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Francis Edward Wehrheim, Chairman  
Catron County Commission  
Commission Office  
P.O. Box 507  
Reserve, NM 87830

March 19, 2007  
Via Certified Mail  
No. 70060100000557759460

**RE: NOTICE OF INTENT TO SUE OVER ILLEGAL TAKE OF MEXICAN GRAY WOLVES AUTHORIZED BY CATRON COUNTY ORDINANCE 001-2007**

Dear Mr. Wehrheim,

Forest Guardians, Sinapu, the Center for Biological Diversity, and the Rewilding Institute are writing to request that you take immediate action to remedy Catron County's violation of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, resulting from the imminent and illegal take of Mexican gray wolves that will directly and foreseeably arise out of Catron County's recently passed ordinance, which inappropriately authorizes the County Commission and county representatives to "remove" and "dispatch" Mexican gray wolves for reasons, and in circumstances, strictly prohibited by federal law.

The Mexican gray wolf is a federally-listed endangered species, which is protected under the ESA as an "experimental, nonessential population." The species' current status is defined by its own ESA § 10(j) rule, which is codified at 50 C.F.R. § 17.84(k). This rule provides for only limited, allowable take of Mexican gray wolves, and vests management authority for the species in the United States Fish and Wildlife Service (FWS). Despite these federal limitations, Catron County has authorized by ordinance wolf removal, including through killing, by the County itself.

This action constitutes the illegal take of a protected species within the meaning of the ESA. By authorizing activities that will imminently and foreseeably result in the unauthorized take of the Mexican gray wolf, Catron County is in violation of ESA § 9 and 50 C.F.R. § 17.84(k). To avoid litigation, Catron County must take immediate action to repeal the aforementioned ordinance. This letter is provided as official 60-day notice under the ESA citizen suit provision, 16 U.S.C. § 1540(g), of our intent to sue you to enforce the law if you do not act within the next 60 days to remedy this legal violation.

## **FACTUAL BACKGROUND**

The Mexican gray wolf (*Canis lupus baileyi*) is an endangered subspecies of the gray wolf species (*Canis lupus*), which is native to most of North America north of Mexico City.<sup>1</sup> The Mexican gray wolf numbered in the thousands before European settlement, and historically occurred over portions of New Mexico, Arizona, Texas, and the Republic of Mexico. The “lobo” declined as a result of concerted eradication efforts undertaken on behalf of American livestock interests. The U.S. Bureau of Biological Survey exterminated breeding populations of the Mexican wolf by the early 1930s. In 1950, its successor agency, the FWS, began sending government produced poisons and its own salaried personnel to Mexico to exterminate wolves there. After passage of the ESA in 1973, and the listing of the Mexican wolf as endangered in 1976, only five wolves could be captured alive for an emergency captive breeding program to prepare for reintroduction. No wolves have been confirmed alive in the wild in Mexico since the 1980s.



The 1982 Mexican Wolf Recovery Plan set out an objective of conserving and ensuring the survival of the Mexican gray wolf through maintaining a captive breeding program and re-establishing two viable, self-sustaining populations through reintroduction. The FWS designated the Blue Range Wolf Recovery Area (BRWRA), which encompasses the Gila and Apache National Forests, as the location for the first such population.

In order to address the concerns of the livestock industry, the FWS labeled all reintroduced Mexican wolves, as well as their offspring, as “experimental, non-essential” under ESA § 10(j). Although the Section 10(j) designation alters certain ESA prohibitions normally afforded under Section 9, it does not delegate responsibility for wolf recovery to non-federal entities, nor does it leave decisions on wolf removal or killing to local ordinances.

On February 7, 2007, the Catron County Commission passed Ordinance No. 001-2007. This ordinance authorizes the Catron County Wolf Interaction Investigator (CWII) to trap or remove, including through killing, Mexican gray wolves exclusive of cooperation with the FWS, and outside the policies and procedures approved by the FWS. Specifically, the Catron County ordinance sets out procedures for the “immediate removal” and the “permanent removal” of Mexican wolves by the County itself. Catron County Ordinance No. 001-2007 § 1. Because this ordinance conflicts with 50 C.F.R. § 17.84(k), it is superceded by the federal regulation, and exposes the Catron County Commission to liability for illegal take under ESA § 9.

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<sup>1</sup> Photo courtesy of Cheyenne Mountain Zoo, [www.cmzoo.org/wolves.html](http://www.cmzoo.org/wolves.html).

## **STATUTORY FRAMEWORK**

ESA § 9 details those acts against fully-protected endangered species that are prohibited by federal law. Section 9 declares it unlawful for any person to “take” an endangered species. 16 U.S.C. § 1538(a)(1)(B). To “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, *or attempt to engage in any such conduct*. 16 U.S.C. § 1532(19) (emphasis added). Attempting to cause almost any level of injury to an endangered species is prohibited by law. “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.” *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294, 1300 (8<sup>th</sup> Cir.1989).

It is unlawful for *any person* to “cause [an ESA violation] to be committed.” 16 U.S.C. § 1538(g) (emphasis added). 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...” 16 U.S.C. § 1532(13).

The ESA “not only prohibits the acts of those parties that directly exact the taking, but also 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. Coxe*, 127 F.3d 155, 163 (1<sup>st</sup> Cir.1997) (emphasis added) (holding that by issuing licenses and permits authorizing gillnet and lobster pot fishing, activities known to incidentally injure Northern right whales, Massachusetts officials had exacted a taking). *See e.g. Defenders of Wildlife v. Administrator, EPA*, 688 F.Supp. 1334 (D.Minn. 1988), *aff’d by Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294 (8<sup>th</sup> Cir.1989) (holding the U.S. Environmental Protection Agency (EPA) liable for take associated with the registration of strychnine even though the administration of the pesticide, which was known to poison endangered species, was actually carried out by third parties); *U.S. v. Town of Plymouth, Mass.*, 6 F.Supp.2d 81 (D.Mass. 1998) (holding the Town of Plymouth liable for the take of endangered piping plovers that had either been run over or isolated from their food source by off-road vehicles, which were allowed on the beach under the Town’s policies).

In order to further the conservation of any endangered species outside that species’ current range, ESA § 10(j) allows the Secretary of the Interior to authorize the FWS to release a recovery population of such species. 16 U.S.C. § 1539(j)(2)(A). The Secretary, acting through the FWS, must determine by regulation which populations of those endangered species reintroduced under Section 10(j) are experimental and which are essential to the continued existence of such species. 16 U.S.C. § 1539(j)(3). When a population of an endangered species, such as the Mexican gray wolf in the BRWRA, is labeled as “experimental, nonessential,” the FWS may alter the Section 9 prohibitions as applied to that particular population. The agency sets forth those altered prohibitions in a Section 10(j) rule.

50 C.F.R. § 17.84(k) is the ESA § 10(j) rule for the Mexican gray wolf. “No person, agency, or organization may ‘take’...any wolf in the wild within the Mexican Wolf Experimental Population Area [BRWRA], except as provided by this rule.” 50 C.F.R. § 17.84(k)(3). 50 C.F.R. § 17.84(k) contemplates who may take Mexican wolves in the BRWRA and for what reasons. This rule places ultimate authority for wolf management in the hands of the FWS, and allows only limited take by non-federal entities.

As with all endangered species, any person may take a Mexican gray wolf in self-defense. See 16 U.S.C. § 1549(a)(3)<sup>2</sup> and 50 C.F.R. § 17.84(k)(3)(xii).<sup>3</sup> The Mexican gray wolf’s Section 10(j) rule alters the normal Section 9 prohibitions only as they relate to defense of property. The 50 C.F.R. § 17.84(k) defense of property exceptions to the ESA § 9 prohibitions for the Mexican gray wolf are highly detailed and narrow in scope.

Specifically, the rule allows livestock owners and their agents to intentionally and injuriously take a wolf in defense of property on private or tribal reservation land *only* if that wolf is actually “engaged in the act of killing, wounding, or biting livestock”; and *only* if “evidence of livestock freshly wounded or killed by wolves is present”; and *only* if “that the take is reported to the [FWS’s] Mexican Wolf Recovery Coordinator or a designated representative of the [FWS] within 24 hours.” 50 C.F.R. §§ 17.84(k)(3)(v) and (v)(i) (emphasis added). Livestock owners and their agents may take a Mexican gray wolf in defense of property on public lands *only* if they have first been issued a permit by the FWS. 50 C.F.R. § 17.84(k)(3)(vii) (emphasis added).<sup>4</sup> “Intentional taking of any wolf in the Mexican Wolf Experimental Population [BRWRA], except as described above, is prohibited.” 50 C.F.R. § 17.84(k)(3)(xiii).

## **DISCUSSION**

The Catron County Commission is violating ESA § 9. By passing an ordinance that vests authority in one or more county officials or other county representatives to remove Mexican gray wolves in ways, and for reasons, that exceed the scope of legal take as defined in 50 C.F.R. § 17.84(k), the Catron County Commission has created an imminent

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<sup>2</sup> ESA § 11(a)(3) states that Section 9 penalties cannot be imposed “if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.”

<sup>3</sup> Under the Mexican gray wolf’s 10(j) rule, any person “may harass or take a Mexican wolf in self defense or defense of the lives of others, provided that [he or she] report the harassment or take within 24 hours to the [FWS’s] Mexican Wolf Recovery Coordinator or a designated representative of the Service. If the Service or an authorized agency determines that a wolf presents a threat to human life or safety, the Service or authorized agency may kill it, capture and euthanize it, or place it in captivity.”

<sup>4</sup> These take permits may only be issued if: the livestock were legally present on the grazing allotment at the time of the attack; six or more “breeding pairs” of Mexican gray wolves are present in the BRWRA; previous wolf-inflicted loss or injury of livestock on the allotment has been documented by the FWS; and agency efforts to resolve the problem have previously been completed. Once issued, the take permit is valid for a maximum duration of 45 days and specifies the maximum number of wolf takes contemplated. In order for a livestock owner to take a wolf under an authorized permit, he or she must present evidence of livestock freshly wounded or killed by wolves, and the take must be reported to the FWS’s Mexican Wolf Recovery Coordinator or designated representative within 24 hours.

and foreseeable threat of harm to this endangered species, which is prohibited by the ESA.

If this ordinance is not repealed, the CWII will undoubtedly “haze, harass, guard, and trap” wolves that are not in active conflict with livestock. Catron County Ordinance No. 001-2007 § 2. If this ordinance is not repealed, the CWII will undoubtedly “permanently remove” wolves from the BRWRA for causing “psychological effects” on humans, regardless of any evidence of physical harm. Catron County Ordinance No. 001-2007 § 5. If this ordinance is not repealed, the CWII will undoubtedly “demand the immediate removal” of wolves merely for being present in “human use areas.” Catron County Ordinance No. 001-2007 § 6.

Sections 2, 5, and 6 of Catron County Ordinance 001-2007 directly conflict with 50 C.F.R. § 12.84(k), and are therefore invalid. The Final Rule for the Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico expressly states that “the [ESA], Mexican wolf experimental population rule, and other Federal authority preempt[s] any conflicting local ordinances.” 63 F.R. 1755. This means that Catron County Ordinance 001-2007 is void. However, so long as the County Commission maintains the ordinance’s validity, it is posing an imminent threat of foreseeable harm to the endangered Mexican gray wolf, which is not covered by 50 C.F.R. § 12.84(k), and therefore violative of ESA § 9. Section 9 liability attaches “to acts by third parties that allow or authorize acts that exact a taking and that, but for the permitting process, could not take place.” *Strahan*, 127 F.3d 155 at 163.

The ESA has a broad citizen suit provision. “[A]ny person may commence a civil suit on his own behalf to enjoin any person...who is alleged to be in violation of any provision of [the ESA]. U.S.C. § 1540(g). A plaintiff can seek to enjoin both present activities that constitute an ongoing take *and future activities that are reasonably likely to result in take*. See *Burlington Northern Railroad*, 23 F.3d 1508 at 1511 (emphasis added). The purpose of Catron County Ordinance 001-2007 is to increase the total amount of wolf removals from the BRWRA from that currently occurring under the FWS’s management. Under this management, wolves are already being removed at an alarming and unsustainable rate due to conflicts with livestock. Should the Catron County Ordinance remain in effect, there is no question that wolf takes would increase at the County’s discretion.

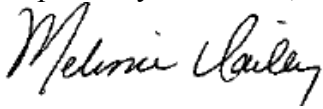
The Catron County Commission has no legal basis by which to authorize the CWII or any other of its agents to take, or attempt to take, Mexican gray wolves in any manner not previously authorized by the ESA or its implementing regulations. If you do not take immediate action to repeal Catron County Ordinance 001-2007, we will seek an injunction against you to enforce the ESA.

Forest Guardians is a non-profit environmental advocacy organization dedicated to preserving the wildlife and wildlands of the American Southwest. Sinapu is a non-profit carnivore advocacy organization dedicated to restoring and protecting native wildlife such as wolves, mountain lions and bears in the American West. The Center for

Biological Diversity is a non-profit conservation-advocacy organization that works to protect wild places and imperiled species through science, law and policy. The Rewilding Institute is a non-profit conservation think tank dedicated to science-informed protection and restoration of biological diversity at landscape and continental scales in North America. Together, our groups have over 37,000 members.

Forest Guardians, Sinapu, the Center for Biological Diversity, and the Rewilding Institute hope that you will respond to this Notice as requested within the next 60 days. We ask that any correspondence with any of the aforementioned groups be directed in writing to Forest Guardians' staff attorney at the address listed below.

Respectfully submitted,

A handwritten signature in black ink that reads "Melissa Hailey". The signature is written in a cursive, flowing style.

Melissa Hailey, Esq.  
Forest Guardians  
312 Montezuma Ave., Suite A  
Santa Fe, NM 87501