IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NEW MEXICO DEPARTMENT OF GAME AND FISH, Petitioner, v. UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, in his official capacity as DIRECTOR OF THE UNITED STATES FISH AND WILDLIFE SERVICE; DR. BENJAMIN N. TUGGLE, in his official capacity as SOUTHWEST REGIONAL DIRECTOR FOR THE UNITED STATES FISH AND WILDLIFE SERVICE, Federal Respondents, and DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; WILDEARTH GUARDIANS; and NEW MEXICO WILDERNESS ALLIANCE, Proposed Defendant-Intervenors.	**Case No. 1:16-cv-00462-WJ-KBM** **MEMORANDUM IN SUPPORT OF DEFENDERS OF WILDLIFE ET AL.'S MOTION TO INTERVENE ON BEHALF OF FEDERAL DEFENDANTS**

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INTRODUCTION

Defenders of Wildlife, the Center for Biological Diversity, WildEarth Guardians, and the New Mexico Wilderness Alliance (collectively, the "Conservation Groups," unless referenced individually by name) respectfully move this Court to intervene as of right as defendants in this case pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. In the alternative, the Conservation Groups move to intervene permissively, pursuant to Rule 24(b)(1)(B).

In its complaint, Petitioner New Mexico Department of Game and Fish ("State of New Mexico" or "Department") seeks to halt the implementation of a key provision in the U.S. Fish and Wildlife Service's (the "Service") 2015 management rule for the Mexican gray wolf population – the expansion of the geographic area into which captive wolves may be released. See 80 Fed. Reg. 2512 (Jan. 16, 2015) (hereinafter "Revised Rule"). The Service promulgated the 2015 management rule pursuant to section 10(j) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1539(j). The State's lawsuit seeks to eliminate the Service's authority to implement the Revised Rule and release wolves into New Mexico, unless the Department grants the Service permission. Dkt. #1 at 12-13 ¶¶ 1, 4, 7, 9 (Prayer for Relief). The State also seeks injunctive relief halting all future releases and requiring the capture and removal of wolves already released into the State. Id. ¶¶ 3, 6, 8.

The Conservation Groups' goal is to ensure the Mexican gray wolf population's survival and recovery in the wild, as required by the ESA. A judgment in favor of the State would frustrate that goal and harm the Conservation Groups' interests. Indeed, in order to protect those interests, Defenders of Wildlife ("Defenders") and the Center for Biological Diversity (the "Center") have intervened as defendants in two cases pending in the U.S. District Court for the

District of Arizona challenging the limited beneficial provisions of the Revised Rule, including the expanded release area.

Moreover, the Conservation Groups' interests are not adequately represented by the Service in this case. As described below, all four groups are currently challenging certain provisions of the Revised Rule in two additional cases pending in the District of Arizona. The Conservation Groups are challenging these provisions because they threaten to overwhelm the limited benefits provided by the Revised Rule, including the expanded release area, and preclude recovery of the Mexican gray wolf population. Thus, while the parties share the same immediate goal – to defeat the State's effort to halt wolf releases and force the removal of wolf pups already released – there is no guarantee that the Service will make all of the Conservation Groups' arguments or maintain its current position.

As set forth below, the Conservation Groups meet the test for intervention as of right under Rule 24(a)(2). In the alternative, the Conservation Groups meet the Rule 24(b)(1)(B) standard for permissive intervention because they have a claim or defense that shares common questions of law and fact with those raised by the State of New Mexico. Counsel for the Conservation Groups have contacted the other parties to determine their positions on this motion. The Federal Respondents take no position on the motion. The State of New Mexico opposes the motion.

FACTUAL BACKGROUND

I. THE MEXICAN GRAY WOLF RECOVERY PROGRAM AND RELEASE OF CAPTIVE WOLVES INTO THE WILD IN NEW MEXICO

The Mexican gray wolf (*Canis lupus baileyi*) has been listed as endangered under the ESA, 16 U.S.C. §§ 1531 et seq., since 1976. Despite the passage of four decades, the Service

has failed to recover this subspecies, as required by the ESA, and it remains one of the most endangered mammals in North America. See 16 U.S.C. §§ 1531(b) (ESA's purposes include "conservation" of threatened and endangered species and ecosystems upon which they depend); 1532(3) (defining "conservation" to include the use of all means to recover species to the point they no longer need ESA protection). In 1998, the Service reintroduced Mexican gray wolves from a captive breeding program into the Southwest, but limited the initial releases to a small area in Arizona. See generally 63 Fed. Reg. 1752 (Jan. 12, 1998) (ESA section 10(j) rule governing management of reintroduced wild population). Today, the reintroduced wild population struggles to survive, with dangerously depressed levels of genetic diversity, an artificially limited range, and overly-permissive rules for the killing of wolves.

The wolf releases at issue in this case are critical to addressing at least one of those challenges – the population's dangerously depressed levels of genetic diversity. The last known wild Mexican gray wolves were captured between 1977 and 1980 to establish a captive-breeding program to prevent the subspecies' extinction and to provide wolves for reintroduction into the wild. See 80 Fed. Reg. at 2515. Every Mexican gray wolf alive today is descended from seven wolves held in that captive breeding program. Id. However, the captive population was not initially managed to retain genetic variation and has lost much of the genetic diversity of the original seven founders. See Final Environmental Impact Statement for the Revised Rule (Nov. 2014), Chapter 1, at 20 (hereinafter "FEIS").[1] The reintroduced wild population is in even worse

[1] The FEIS and other public documents associated with the Revised Rule can be found on the Service's website: http://www.fws.gov/southwest/es/mexicanwolf/ (last visited May 24, 2016). The Court may take judicial notice of official government documents. Pueblo of Sandia v. United States, 50 F.3d 856, 861, n.6 (10th Cir. 1995).

condition. On average, the wolves in the wild population are as closely related to each other as siblings. Id. at 21. This population is already suffering from the effects of inbreeding, including reduced litter sizes. See id., Appendix G at 10.

The release of more genetically diverse captive wolves into the wild is essential to address the wild population's genetic plight. See 80 Fed. Reg. at 2542 ("Increased initial releases can improve the genetic composition of the [wild] population because the captive population contains Mexican wolves with genetic material that is currently unrepresented (or underrepresented) in the [wild] population…"); Sargent Decl. ¶¶ 15-17 (attached as Exh. 1).[2] However, under the 1998 rule, initial releases were limited to a designated "primary recovery zone," which was located entirely in Arizona and represented only 16 percent of the Blue Range Wolf Recovery Area. 63 Fed. Reg. at 1765; see also FEIS, Chapter 1, at 23-24.[3] With such a small area for releases, the primary recovery zone became nearly saturated with wolf territories. See FEIS, Chapter 1, at 24-25. Newly-released wolves had little success in navigating these existing territories and establishing new ones, contributing to the failure of the overall reintroduction program. See id.

Absent more, and successful, releases, the Service predicts that the negative effects of inbreeding, combined with other factors, will "ultimately caus[e] an extinction vortex" for the

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[2] The exhibits supporting this motion, consisting of eight declarations, total 66 pages. Pursuant to D.N.M.LR-Civ 10.5, all parties agreed to the Conservation Groups' exceedance of the 50-page limit.

[3] The 1998 management rule did allow "translocations" – the release of wolves that have previously been in the wild – into New Mexico. See FEIS, at xiv (defining "translocate"). "Initial releases" (referred to herein as "releases") refer to wolves that have only lived in captivity. Id. at xiii.

wild population. Id. at 25; see also id., Chapter 1, at 22 ("[T]he [wild] population is considered small, genetically impoverished, and significantly below estimates of viability appearing in the scientific literature…") (internal citations omitted). Indeed, David Parsons, a former Service biologist and the agency's first Mexican Wolf Recovery Coordinator, has concluded that without additional releases, it will be "impossible to achieve full recovery of the Mexican gray wolf subspecies." Parsons Decl. ¶ 11 (attached as Exh. 2). For that reason, Defenders and others have consistently advocated for the Service to release more captive wolves into the wild. See Sargent Decl. ¶¶ 8, 12; Robinson Decl. ¶¶ 10, 12, 15 (attached as Exh. 3).

The Service promulgated its Revised Rule in part to address the population's low level of genetic diversity. See 80 Fed. Reg. at 2517-18, 2520. The Revised Rule authorized the release of captive wolves into a larger geographic area, including suitable wolf habitat in New Mexico. Id. In the spring of 2015, after the Revised Rule went into effect, and even though it was not required to do so, the Service sought permits from the Department prior to releasing wolves directly into New Mexico. See Dkt. #9 at 5-6; Dkt. #3 at 5-6. The Department denied the permits, and the Service apparently did not release any wolves into the State that year while pursuing an ultimately unsuccessful appeal. Id. Soon thereafter, the Service stated that it must move forward with wolf releases in New Mexico regardless of the State's consent in order to comply with its responsibilities under the ESA. See Dkt. #3-7 (citing 43 C.F.R. § 24.4(i)(5)(i)). In 2016, the Service developed an "Initial Release and Translocation Plan for 2016" ("2016 Release Plan"), which describes the Service's specific plans for wolf releases and translocations this year. See Dkt. #3-9 – 3-10 (2016 Release Plan). Pursuant to the 2016 Release Plan, the Service intended to try to "cross-foster" a total of 2-6 pups into one or two litters on federal land

in New Mexico by the end of May and to release a captive pair of wolves and their pups into the Gila Wilderness or Aldo Leopold Wilderness on U.S. Forest Service land in New Mexico in June or July. See Dkt. #9-4 ¶ 8(a), (b) (Barrett Declaration). According to the Service, the agency released two pups on federal land in New Mexico as part of a "cross-fostering" effort in the spring of 2016, before this lawsuit was filed. Id. ¶ 8(b).

Through this litigation, the State of New Mexico seeks to force the Service to capture and remove those two pups, and to halt any new releases, including the pack scheduled to be released in June or July. If successful, this litigation would have the effect of significantly undermining one of the few beneficial provisions of the Revised Rule. It would also undermine the Service's authority and obligation under the ESA to provide for the recovery of endangered species like the Mexican gray wolf.

II. THE CONSERVATION GROUPS' INTERESTS AND EFFORTS TO ENSURE THE SURVIVAL AND RECOVERY OF THE MEXICAN GRAY WOLF

The Conservation Groups actively participated in the public process for the Service's Revised Rule authorizing the wolf releases at issue in this case and are currently involved in four different cases in the District of Arizona involving the Revised Rule. During the Service's public process to develop the Revised Rule, the Conservation Groups provided detailed comments and organized public events around the rule. See Sargent Decl. ¶ 7; Robinson Decl. ¶ 10; Horning Decl. ¶ 8 (attached as Exh. 4); see also P. Ossorio Decl. ¶¶ 15, 17 (attached as Exh. 5); J. Ossorio Decl. ¶¶ 13-16 (attached as Exh. 6). The final Revised Rule fell far short of providing for recovery of the Mexican gray wolf population, prompting the Conservation Groups to challenge the Rule in two cases pending the district court in Arizona. See Center for Biological Diversity v. Jewell, No. 4:15-cv-00019-TUC-JGZ (D. Ariz.) ("Center v. Jewell");

WildEarth Guardians v. Ashe, No. 4:15-cv-00285-JGZ (D. Ariz.) ("Guardians v. Ashe") (consolidated); Sargent Decl. ¶ 11; Robinson Decl. ¶ 12; Horning ¶ 20; Carey ¶¶ 24, 27 (attached as Exh. 7). However, the Revised Rule contained two limited provisions that offered modest progress toward recovery and that were supported by the Conservation Groups, including the expanded geographic area for wolf releases at issue in this case. See Robinson Decl. ¶ 12.

The beneficial provisions prompted two lawsuits from anti-wolf organizations challenging the Revised Rule, and Defenders of Wildlife ("Defenders") and the Center for Biological Diversity (the "Center") have been granted the right to intervene as defendants in both. See Arizona and New Mexico Coalition of Counties for Economic Growth et al. v U.S. Fish and Wildlife Serv., No. 4:15-CV-00179-TUC-JGZ (D. Ariz.) (consolidated with Center v. Jewell, No. 4:15-cv-00019-TUC-JGZ (lead), Dkt. #74 (August 18, 2015)); Safari Club Int'l v. Jewell, No. 4:16-cv-00094-TUC-JGZ (D. Ariz.), Dkt. #49 (May 13, 2016). These cases significantly overlap with the instant case; to the extent the State of New Mexico prevails in this litigation, Defenders' and the Center's defense of the Revised Rule's authorization for expanded release areas in the Arizona litigation may be rendered futile.[4]

As noted above, the Revised Rule also contains many provisions that are not supported by the best available science, in conflict with expert opinions, and that will undermine the

[4] The overlap between the instant litigation and the four pending challenges to the Revised Rule in the District of Arizona raises the strong possibility of inconsistent judgments, a factor in this Court's prior decisions to transfer two of these cases to the District of Arizona. See Arizona and New Mexico Coalition of Counties for Economic Growth v. U.S. Fish and Wildlife Service, No. 2:15-cv-00125-WJ-WPL, 2015 WL 9917341, at *7 (D.N.M.); see also Safari Club Int'l v. Jewell, No. 1:15-cv-00930-JCH-LF (D.N.M.), Dkt. #26 at 11-12 (Feb. 11, 2016). This case should be transferred to the District of Arizona for similar reasons.

prospects for recovery, in violation of the ESA. See Sargent Decl. ¶ 11; Robinson Decl. ¶ 12; Horning ¶ 20; Carey ¶¶ 24, 27. Because the problematic provisions of the Revised Rule threaten to impede the wolf's overall recovery, all four groups are currently challenging those provisions of the Revised Rule in two different cases in the District of Arizona. See Center v. Jewell, Dkt. #1; Guardians v. Ashe, Dkt. #1.[5] Consistent with their efforts to preserve the beneficial aspects of the Revised Rule, the Conservation Groups are seeking to vacate only the challenged portions of the Revised Rule. Center v. Jewell, Dkt. #1, at 50 ¶ 2; Guardians v. Ashe, Dkt. #1, at 24 ¶ 2.

The Conservation Groups' extensive advocacy and litigation in connection with the Revised Rule is consistent with their goal of ensuring the survival and recovery of the wild Mexican gray wolf population, in line with their organizations' missions. See Sargent Decl. ¶ 5 (describing Defenders' organizational mission); Robinson Decl. ¶ 6 (describing the Center's organizational mission); Horning Decl. ¶ 3 (describing WildEarth Guardians' ("Guardians") organizational mission); Newcomer Decl. ¶ 4 (describing New Mexico Wilderness Alliance's ("NMWA") organizational mission) (attached as Exh. 8). In pursuit of that goal, the Conservation Groups have engaged in extensive advocacy, public education, and litigation efforts for more than two decades. For example, Defenders has participated in public education efforts, discussed the conservation needs of the wolves on numerous occasions with state and

[5] Defenders and the Center, along with other plaintiffs, also brought separate litigation in 2014 in the U.S. District Court of Arizona to challenge the Service's failure to develop a legally-compliant recovery plan, as required by section 4(f) of the ESA, 16 U.S.C. § 1533(f). See Defenders of Wildlife v. Jewell, No. 4:14-cv-02472-JGZ (D. Ariz.). The plaintiffs and the Service, along with the State of Arizona (which filed a related case, State of Arizona v. Jewell, No. 4:15-cv-00245-JGZ (D. Ariz.)), and the State of Utah filed a stipulated settlement agreement to resolve both cases on April 26, 2016 that requires the Service to complete a recovery plan by November 2017. Id., Dkt. #50-1.

federal officials, including the Service and the State of New Mexico, drafted comment letters, funded a compensation program to reimburse ranchers for livestock lost to wolves from 1998 to 2010, and funded a coexistence program starting in 2000 to assist ranchers in decreasing conflicts with wolves. Sargent Decl. ¶¶ 6-7; see also P. Ossorio Decl. ¶ 6, J. Ossorio ¶ 13. Defenders also participated on the Stakeholder Subgroup of the Mexican Gray Wolf Recovery Team convened by the Service from 2010-2011. Sargent Decl. ¶¶ 6-7.

The Center has also worked for Mexican gray wolf recovery for decades. Among other things, after the inadequacy of the 1998 management rule became apparent, the Center filed a petition and two lawsuits challenging the Service's failure to recover the wolves. Robinson Decl. ¶¶ 10-11. In response to the Center's actions, the Service began the revision process that culminated with the Revised Rule. Id. at ¶ 11. In addition, the Center has conducted at least 170 slide show presentations, written dozens of opinion pieces for newspapers, engaged in outreach efforts at public events, contributed to hundreds of news articles and broadcasts on the wolves by providing information to reporters, testified at hearings, submitted written comments to government agencies, and participated in other public cooperative management processes. Robinson Decl. ¶¶ 9-10.

Similarly, Guardians has utilized multiple strategies to promote Mexican gray wolf recovery. Guardians has brought several lawsuits to remedy illegal activities on the part of state and federal agencies that threaten wolf recovery. Horning Decl. ¶ 6. Guardians has also worked extensively in cooperation with ranchers who may be interested in accepting "buy outs" to voluntarily retire their grazing permits, allowing restoration of essential habitat and reducing conflicts between wolves and livestock. Horning Decl. ¶ 7; Carey Decl. ¶ 22.

The New Mexico Wilderness Alliance has focused on public education efforts to help promote wolf recovery and protection of their wilderness habitat. Among other things, NMWA offers the public wilderness outings with wolf scientists and other experts to promote education about the status of the Mexican gray wolf and encourage the public to advocate for wolf recovery. Newcomer Decl. ¶¶ 5, 8.

The Conservation Groups' efforts are motivated by their staffs' and members' intense personal commitments to the conservation and survival of the Mexican gray wolf in the wild. The Conservation Groups' staff and members have aesthetic and scientific interests in the wolves and their native habitat, and frequently visit areas where wolves live in New Mexico and Arizona in the hope of seeing or hearing them. Sargent Decl. ¶¶ 9-10; Robinson Decl. ¶¶ 4, 16, 20-21; Horning Decl. ¶¶ 9-18; Parsons Decl. ¶ 7; Newcomer Decl. ¶¶ 6-8; P. Ossorio Decl. ¶¶ 7-13; J. Ossorio Decl. ¶¶ 4-12; 20; Carey Decl. ¶¶ 5-8, 10-11, 13-21, 26. Their staff and members greatly value those rare times when they catch a glimpse of a wolf or hear them howl, describing those moments as a significant enhancement to their wilderness experience and recreational pursuits. Sargent Decl. ¶ 9; Robinson Decl. ¶¶ 4, 21; Horning Decl. ¶¶ 9, 13; Newcomer Decl. ¶ 7; P. Ossorio Decl. ¶¶ 11, 13; J. Ossorio Decl. ¶¶ 8-10.

A judgment in the State of New Mexico's favor would harm the Conservation Groups' interests by blocking the wolf releases authorized by the Revised Rule, including those described in the 2016 Release Plan, and requiring the Service to capture and remove the wolf pups released this year. Sargent Decl. ¶¶ 14, 17; Robinson Decl. ¶¶ 12, 17-20; Horning Decl. ¶¶ 19-22; Carey Decl. ¶¶ 22-23, 25-26; Parsons Decl. ¶ 11; Newcomer ¶¶ 11-12; P. Ossorio Decl. ¶ 19; J. Ossorio ¶¶ 17-20. Such a result could push the subspecies closer to extinction, directly contrary to the

interests of the Conservation Groups and their members in the recovery of Mexican gray wolves in the wild.

ARGUMENT

I. THE CONSERVATION GROUPS ARE ENTITLED TO INTERVENE AS OF RIGHT

Pursuant to Federal Rule of Civil Procedure 24(a)(2), courts must allow an applicant to intervene if: (1) the motion is "timely;" (2) the movant "claims an interest relating to the property or transaction that is the subject of the action;" (3) "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest;" and (4) that interest is not "adequately represent[ed]" by existing parties. The Rule 24 factors are "'not rigid, technical requirements,'" but rather are "intended to 'capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation.'" WildEarth Guardians v. National Park Service, 604 F.3d 1192, 1198 (10th Cir. 2010) (hereinafter "WildEarth Guardians v. NPS") (quoting San Juan County. v. United States, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc)). The Tenth Circuit "follow[s] a somewhat liberal line in allowing intervention." WildEarth Guardians v. NPS, 604 F.3d at 1198 (internal quotation omitted). The Conservation Groups are entitled to intervene in this action as a matter of right because they satisfy each requirement of Rule 24(a).

A. The Motion to Intervene Is Timely.

Rule 24(a)'s "timeliness" requirement focuses in large part on prejudice to existing parties arising from the length of time between the initiation of litigation and the motion to intervene. See Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1250–51 (10th Cir. 2001).

Here, the Conservation Groups filed this Motion less than three weeks after the State of New Mexico filed its Complaint. On the same day that it filed the complaint, the State of New Mexico also filed a motion for preliminary injunction and temporary restraining order. Dkt. #3. This Court held a hearing on the motion on May 26, 2016 and took the matter under advisement. Dkt. #16. Because the Court has indicated a ruling is imminent (see id.), the Conservation Groups presently are not seeking to file a response to the State's motion prior to the Court's ruling on that motion. Because the Conservation Groups' intervention at this early stage would not prejudice the existing parties, the Motion is timely in satisfaction of Rule 24.

B. The Conservation Groups Have an Interest in the Subject Matter of This Litigation.

Rule 24(a)(2) requires that an intervenor must have an interest related to the property or transaction in dispute. Fed. R. Civ. P. 24(a)(2). There is no "rigid formula" or "mechanical rule" for determining whether an interest is sufficient to justify intervention, and courts should apply "practical judgment" when determining "whether the strength of the interest and the potential risk of injury to that interest justify intervention." San Juan County, 503 F.3d at 1199.

The Tenth Circuit has a "practice of considering the public interests at stake when weighing the equities" of the interests. Id. at 1201. When litigation raises issues of significant public interest, rather than solely private rights, "the requirements for intervention may be relaxed." Id. The Tenth Circuit has also held that it is "'indisputable' that a prospective intervenor's environmental concern is a legally protectable interest." WildEarth Guardians v. NPS, 604 F.3d at 1198 (advocacy organization's interest in conservation of wildlife through hunting on public lands entitled it to intervene to support an agency's proposal to reduce the population of that wildlife through controlled hunts); see also San Juan County, 503 F.3d at 1199

(same environmental concerns that give an environmental group standing also constitute a legally protectable interest) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–563 (1992) ("[T]he desire to use or observe an animal species, even for purely [a]esthetic purposes, is undeniably a cognizable interest for purpose of standing.")); Utah Ass'n of Counties, 255 F.3d at 1252 (environmental organization's conservation interest in particular public lands was sufficient to intervene to defend those lands' inclusion within a national monument). Specifically, concern for wildlife and the habitat it depends upon, including the desire to observe a species in the wild for purely aesthetic purposes, is a sufficient interest to meet this part of the test for intervention of right. See, e.g., WildEarth Guardians v. NPS, 604 F.3d at 1198; Coalition of Arizona/New Mexico Counties v. Department of the Interior, 100 F.3d 837, 841 (10th Cir. 1996).

The Tenth Circuit has also held that conservation interests merit intervention of right where a plaintiff challenges a decision that the proposed intervenor supported. In Coalition of Arizona/New Mexico Counties, Dr. Robin Silver—an activist, wildlife photographer, amateur biologist, and naturalist—sought to intervene in a suit against the Service in which plaintiffs challenged the agency's decision to list the Mexican Spotted Owl pursuant to the ESA. 100 F.3d at 838-39, 841. Dr. Silver had petitioned the Service to list the owl and demonstrated his interest in the bird by observing and photographing it in its natural environment. Id. at 841. The Tenth Circuit held that Dr. Silver had a right to intervene in the case pursuant to Rule 24(a), finding "[Silver's] involvement with the Owl in the wild and his persistent record of advocacy for [the Owl's] protection amounts to a direct and substantial interest in the listing of the Owl for the purpose of intervention as of right, even though Dr. Silver has little economic interest in the Owl itself." Id.; see also Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995)

(recognizing that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported").

Here, the Conservation Groups' "persistent record of advocacy" for the recovery of the Mexican gray wolf, a strong management rule, and additional wolf releases into New Mexico represents a "direct and substantial interest" in ensuring that the captive wolf releases for which they advocated go forward. See supra at 6-8. This interest is demonstrated in part by Defenders' and the Center's intervention to defend certain provisions of the Revised Rule in the District of Arizona. See supra at 7. The Conservation Groups' advocacy and litigation with respect to the beneficial aspects of the Revised Rule places them squarely within the Tenth Circuit's holdings granting intervention to conservation interests seeking to defend measures that they have supported against litigation challenges.

Moreover, as described above, the Conservation Groups' members have aesthetic and scientific interests in protecting the Mexican gray wolf and its habitat, and make frequent use of the recovery area to seek any sign of wolves. See supra at 10. The Conservation Groups' members use public lands occupied by the Mexican gray wolf population, including in New Mexico, for a wide range of activities. Id. They seek signs of wolf presence, listen for their howls, and deeply value these experiences. Id. These interests also fit squarely within the Tenth Circuit's "interest" test for intervention of right.

Finally, the Conservation Groups have organizational interests in ensuring the Service has ultimate authority over endangered species recovery. See Horning Decl. ¶ 20; P. Ossorio Decl. ¶ 20; Carey Decl. ¶¶ 25, 27; Parsons Decl. ¶ 6; Sargent Decl. ¶¶ 11-12. If the State of New Mexico prevails in this litigation, the case could set a precedent that may undermine future

reintroduction programs for ESA listed species. In a similar situation, the Tenth Circuit found that a potential intervenors' interest "in defending and preserving the [National Park Service's] interpretation of the Organic Act and individual national park enabling statutes" was an interest that supported intervention of right. WildEarth Guardians v. NPS, 604 F.3d at 1200-01. The Conservation Groups' interest in defending and preserving the Service's authority under the ESA is no different.

In short, the Conservation Groups' interests in the conservation and recovery of the Mexican gray wolf and the defense of one of the limited beneficial provisions of the Revised Rule satisfy the interest test of Rule 24(a).

C. The State of New Mexico's Case May Impair the Interests of the Conservation Groups and Their Members.

An applicant for intervention of right must also demonstrate that the litigation "may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). Meeting this "impairment" requirement presents only a "minimal burden" to prospective intervenors. WildEarth Guardians v. NPS, 604 F.3d at 1199 (citing WildEarth Guardians v. USFS, 573 F.3d 992, 995 (10th Cir. 2009)). A movant "must show only that impairment of its substantial legal interest is possible if intervention is denied." Id. (emphasis added). This requirement "refers to impairment 'as a practical matter,'" and, therefore courts are not "limited to consequences of a strictly legal nature." Utah Ass'n of Counties, 255 F.3d at 1253; see also WildEarth Guardians v. USFS, 573 F.3d at 995 ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.") (quoting San Juan County, 503 F.3d at 1195). The Court "may consider any significant legal effect in the applicant's interest and [is] not restricted to a

rigid *res judicata* test." WildEarth Guardians v. NPS, 604 F.3d at 844 (quoting Coalition of Arizona/New Mexico Counties, 100 F.3d at 844).

In addition, the Tenth Circuit has long permitted conservation groups to intervene where, as here, litigation may result in harm to wildlife species and other resource values central to the groups' missions, particularly when the groups have worked to protect those resources. See, e.g., Utah Ass'n of Counties, 255 F.3d at 1253–54 (concluding impairment prong of intervention test was satisfied when plaintiffs' claim could impair groups' environmental and conservation interests in land protected by a national monument for which the groups had advocated); see also Coalition of Arizona/New Mexico Counties, 100 F.3d at 844 (holding activist's interests in an owl species could be impaired when plaintiffs sought an injunction enjoining the Service from listing the owl pursuant to the ESA). In determining whether a proposed intervenor's interests may be impaired, the Court should look to the relief requested in the complaint. Utahns for Better Transp. v. Dep't of Transp., 295 F.3d 1111, 1116 (10th Cir. 2002).

Here, the State of New Mexico seeks not only to halt and enjoin all captive wolf releases in New Mexico, but also to require the removal of all wolves that were released in alleged violation of State statutes. Dkt. #1 at 12-13 ¶¶ 3, 6, 8, 11 (Complaint). Plaintiffs additionally seek a declaration that the Service must comply with all of the Department's permitting decisions. Id. at 12-13 ¶¶ 1, 2, 4, 5, 7, 9, 10. The State of New Mexico's requested relief would give it veto power over the Service's recovery program for Mexican gray wolves and its ability to release wolves into New Mexico. The loss of the Service's authority and this provision of its release program would harm the Conservation Groups' interests in the recovery of the Mexican gray wolf population. The expansion of the area for wolf releases into New Mexico is a key

element of the "genetic rescue" for which the Conservation Groups have advocated. Sargent Decl. ¶ 14-17; Robinson Decl. ¶¶ 12, 18-19; Carey ¶ 24; Newcomer ¶¶ 9-10. Moreover, time is of the essence. Any halt – or, worse, removal of wolves from the wild – will set the Service's struggling Recovery Program back even further and push the wild population closer to extinction. Sargent Decl. ¶ 17; Robinson Decl. ¶¶ 18-19; P. Ossorio Decl. ¶ 19; J. Ossorio Decl. ¶¶ 17, 19. The threats to the Conservation Groups' interests posed by this litigation fit squarely within the Tenth Circuit's "impairment" test for intervention as of right.

Further, the State of New Mexico's requested remedy would immediately interfere with the Conservation Groups' members' ability to use and enjoy public lands in New Mexico for the purpose of looking for signs of wolves, hearing their howls, and occasionally seeing the wolves themselves. See Coalition of Arizona/New Mexico Counties, 100 F.3d at 844 (finding that threat of immediate removal of Mexican spotted owl from endangered species list, even if it was eventually reinstated, would be sufficient impairment of Dr. Silver's interest in the conservation of the Owl); supra at 10.

Finally, the Conservation Groups' interest in defending and protecting the Service's authority under the ESA to release wolves in New Mexico will also be impaired if the State of New Mexico prevails. See supra at 14-15. An adverse decision may discourage the Service from taking necessary actions with respect to other reintroduction or recovery programs under the ESA, which would interfere with the groups' larger missions to preserve and protect endangered species elsewhere. See WildEarth Guardians v. NPS, 604 F.3d at 1201 (concluding that a practical effect of a declaratory judgment in plaintiff's favor and against NPS may affect NPS's decisions at other national parks); Utah Ass'n of Counties, 255 F.3d at 1254 (noting that if

the plaintiffs prevailed, the *stare decisis* effect of the judgment may impair the potential intervenors' "interest in promoting their environmental protection goals by seeking presidential designation of other national monuments in the future").

In short, this suit "may impair" the Conservation Groups' interests pursuant to the third prong of Rule 24.

D. The Service Does Not Adequately Represent the Conservation Groups' Interests.

The final prong of the intervention as of right test is "satisfied if the applicant shows that representation of his interest [by existing parties] 'may be' inadequate." Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972) (quoting 3B James Wm. Moore et al., Moore's Federal Practice ¶ 24.09-1 (4) (1969)). The "inadequate representation" requirement also imposes a "minimal burden." WildEarth Guardians v. NPS, 604 F.3d at 1200. "The possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden." Id. (quotation omitted). A prospective intervenor "must show only the possibility that representation may be inadequate." Id. (emphasis added).

Here, there is more than a mere "possibility" that the Service does not adequately represent the Conservation Groups' interests in recovery of the Mexican gray wolf. Indeed, the Conservation Groups are challenging the Revised Rule at issue in this case in the District Court of Arizona because the Revised Rule, overall, has far too many flaws to provide for recovery and is contrary to the Conservation Groups' interests. This fact alone demonstrates that the Service cannot adequately represent the Conservation Groups' interests. See New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service, 540 Fed. Appx. 877, 881 (10th Cir. 2013) (unpublished) (holding that where proposed environmental intervenors had advocated for far greater

protections than the agency ultimately granted, there is "no guarantee" that the agency would "make all of the environmental groups' arguments in litigation"); Arizona and New Mexico Coalition of Counties, No. 4:16-cv-00094-JGZ, Dkt. #49 at 3-4 (finding that "it is clear" that the Service will not adequately represent Defenders and the Center's interests because the Service opposes the changes to the Revised Rule sought by Defenders and the Center); Safari Club Int'l, No. 4:15-cv-00019-JGZ, Dkt. #74 at 3 (finding Defenders and the Center's interests would not be adequately represented because the groups' interests are opposed to the Service's interests in two other cases involving the Revised Rule).[6]

Further, the genetic crisis facing the Mexican gray wolf population – and the immediate need for more wolf releases – is the product of years of failure on the part of the Service to take the steps necessary to recover this population. The Service has repeatedly acquiesced to the State of New Mexico and State of Arizona's demands in a way that has undermined the recovery program and the Conservation Groups' interests. See Sargent Decl. ¶¶ 11-13. Indeed, the Service promulgated the Revised Rule – which authorizes the captive wolf releases into the wild in New Mexico at issue in this case – only after litigation was brought by the Center. See Coalition of Arizona/New Mexico Counties 100 F.3d at 845 (the Service's "ability to adequately represent Dr. Silver [the proposed defendant-intervenor] despite its obligation to represent the public interest is made all the more suspect by its reluctance in protecting the Owl, doing so only after Dr. Silver threatened, and eventually brought, a law suit to force compliance with the Act")

[6] Pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1, New Mexico Off-Highway Vehicle Alliance may be cited as persuasive, not binding, authority. The Federal Rules of Civil Procedure and New Mexico local rules do not address the citation of unpublished opinions.

(emphasis added); see also Idaho Farm Bureau Fed'n, 58 F.3d at 1398 (finding the Service would not adequately represent environmental group where challenged agency decision was compelled by that group's prior litigation); Robinson Decl. ¶¶10-11.

Accordingly, even if the Service and the Conservation Groups currently have the same immediate goal – to defeat the State's efforts to force the removal of wolf pups from the wild and block further wolf releases – there is no guarantee that the Service will maintain its policy or position during the course of litigation. See WildEarth Guardians v. USFS, 573 F.3d at 997 (recognizing that coal mine should not be required to rely on federal agency to protect its interests in part because the agency could shift its policy during litigation); Utah Ass'n of Counties, 255 F.3d at 1256 (noting that "it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts") (internal quotation omitted); New Mexico Off-Highway Vehicle Alliance, 540 Fed. Appx. at 881 (concluding that "there is no guarantee that the Forest Service's policy will not shift during litigation; it may decide to grant the [plaintiff's] goals in full or in part"). Similarly, even if the Conservation Groups' interests are aligned with the Service's interests for the purpose of the merits, "there is no assurance of aligned interests" for the purposes of remedy, if the State of New Mexico prevails on any of its claims. New Mexico Off-Highway Vehicle Alliance, 540 Fed. Appx. at 882.

Finally, the Tenth Circuit "ha[s] repeatedly recognized that it is 'on its face impossible' for a government agency to carry the task of protecting the public's interests and the private interests of a prospective intervenor." WildEarth Guardians v. NPS, 604 F.3d at 1200 (quoting Utahns for Better Transp., 295 F.3d at 1117). In addition, where, as here, the federal agency takes no position on a motion to intervene on the agency's behalf, the "silence on any intent to

defend the [intervenors'] special interests is deafening." Utah Ass'n of Counties, 255 F.3d at 1256 (internal quotation omitted); New Mexico Off-Highway Vehicle Alliance, 540 Fed. Appx. at 882.

In short, the Conservation Groups are entitled to intervene as of right under Fed. R. Civ. P. 24(a).

II. ALTERNATIVELY, THE CONSERVATION GROUPS SHOULD BE GRANTED PERMISSIVE INTERVENTION UNDER RULE 24(B).

If the Court determines that the Conservation Groups have not satisfied all requirements for intervention of right, the Court should grant them permissive intervention under Rule 24(b). Rule 24(b) permits intervention where an applicant's claim or defense, in addition to being timely, possesses questions of law or fact in common with the existing action. Fed. R. Civ. P. 24(b)(1)(B).

This test places a substantially lesser burden on movants than the test for intervention as of right under Rule 24(a), because it omits entirely any requirement concerning interests or adequacy of representation. As shown above, this motion is timely, and granting the motion will not prejudice the proceedings or the existing parties. The Conservation Groups intend, inter alia, to defend the Service's authority to release captive wolves into the wild in New Mexico pursuant to the ESA and regardless of the State's consent, to argue that the Service's decision to release wolves does not violate the ESA, and to argue that this Court is without jurisdiction to rule on some of the State of New Mexico's claims. The Conservation Groups' defenses thus involve questions of law in common with this case. Accordingly, permissive intervention is warranted.

CONCLUSION

Because the Conservation Groups meet the requirements of intervention as of right and permissive intervention, the Court should grant Conservation Groups' Motion to Intervene.

Respectfully submitted this 6th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that June 6, 2016, I electronically filed the foregoing document through the CM/ECF System, which will send notification of this filing to all counsel of record:

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