 2016, I electronically filed the foregoing documents with the Clerk of the Court via CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Nicole M. Smith
NICOLE M. SMITH