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Comment:
Please accept the attached comments of the Pima Natural Resource Conservation District and the Pima Center for Conservation Education, Inc.

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RE: 50 CFR Part 17; [Docket No. FWS–R2–ES–2020–0007; FXES111302WOLF0–201–FF02ENEH00] ; RIN 1018–BE52

Endangered and Threatened Wildlife and Plants; Revision to the Nonessential Experimental Population of the Mexican Wolf (Canis lupus baileyi); Environmental Impact Statement (85 FR 73 at 20967 to 20970)

Ladies and Gentlemen,

The following comments are submitted on behalf of the Pima Natural Resource District and the Pima Center for Conservation Education, Inc. (District). We incorporate into these comments, by reference, all our previous comment submissions regarding the Mexican wolf, including all attachments thereto.

Background

On March 31, 2018, the District Court of Arizona remanded the 2015 final rule to the Service based on the Court's finding that the 2015 final rule failed to further the long-term conservation and recovery of the Mexican wolf and that the essentiality determination was arbitrary and capricious (Center for Biological Diversity v. Jewell, No. 4:15– cv–00019–JGZ (D. Ariz.) (March 31, 2018, Order)). **(85 FR 73 at 20968)**

The attached Court Order explains,

Under APA [Administrative Procedure Act] Section 706(2), the court may set aside agency action where it is found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with applicable law. 5 U.S.C. § 706(2)(A). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view

or the product of agency expertise." Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).) **Court Order, attached, Page 4 Lines 1-9**

The "experimental nonessential" terminology in section 10(j) of the Act is a classification designed to make the reintroduction and management of endangered species more flexible and responsive to public concerns to improve the likelihood of successfully recovering the species. **63 Federal Register at 1757**

Individual animals used in establishing an experimental population can be removed from a source population if their removal is not likely to jeopardize the continued existence of the species. **61 FR 85 at 19237**

Information the Service is seeking, as the District infers from the proposed rule

The District infers from the above-referenced, proposed revision to the Nonessential Experimental Population of the Mexican Wolf (*Canis lupus baileyi*) that the Service seeks, among other information, public comment on the one question that defines the scope of these comments:

Is the experimental population of Mexican wolves essential? The Service requests feedback from the public and its partners on the benefits or potential impacts to the Mexican wolf or the public and its partners of an "essential" versus "nonessential" designation. **(85 FR 73 at 20969)**

The District responds to the Service's requests for comment in the same order as the enumeration given above.

1. *Is the experimental population essential?*

Recommendations:

1. The Service should stand by its previous, correct "nonessential" determination.
2. The Service must immediately withdraw and revise 50 C.F.R.§17.80, which improperly defines "an essential experimental population" contrary to the intent of Congress. The definition is arbitrary, capricious, and illegal.
3. The Service must immediately withdraw and revise 50 C.F.R §17.81. The regulation perverts the Endangered Species Act by imposing Section 10(a)(2)(A) requirements over Section 10(a)(1)(A) permits, which Congress neither intended nor passed into law. It is therefore arbitrary, capricious, and illegal.
4. The Service should test the DNA of Mexican wolf specimens collected long enough before the species nearly went extinct, before genetic diversity was lost to near extinction, and compare it to the DNA of today's experimental population. This would ensure the public that the experimental population is indeed true Mexican wolves as opposed to a genetically inferior "designer" species that may have Mexican wolf alleles, but whose genetic identifiers still differ from authentic historical Mexican wolves.

Comment:

The short answer to the essentiality question, considering the unambiguous requirements of the Endangered Species Act (ESA), is no. Either way the Service decides, its decision is arbitrary and capricious. This is due to errors in the Code of Federal Regulations that improperly conflate and confuse the unambiguous requirements of the Endangered Species Act.

The Service openly admits that it considers the requirements of Section 10(j) of the Endangered Species Act confusing. **63 Federal Register 7 at 1757**

The Service cannot legally serve two conflicting masters. The Court is correct to remand the previous essentiality determination because it contradicts the Code of Federal Regulations.

The Service made the correct essentiality determination, however, because it complies with the ESA. Based on Article 1 Section 1 of the Constitution, the United States Code supersedes the Code of Federal Regulations.

Therefore, the Service's essentiality determination is correct. For the Service to legally finalize the experimental population rule, it must first correct its errors in the Code of Federal Regulations.

Discussion:

On March 31, 2018, the District Court of Arizona remanded the 2015 final rule to the Service based on the Court's finding that … and the essentiality determination of the 2015 final rule was arbitrary and capricious (Center for Biological Diversity v. Jewell, No. 4:15– cv–00019–JGZ (D. Ariz.) (March 31, 2018, Order). (herein after referred to as Court Order or Zipps Court Order) **85 Federal Register 73 at 20968**

The Court Order misquotes the Endangered Species Act (ESA) to uphold arbitrary and capricious regulations. 50 C.F.R. § 17.81(c)(2) and 50 C.F.R. § 17.80(b) both impose requirements Congress never passed into law.

The Court Order states,

"*Second, prior to releasing an experimental population, the Secretary must determine whether the population is essential to the continued existence of the species in the wild. 16 U.S.C. § 1539(j)(2)(B); see also 50 C.F.R. § 17.81(c)(2). "Essential" means the experimental population's loss "would be likely to appreciably reduce the likelihood of the survival of the species in the wild." 50 C.F.R. § 17.80(b). All other populations are to be classified as "nonessential." Id. "* Court Order, attached, page 9, lines 15-20)

Here, the Court Order misquotes and misrepresents the Endangered Species Act.

The Endangered Species Act at 16 U.S.C. § 1539(j)(2)(B) a.k.a. ESA Section 10(j)(2)(B) states,

Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

Here, the intent of Congress is self-evident.

Moreover, this is the only stated or implied definition of "essential" to be found anywhere in the ESA. Here, "essential" is clearly defined by its context as, "essential to the continued existence of the species."

Identical usage in the context of "essential to the continued existence of the species" occurs three additional times: twice in Section 10(j)(2)(C)(i) and once in Section 10(j)(3). Congress intended "essential" to be contextually self-defined as, "essential to the continued existence of the species." This could not be more obvious.

Nowhere does the ESA state or imply that "essential" means anything else.

The Court Order misquotes and misrepresents 16 U.S.C. § 1539(j)(2)(B) by adding, "in the wild." That improperly changes the requirements of the law.

The Court Order correctly quotes 50 C.F.R. § 17.81.(c)(2), a perverted regulation that adds to the requirements of 16 U.S.C. § 1539(j)(2)(B) words Congress never intended nor passed into law: "in the wild."

The Court Order correctly quotes the definition of "essential" found in 50 C.F.R. § 17.80(b), although that definition is not derived from the ESA.

Therefore, both 50 C.F.R. § 17.80(b) and 50 C.F.R. § 17.81(c)(2) contradict the ESA by improperly redefining "essential" from"essential to the continued existence of the species" to "essential to recovery in the wild." Both regulations are arbitrary, capricious, illegal, and must be immediately withdrawn.

The Court Order upholds both of these arbitrary and capricious regulations with citations to two precedent court opinions: Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service[1], and Sierra Club v. U.S. Fish and Wildlife Service[2].

Both opinions have been credibly criticized by Norman D. James and Thomas J. Ward for improperly transforming critical habitat into recovery habitat without sufficient examination

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[1] *See* Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059 (9th Cir. 2004), amended by 387 F.3d 968 (9th Cir. 2004).

[2] *See* Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434 (5th Cir. 2001).

of the legislative history; as well as improperly conflating "conservation" with "recovery".[3] We incorporate James and Ward (2016) into these comments by reference and in attachment.

The error in 50 C.F.R. § 17.81(c)(2) arose from the improper imposition of ESA Section 10(a)(2)(A) requirements over the exempt creation and maintenance of experimental populations under Section 10(a)(1)(a) and Section 10(j).

50 C.F.R. § 17.81 errantly states,

"The Secretary may issue a permit under section 10(a)(1)(A) of the Act, if appropriate under the standards set out in subsections 10(d) and (j) of the Act, to allow acts necessary for the establishment and maintenance of an experimental population.

(c) Any regulation promulgated under paragraph (a) of this section shall provide:

. . .

(2) A finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild;

Here, the Service's regulation misrepresents 16 U.S.C. § 1539(j)(2)(B) by adding "in the wild."

The Endangered Species Act

Section 10(a)(1)(A) of the Endangered Species Act states,

"(ESA § 10) § 1539.

Exceptions

(a)Permits
(1) The Secretary may permit, under such terms and conditions as he shall prescribe –

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section;

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[3]Norman D. James and Thomas J. Ward, 2016, "Critical Habitat's Limited Role under the Endangered Species Act and Its Improper Transformation into Recovery Habitat." UCLA Journal of Environmental Law and Policy, 34 (1), pp. 1-55. Permalink: http://escholarship.org/uc/item/49j0k5fs

or

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking ***referred to in paragraph (1)(B)*** *unless the applicant therefor submits to the Secretary a conservation plan that specifies*

. . .

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and…" (emphasis added)

The establishment and maintenance of experimental populations referred to in paragraph Section 10(a)(1)(A) is explicitly *excluded* from the requirements of Section 10(a)(2)(A).

If Congress had intended to include the establishment and maintenance of experimental populations in the requirements of paragraph (1)(B), they would have omitted the words, "referred to in paragraph (1)(B)" from the ESA. Obviously, Congress intended to treat permits for the establishment and maintenance of experimental populations under Section 10(j) differently than other incidental take permits.

This is precisely why 16 U.S.C. § 1539(j)(2)(B) is written in plain, unambiguous English and does not include the words, "in the wild." Congress obviously did not intend for the establishment and maintenance of Section 10(j) experimental populations to be subjected to the "likelihood of survival and recovery in the wild" requirements of Section 10(a)(2)(A).

In fact, it would be absurd if Congress did intend that, because no experimental population of Mexican wolves could ever have been initially introduced if, upon the initial release of the first wolves into the wild, the Service had to have foreknowledge the experiment would work. That's why the ESA identifies such populations as, "experimental."

In publishing 50 C.F.R. § 17.81 the Service disregarded both the unambiguous wording of the ESA and the intent of Congress. The Service unlawfully imposed the requirements of Section 10(a)(2)(A) over Section 10(a)(1)(A) permits, which the ESA unambiguously excludes from paragraph 10(a)(2)(A).

50 C.F.R §17.81 is therefore arbitrary and capricious, and illegal, and must be immediately withdrawn and revised.

Evidence the experimental Mexican wolf population is nonessential to the continued existence of the species.

The following evidence indicates the experimental population is not essential to the continued existence of the species:

1. A captive population of Mexican wolves existed from 1968 to 1998 before any experimental population of Mexican wolves was released into the wild. Even with a tiny captive population descended from just three unrelated founders (AM1, AF5, and AM11) when no experimental population had ever existed in the wild, the Mexican wolf neither went extinct nor trended toward extinction. **Siminski, D.P., 2011, Mexican wolf (Canus lupus baileyi) International Studbook**

   By 1998 the captive population had grown from 7 wild-caught Mexican wolf specimens of which just three were unrelated, to 148 specimens— a 21-fold population increase indicating the likelihood of species survival had vastly improved despite the non-existence of any experimental Mexican wolf population. The expansion of the captive population absent an experimental wild population proved that an experimental population in the wild was neither then, nor is it now essential to the continued existence of this endangered species. (Id.)

2. If, hypothetically, a massive wildfire or other calamity obliterated the present experimental population, the captive population would still survive and continue to produce progeny indefinitely. The Service intends to use the captive Mexican wolf population as the source population that will provide the genetic interchange necessary to improve the genetic variation within the experimental population. Until there are other populations of Mexican wolves established in the wild, the captive population is the only source of effective migrants to the experimental population. **2014 Environmental Impact Statement for the Proposed Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, page ES-3**

   We infer this means that the captive population has more robust genetic diversity than the experimental population. The captive population would not decline faster genetically if the entire experimental population suddenly ceased to exist. Therefore, the experimental population is nonessential to the continued existence of the species.

   Moreover, a second wild population exists and is expanding in Sonora, Mexico. Therefore, the loss of the entire experimental population would not threaten the continued existence of the Mexican wolf species in the wild.

3. The 1982 Mexican Wolf Recovery Plan made it clear that the experimental population was not essential to the continued existence of the species. In fact, the Service stated on page 14 (Bates number N050629 in the most recent litigation),

   > "*If the Mexican wolf is alive in captivity but declared extinct in the wild without a reintroduction attempt, there is thereby removed a major reason for the preservation of large areas of habitat as natural ecosystems.*"

Thus we infer that the Service saw that unless it risked catastrophic failure of an experimental population to survive in the wild, the opportunity for the agency to self-expand its authority over coveted federal, state and private lands would be lost. Therefore, the Service maintained the genetic base in captivity and released disposable specimens. That has been the Service's policy ever since.

Therefore, the experimental population is not essential for the continued existence of the Mexican wolf species.

4. The Service determined that the nonessential experimental classification fits the Mexican wolf's status. Only wolves surplus to the captive breeding program will be released.Their loss would not jeopardize the continued survival of the subspecies. Further, the nonessential experimental classification allows for management flexibility deemed vital to successful wolf recovery. Experimental essential status is neither required by section 10(j) of the Act nor the implementing regulations, and it has not been used in past reintroductions of captive-raised animals, such as the red wolf, black- footed ferret, and California condor. **63 Federal Register No. 7 at 1756, 1757**

Even if the entire experimental population died, this would not appreciably reduce the prospects for future survival of the subspecies in the wild. **61 FR 85 at 19237**

5. The number of wolves in captivity is adequate to support the proposed reintroduction, through the reintroduction of genetically surplus wolves, without significantly affecting the likelihood of survival of the population remaining in captivity. This is not the same as saying that the total captive or wild populations (or both combined) would constitute a minimum viable population under conservation biology principles. The goal of this reintroduction effort is to initiate the recovery of the subspecies. There is strong information from reintroduction efforts for other gray wolf populations, the red wolf, and other species that the nonessential designation is biologically appropriate to successfully initiate the recovery process. **63 Federal Register No. 7 at 1756, 1757**

6. With the "nonessential" determination in place, 55% of Mexican wolf mortalities in the wild were a result of illegal shooting. **2014 FEIS, Chapter 1, page 18, footnote 1.**

The present nonessential experimental designation enables the Service to develop measures for management of the population that are less restrictive than the mandatory prohibitions that protect species with ''endangered'' status. This includes limited allowance of both governmental and private take of individual wolves under narrowly defined circumstances. Management flexibility is needed to make reintroduction compatible with current and planned human activities, such as livestock grazing and hunting, in the reintroduction area. It is also critical to obtaining needed State, tribal, local, and private cooperation. Thus, this flexibility will improve the likelihood of success. **61 FR 85 at 19237**

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Abstract:
The Endangered Species Act (ESA) requires that areas be designated as critical habitat for species that are protected under the Act. Once designated, critical habitat is protected from “destruction or adverse modification” by Section 7(a)(2) of the ESA, which applies to any action authorized, funded, or carried out by a federal agency, including permits and other authorizations issued to private landowners and resource users. In 1978, Congress enacted extensive amendments to the ESA that were intended to limit the scope of critical habitat to areas essential for the survival of protected species. Based on these amendments, the U.S. Fish and

Wildlife Service and the National Marine Fisheries Service adopted regulations that recognized critical habitat's limited role in conserving species, including a definition of "destruction or adverse modification" that emphasized impacts to the protected species' survival. In *Sierra Club v. U.S. Fish and Wildlife Service* and *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service* however, the Fifth Circuit and the Ninth Circuit respectively held that the agencies' adverse modification definition is unlawful and that the purpose of critical habitat is to recover species. These cases have strongly influenced the administration of the ESA over the past decade and the Services recently relied on these cases to justify regulations that will transform critical habitat into recovery habitat. The authors maintain that a reassessment of the role of critical habitat is needed to ensure that the regulatory and judicial treatment of critical habitat conforms to the intent of Congress.

Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat

Norman D. James and Thomas J. Ward***

ABSTRACT

The Endangered Species Act (ESA) requires that areas be designated as critical habitat for species that are protected under the Act. Once designated, critical habitat is protected from "destruction or adverse modification" by Section 7(a)(2) of the ESA, which applies to any action authorized, funded, or carried out by a federal agency, including permits and other authorizations issued to private landowners and resource users. In 1978, Congress enacted extensive amendments to the ESA that were intended to limit the scope of critical habitat to areas essential for the survival of protected species. Based on these amendments, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service adopted regulations that recognized critical habitat's limited role in conserving species, including a definition of "destruction or adverse modification" that emphasized impacts to the protected species' survival. In

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I.
INTRODUCTION

Congress enacted the Endangered Species Act (ESA)[1] in 1973 to provide a program for the conservation of endangered species and to comply with certain treaties and conventions concerning species of wildlife, fish, and plants.[2] Since its enactment, the ESA has evolved into one of the nation's most demanding environmental laws. In *Tennessee Valley Authority v. Hill*, the Supreme Court, in affirming an injunction preventing the completion of the Tellico Dam to protect a species of minnow called the snail darter, stated that the "plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost," and that the ESA "reveals a conscious decision to give endangered species priority over the 'primary missions' of Federal agencies."[3]

One of the most confounding aspects of the ESA has been the requirement that critical habitat be designated for species that have been listed as endangered or threatened.[4] The agencies that

1. 16 U.S.C. §§ 1531-1544 (2015).

2. *See id.* at § 1531.

3. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184–85 (1978). Notably, in *Hill*, the parties agreed that the dam's operation would destroy the species' critical habitat. *Id.* at 171 (stating that "we begin with the premise that the operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat").

4. Under the ESA, species subject to protection are "listed," i.e., placed on the lists of endangered and threatened species codified at 50 C.F.R. § 17.11 (fish and wildlife) and § 17.12 (plants). The ESA permits the Services to list a group of animals if it is a "species" as defined by ESA § 3(16), i.e., a species, subspecies, or a distinct population segment, and only if that species is determined to be an "endangered species" or a "threatened species." 16 U.S.C. § 1532(16). To constitute an "endangered species," the species must be "in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6).

administer the ESA, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (jointly called the "Services" below), must designate a species' critical habitat at the time a species is listed "to the maximum extent prudent and determinable."[5] Critical habitat normally should be occupied by members of the species, and consists of specific areas that contain "physical and biological features" which are "essential to the conservation of the species" and "require special management considerations or protection."[6] Specific areas that are not occupied may be designated as critical habitat "upon a determination by the Secretary that such areas are essential to the conservation of the species."[7]

Critical habitat has significant legal and economic consequences for landowners and resource users. Section 7(a)(2) of the ESA requires federal agencies to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[8] Thus, federal actions may not proceed if they would destroy or adversely modify a listed species' critical habitat, unless a cabinet-level committee called the Endangered Species Committee grants an

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To constitute a "threatened species," the species must be "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). This determination is based on five statutory factors, after taking into account any efforts being made by any foreign country, state, or political subdivision to protect the species. *Id.* § 1533(a)(1), (b)(1)(A) (2015).

5. 16 U.S.C. § 1533(a)(3)(A).

6. *Id.* § 1532(5)(A) (definition of the term "critical habitat"); *see also* Alaska Oil and Gas Ass'n v. Salazar, 916 F. Supp. 2d 974, 998-1003 (D. Alaska 2013) (setting aside the FWS's critical habitat designation for the polar bear because the record lacked evidence showing that critical habitat areas actually contained the physical or biological features essential for the conservation of the species).

7. 16 U.S.C. § 1532(5)(A)(ii); *see also* Cape Hatteras Access Pres. Alliance v. Dep't of Interior, 344 F. Supp. 2d 108, 124-25 (D.D.C. 2004) (discussing the designation of unoccupied land as critical habitat).

8. 16 U.S.C. § 1536(a)(2); *see*, *e.g.*, Butte Env'l Council v. U.S. Army Corps of Eng'rs, 620 F.3d 936, 947-48 (9th Cir. 2010) (addressing the claim that the development of business park would adversely modify species' critical habitat).

exception.[9] Moreover, federal agencies must "consult" with the relevant Service prior to proceeding with a proposed action to ensure that the "jeopardy" and "adverse modification" standards imposed by Section 7(a)(2) are not violated.[10]

The term "action" is broadly defined in the Services' Section 7 consultation regulations and includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high

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9. *See* 16 U.S.C. § 1536(e)(l). Given the complexity of the exemption process, it has rarely been used. *See* MICHAEL J. BEAN & MELANIE J. ROWLAND, The Evolution of National Wildlife Law 263-65 (3rd ed. 1997). In short, the federal agency proposing the action, the Governor of the state in which the action will occur, or a federal permit applicant may apply to the Secretary for an exemption. 16 U.S.C. § 1536(g)(1). The Secretary must then determine whether the application satisfies certain threshold requirements. *Id.* § 1536(g)(3). Next, a formal hearing is conducted, following which the Secretary prepares a report that is submitted to the Endangered Species Committee, which consists of six high-ranking administrative officials and one individual from each affected state appointed by the President. *Id.* § 1536(g)(4)-(5). At least five members must agree that:

> (i) there are no reasonable and prudent alternatives to the agency action;
>
> (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
>
> (iii) the action is of regional or national significance; and
>
> (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by [Section 7(d)] . . . .

Id. § 1536(h)(1). In addition, the committee must establish "reasonable mitigation and enhancement measures . . . as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned*." Id.* § 1536(h)(1)(B). Any person may challenge the committee's decision in the United States Court of Appeals where the action will take place. *Id.* § 1536(n).

10. *See, e.g.,* Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 924 (9th Cir. 2008) (as amended) ("The ESA imposes a procedural consultation duty whenever a federal action may affect an ESA-listed species."); Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1238-39 (9th Cir. 2001) (summarizing the consultation process). As discussed below, the Services have adopted regulations that govern the consultation process, which are codified at 50 C.F.R. Part 402. In the case of proposed actions that adversely affect a listed species or its critical habitat, the relevant Service must complete a "formal" consultation, which includes the issuance of a biological opinion. *See* 50 C.F.R. § 402.14 (2015) (requirements for formal consultation and biological opinions).

seas."[11] The term includes "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid."[12] Consequently, the issuance of various federal permits and authorizations in connection with private land uses may trigger the application of Section 7(a)(2).

As federal regulatory programs have expanded, an increasing number of non-federal activities require some sort of federal permit or approval, or have some other federal nexus that triggers Section 7(a)(2) and the duty to avoid the adverse modification of critical habitat.[13] Consequently, private landowners are often required to consult with the Services when they need federal permits and authorizations to utilize their property.[14] And beginning in the 1990s, the Services became

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11. 50 C.F.R. § 402.02 (2015) (defining the term "action"). *See also* Karuk Tribe v. U.S. Forest Serv., 681 F.3d 1006, 1020-21 (9th Cir. 2012) (en banc) (discussing examples of agency actions triggering Section 7(a)(2)). The Services' regulations limit the application of Section 7(a)(2) to actions "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Therefore, Section 7(a)(2) does not apply where a federal agency is performing an action mandated by statute. *See, e.g.,* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662-69 (2007) (finding that Section 7(a)(2) did not apply to EPA's approval of a state's National Pollution Discharge Elimination System permitting program because EPA lacked discretion to consider the impacts on listed species).

12. 50 C.F.R. § 402.02.

13. For example, in order to conduct land use activities, many landowners are required to obtain federal permits to discharge fill material under Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a). The Supreme Court discussed the dramatic expansion of federal jurisdiction under this provision in Rapanos v. United States, stating:

> The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act . . . . The [Army Corps of Engineers] has . . . asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands.

547 U.S. 715, 722 (2006) (plurality opinion).

14. If the project has no effect on listed species or critical habitat,

increasingly aggressive in exploiting the Section 7 consultation process to control how land and water resources are used.[15] Therefore, the designation of an area as critical habitat is likely to result in restrictions on land and water uses that go beyond those caused by a species' listing and application of the jeopardy standard. Critical habitat is particularly problematic when it includes land unoccupied by members of the species, because in the absence of critical habitat, Section 7(a)(2) would not be triggered.[16]

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consultation is not required. *See, e.g.,* Defenders of Wildlife v. Flowers, 414 F.3d 1066, 1069-70 (9th Cir. 2005) (holding that a real estate developer and the Army Corps of Engineers had no duty to consult with the FWS on the effects of issuing a Clean Water Act permit for the developer's project when no listed species occupied the project area and no critical habitat was present).

15. While it may seem obvious that the federal action is the issuance of the federal permit and the activities authorized by that permit, the action is frequently described in terms of the larger project, without regard to the scope of federal jurisdiction. For example, when the pygmy-owl was listed in southern Arizona, the FWS relied on the nexus created by Clean Water Act permits and the Section 7 consultation process to regulate the development of private land to preserve habitat for the species. The FWS's land use requirements included limits on surface disturbance (typically less than 30 percent of the project site), restoration and revegetation of disturbed areas, limited access to open areas within the subdivision, restrictions on the size and locations of fences and pedestrian walkways, and restrictions on outdoor lighting and activities such as cooking. These land use requirements and restrictions were enforced as conditions in the project's Clean Water Act permit that must be met to achieve compliance. *See*, *e.g.*, U.S. DEP'T OF THE INTERIOR, BIOLOGICAL OPINION ON THE EFFECTS OF THE PROPOSED PUEBLO OASIS DEVELOPMENT IN PIMA COUNTY, ARIZONA (July 9, 2002), *http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/02088_Pueblo_Oasis.pdf;* U.S. DEP'T OF THE INTERIOR, BIOLOGICAL OPINION ON THE EFFECTS OF THE PROPOSED CHAPARRAL HEIGHTS DEVELOPMENT IN PIMA COUNTY, ARIZONA (Apr. 30, 2002), http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/ 00131_Chaparral_Heights.pdf; U.S. DEP'T OF THE INTERIOR, BIOLOGICAL OPINION OF THE EFFECTS OF THE PROPOSED BUTTERFLY MOUNTAIN DEVELOPMENT IN MARANA, ARIZONA (Apr. 10, 2002), http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/ 01277_Butterfly_Mtn.pdf.

16. *See, e.g.*, Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1244 (9th Cir. 2001) (explaining that, in the absence of critical habitat, "there is no evidence that Congress intended to allow the [FWS] to regulate any parcel of land that is merely capable of supporting a protected species"). Thus, federally authorized or funded activities taking place in areas that are not occupied by members of a species will typically not be subject to Section 7(a)(2) *unless* critical habitat is present.

At the same time, critical habitat designations by the Services have expanded dramatically, often including vast expanses of land.[17] Given that habitat loss is frequently the principal justification for listing a species, common sense suggests that if there are millions of acres of land that contain the physical and biological features essential to the species, the species should not be listed. In many cases, however, areas designated as critical habitat are unoccupied and lack habitat essential for the species' survival. Instead, they are set aside for future population expansion—a practice Congress strongly criticized in 1978 when it amended the ESA to restrict critical habitat.[18]

Finally, in 2014, the Services proposed dramatic changes to their rules governing the designation of critical habitat and to the regulatory definition of "destruction or adverse modification."[19] These proposed rule changes would effectively

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17. *See, e.g.,* Designation of Revised Critical Habitat for the Northern Spotted Owl, 77 Fed. Reg. 71,876 (Dec. 4, 2012) (codified at 50 C.F.R. § 17.95) (designating nearly 9.6 million acres of land as critical habitat); Designation of Critical Habitat for the Polar Bear (*Ursus maritimus*) in the United States, 75 Fed. Reg. 76,086 (Dec. 7, 2010) (codified at 50 C.F.R. § 17.95) (designating approximately 120 million acres of land as critical habitat); Revised Designation of Critical Habitat for Bull Trout, 75 Fed. Reg. 63,899 (Oct. 18, 2010) (codified at 50 C.F.R. § 17.95) (designating 19,729 miles of streams and 488,252 acres of reservoirs as critical habitat); Revised Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx, 74 Fed. Reg. 8,616 (Feb. 25, 2009) (codified at 50 C.F.R. § 17.95) (designating nearly 25 million acres of land as critical habitat).

18. For example, in 2013, the FWS designated 208,973 acres of critical habitat along 1,227 miles of waterways in six western states for the southwestern willow flycatcher—a 73 percent increase over the 2005 designation. *See* Designation of Critical Habitat for the Southwestern Willow Flycatcher, 78 Fed. Reg. 344 (Jan. 3, 2013) (to be codified at 50 C.F.R. § 17.95). The FWS explained that it relied on that species' 2002 recovery plan to designate "areas for critical habitat that have never been known to be occupied by flycatchers but are essential for the conservation of the flycatcher *in order to meet recovery goals*." *Id.* at 359 (emphasis added); *see also id.* at 351 ("In general, the areas designated as critical habitat are designed to provide sufficient riparian habitat . . . in order to reach the geographic distribution, abundance, and habitat-related *recovery goals described in the Recovery Plan*") (emphasis added).

19. Definition of Destruction or Adverse Modification of Critical Habitat, 79 Fed. Reg. 27,060 (proposed May 12, 2014) (to be codified at 50 C.F.R. § 402.02); Implementing Changes to the Regulations for Designating Critical Habitat, 79 Fed. Reg. 27,066 (proposed May 12, 2014) (to be codified at 50 C.F.R. §§ 424.01,

convert critical habitat into "recovery habitat" by authorizing areas that lack the physical and biological features necessary to support the species to be designated as critical habitat and preserved in the hope that these features may develop later, and defining "destruction or adverse modification" as impairment of the species' recovery.[20]

The legal underpinning of the Services' proposed rules are two circuit court decisions, *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*,[21] and *Sierra Club v. U.S. Fish and Wildlife Service*,[22] which held that the Services' 1986 regulatory definition of "destruction or adverse modification" was invalid because the definition emphasized impacts to the species' survival.[23] In both cases, the court equated the term "conservation"[24] with recovery and concluded that "destruction or adverse modification" should be a recovery-based standard.[25] As discussed below, the courts read the term "conservation" far too narrowly. As used in the ESA, "conservation" has its ordinary meaning—to manage and protect wildlife—and includes actions that support a species' survival. It is not limited to actions that recover listed species.

424.02, 424.12).

20. Implementing Changes to the Regulations for Designating Critical Habitat, 79 Fed. Reg. at 27,069. The term "recovery" is not defined in the ESA, but is defined in the Services' regulations as "improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act." 50 C.F.R. § 402.02. *See also* Friends of Blackwater v. Salazar, 691 F.3d 428, 432-34 (D.C. Cir. 2012) (discussing the legal effect of a recovery plan and its relationship to delisting a species).

21. *See* Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059 (9th Cir. 2004*), amended by* 387 F.3d 968 (9th Cir. 2004).

22. Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434 (5th Cir. 2001).

23. *See* Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,933-35 (June 3, 1986) (codified at 50 C.F.R. pt. 402). This rulemaking is discussed in greater detail below. The definition of "destruction or adverse modification," codified at 50 C.F.R. § 402.02, was intended to emphasize impacts to critical habitat that jeopardized the species' continued existence, rather than impairment of the species' recovery.

24. *See* U.S.C. § 1532(3) (definition of "conserve," "conserving"," and "conservation").

25. *See Gifford Pinchot*, 378 F.3d at 1069-71; *Sierra Club*, 245 F.3d at 441-43.

More critically, however, each court relied on the ESA's legislative history to support its holding.[26] In *Gifford Pinchot*, the Ninth Circuit strongly criticized the Services for ignoring the intent of Congress, describing the regulatory definition of "destruction or adverse modification" as "blatantly contradictory to Congress' express command" and a "failure . . . to implement Congressional will."[27] Yet, as explained below, Congress has clearly indicated that critical habitat should be limited to specific areas that are essential to the species' survival and should not include areas for future population expansion.

Notwithstanding these errors and the conflict between their holdings and the legislative history, *Sierra Club* and *Gifford Pinchot* have been cited as authoritative, allowing critical habitat to be transformed into "recovery" habitat.[28] Moreover, in

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26. *See Gifford Pinchot*, 378 F.3d at 1070-71; *Sierra Club*, 245 F.3d at 442-43.

27. *Gifford Pinchot*, 378 F.3d at 1070.

28. Numerous courts have followed the *Gifford Pinchot* court's characterization of critical habitat as habitat that is necessary for the species' recovery. *See, e.g.,* Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv., 616 F.3d 983, 989 (9th Cir. 2010) (stating that "*Gifford Pinchot* requires FWS to be *more* generous in defining area [sic] as part of the critical habitat designation" (emphasis original)); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 934 (9th Cir. 2008) (concluding that the NMFS's "adverse modification analysis did not adequately consider recovery needs and was therefore deficient under *Gifford Pinchot*"); Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency, 855 F. Supp. 2d 1199, 1223 (D. Or. 2012) (stating that "recovery is an essential component of the ESA that must be considered when an agency carves out critical habitat for a species or makes a jeopardy analysis," citing *Gifford Pinchot*); Ctr. for Biological Diversity v. Salazar, 804 F. Supp. 2d 987, 997-98 (D. Ariz. 2011) (applying *Gifford Pinchot* in requiring that the impacts on the species' recovery be separately analyzed); Rock Creek Alliance v. U.S. Forest Serv., 703 F. Supp. 2d 1152, 1192-94 (D. Mont. 2010), *aff'd*, 663 F.3d 439, 443 (9th Cir. 2011) (explaining that adverse modification occurs when an action diminishes the value of critical habitat for a species' recovery, following *Gifford Pinchot*); Fisher v. Salazar, 656 F. Supp. 2d 1357,1369-70 (N.D. Fla. 2009) (explaining that the Fifth and Ninth Circuits have invalidated the regulation that defines "destruction or adverse modification" because the regulation "fail[ed] to provide protection of habitat when necessary only for conservation of the species," quoting and following *Gifford Pinchot* and *Sierra Club*); Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 128-29 (D. D.C. 2004) (discussing and following *Gifford Pinchot* and *Sierra Club*, noting that those courts "struck the adverse modification definition because it was blatantly inconsistent with the ESA's recovery goal").

their proposed rule redefining the term "destruction and modification," the Services cited and discussed *Sierra Club* and *Gifford Pinchot* to justify this rule change,[29] and further explained:

> [T]he courts have concluded that Congress intended that "conservation and survival be two different (though complementary) goals of the (Act)." *Gifford Pinchot* at 1070. In light of congressional intent that critical habitat be established for conservation purposes, the courts concluded, and we agree, that the purpose of establishing "critical habitat" is for the government to designate habitat "that is not only necessary for the species' survival but also essential for the species' recovery." *Id.* From these cases, it is clear that any definition of "destruction or adverse modification" must reflect the purpose for which the critical habitat was designated—the recovery of the species.[30]

Like the *Gifford Pinchot* and *Sierra Club* courts, the Services failed to carefully review the legislative history to ascertain Congress' intent, repeating the mistake made by those courts.

The following section of this article provides a detailed discussion of the legislative history pertaining to critical habitat, focusing on the amendments enacted in 1978, which added the definition of critical habitat and the procedures for its designation and required that economic and other impacts be considered. This article will then discuss how the language and structure of the ESA supports critical habitat's narrow scope and limited role. Finally, this article discusses *Gifford Pinchot* and *Sierra Club* in greater detail. As explained below, the *Sierra Club* court badly misread the legislative history, while the *Gifford Pinchot* court relied on *Sierra Club*'s erroneous analysis to support its holding. The term "conservation" is also discussed, including this term's use in various statutory provisions and in the Services' regulatory documents in the ordinary sense of managing and protecting a resource.

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29. *See* Definition of Destruction or Adverse Modification of Critical Habitat, 79 Fed. Reg. 27,060, 27,061 (proposed May 12, 2014) (to be codified at 50 C.F.R. § 402.02).

30. *Id.* at 27,062.

II.
THE LEGISLATIVE HISTORY

A. *The Endangered Species Act of 1973 and the Services' 1978 Rule Defining Critical Habitat*

As originally enacted in 1973, the ESA contained no definition of critical habitat and no procedures or requirements for determining what areas should be specified as critical habitat.[31] The only reference to critical habitat appeared in the original, one-paragraph version of Section 7, which stated:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purpose of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act and by taking such action as necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in *the destruction or modification of habitat of such species which is determined by the Secretary, after consultation, as appropriate with the affected States, to be critical.*[32]

The 1973 Act's legislative history does not discuss critical habitat in any detail, which is not surprising given that the Act only mentions critical habitat once. The legislative history indicates that Congress believed critical habitat should be acquired pursuant to ESA Section 5[33] and set aside, rather than

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31. *See generally* Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (showing the absence of a definition of critical habitat and no discussion on the subject).

32. *Id.* § 7, 87 Stat. at 892 (emphasis added) (codified at 16 U.S.C. § 1536).

33. 16 U.S.C. § 1534. This provision, entitled "Land Acquisition," directs the Secretaries of Commerce (the NMFS) and the Interior (the FWS), as well as the Secretary of Agriculture with respect to the National Forest System, to implement a program to conserve fish, wildlife and plants, including the acquisition of land for such purpose. *Id.* This authority is not limited to species listed under the ESA.

regulated through the adverse modification standard.[34] In fact, the House Committee Report estimated that by 1976, about 35 percent of the annual cost of the entire ESA program would be for "habitat acquisition."[35] The Senate Committee Report also stated that "an accelerated land acquisition program is essential" to protect habitat for endangered wildlife.[36] Finally, the conference committee report, in describing Section 5, stated:

> Any effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire habitat which is *critical to the survival of those species*.[37]

In short, while the 1973 legislative history is limited, it suggests Congress intended critical habitat to be habitat essential to the species' survival and that land containing such habitat should be acquired and protected, rather than regulated, through Section 7.

As explained, the 1973 Act contained only one mention of critical habitat and no guidance on how Section 7 was intended to work. To address this uncertainty, the Services jointly issued guidelines to other federal agencies in 1976 and, after notice-and-comment rulemaking, regulations in 1978.[38] The regulations defined "critical habitat" as:

> [A]ny air, land, or water (exclusive of those man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would *appreciably decrease the likelihood of the survival and recovery of a listed species* or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and

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34. *See* H.R. Rep. No. 93-412, at 5, 9 (1973), *reprinted in* Cong. Research Office, 97th Cong., A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980, at 144, 148 (1982) [hereinafter Legislative History of the ESA].

35. Legislative History of the ESA, *supra* note 34, at 159.

36. S. Rep. No. 93-307, at 4 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2992.

37. H.R. Rep. No. 93-740, at 25 (1973) (Conf. Report), *reprinted in* 1973 U.S.C.C.A.N. 3001, 3004 (emphasis added).

38. *See* Interagency Cooperation, 43 Fed. Reg. 870 (Jan. 4, 1978).

> the quality and chemical content of land, water, and air. *Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.*[39]

As discussed below, Congress believed this definition was too broad and amended the ESA to narrow the scope of critical habitat to focus on species' survival and reduce its regulatory impact on land uses.

B. *The 1978 ESA Amendments*

1. Overview

In 1978, Congress enacted major amendments to the ESA.[40] The amendments were considered and passed in the wake of the Supreme Court's decision in *Tennessee Valley Authority v. Hill*,[41] following extensive oversight hearings conducted by the Senate Subcommittee on Resource Protection in July 1977, and by the House Merchant Marine and Fisheries Committee in May and June 1978.[42] As one Congressman stated, the goal of the 1978 Amendments was to "mak[e] the agency in charge of enforcing the provisions of the [ESA] conform to its original intent."[43]

At that time, there was widespread recognition in Congress that the ESA was flawed and administered improperly. Senator Garn's comments summarized the views of a number of members of Congress:

> I think it was very important that the [ESA] was passed in 1973, but I think what we have seen happen is what often happens in Congress. There obviously was a problem. We were building without regard to various species. We were not as concerned about the environment as we should have been. But then we passed an act that goes to the other extreme. It goes too far, and beyond correcting a problem that needed to be

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39. *Id.* at 874-75 (emphasis added).

40. *See* Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified as amended at 16 U.S.C. § 1531).

41. *See supra* note 3 and accompanying text.

42. *See* Legislative History of the ESA, *supra* note 34, at 643-46.

43. *Id.* at 796 (statement of Rep. Lott).

> corrected, we create new side effects that were not foreseen at the time.
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> . . . The [ESA] passed the Senate extremely easily, with no dissenting votes. But, talking to many of my colleagues, I learn that they certainly would not have voted for it if they had known the implications and the extremes to which the act would be carried.[44]

In particular, the breadth of the Service's definition of critical habitat and how critical habitat was being designated and used to stop federal projects disturbed Congress.[45] As a result, the standards and requirements for critical habitat, including the term's statutory definition, were enacted in the 1978 Amendments with the purpose of limiting the scope and regulatory impact of critical habitat.

2. House Bill 14104

House Bill 14104, as reported out of the House Merchant Marine and Fisheries Committee, contained a definition of critical habitat largely modeled after the definition in the Services' 1978 regulations. This definition provided:

> The term critical habitat for an endangered species or threatened species means any air, land, or water area (exclusive of those

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44. *Id.* at 1006; *see also id.* at 805 (statement of Rep. Beard) ("[I]t is my impression that the entire membership is aware that the [ESA] is seriously flawed and in need of amendment."); *id.* at 837 (statement of Rep. Burgener) ("Many zealous bureaucrats have discarded human needs from their considerations with regard to endangered species. The amendments . . . recognize that there are important human considerations to be dealt with and people are an important factor in this equation."); *id.* at 1017 (statement of Sen. Stennis) (describing the ESA as "an intolerable law").

45. *See, e.g.*, *id.* at 802 (statement of Rep. Bowen) (stating that the critical habitat for the Houston toad "is a good example of the mistakes and, frankly, what I must consider ineptitude we have seen from time to time on the part of many of the officials of the Office of Endangered Species."); *id.* at 821 (statement of Rep. Murphy) ("The designation of critical habitat amounts to nothing less than a form of restrictive zoning from Washington, D.C."); *id.* at 1015 (statement of Sen. McClure) ("When it comes to the extension of habitat [beyond occupied areas] we run into some very, very unusual problems."). In fact, the first critical habitat designation was made in 1976 for the snail darter, on an emergency basis, in an apparent effort by the Interior Department to halt the Tennessee Valley Authority's construction of the Tellico Dam. *See* BEAN & ROWLAND, *supra* note 9, at 253 n.302.

> manmade structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would significantly decrease the likelihood of conserving such species.[46]

The committee report accompanying House Bill 14104 emphasized that this definition was intended to restrict the scope of critical habitat:

> The term "critical habitat" is defined for the first time. The definition is modeled after that found in present Department of Interior regulations. Under the present regulations, critical habitat includes air, land or water areas—the loss of which would appreciably decrease the likelihood of conserving a listed species. Under the present regulations, the Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured.
>
> In the Committee's view, the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat.
>
> Under the definition of critical habitat included in H.R. 14104, air, land or water areas would be designated critical habitat only if their loss would significantly decrease the likelihood of conserving the species in question. The committee believes that *this definition narrows the scope of the term as defined in the existing regulations*.[47]

The committee also directed the Services to "be exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species."[48]

As explained above, the Services' then-existing regulations defined critical habitat as "any air, land, or water (exclusive of those man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed

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46. H.R. 14104, 95th Cong., at § 5(1) (2d Sess. 1978)

47. H.R. Rep. No. 95-1625, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9475 (emphasis added).

48. *Id.* at 18, *reprinted in* 1978 U.S.C.C.A.N. 9468.

species or a distinct segment of its population."[49] In House Bill 14104, the word "significantly" was substituted for "appreciably" and the word "conserving" was substituted for "survival and recovery," eliminating the reference to recovery. In addition, the definition eliminated the regulatory definition's authorization to include as critical habitat "additional areas for reasonable population expansion."

During the House floor debate on House Bill 14104, a number of Congressmen stated that the committee bill did not go far enough in limiting critical habitat and the Services' discretion when critical habitat is designated. Representative Bowen, for example, explained:

> The present law provides no definition of what critical habitat is, and [House Bill 14104] makes some steps in that direction. It points out that critical habitat must include the range the loss of which would significantly decrease the likelihood of preserving such species. So we have given some fairly rigid guidelines.
>
> . . . I believe the majority of the House is in agreement on that, that the Office of the Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of *what is actually needed for survival of this species*.[50]

In response to the concerns expressed by Representative Bowen and other Congressmen,[51] Representative Duncan explained that he was offering an amendment to the bill "to define critical habitat to be that area essential to the preservation and conservation of the species." He added, "if we are concerned with critical habitat, *that word 'critical' implies essential to its survival*."[52] His floor amendment struck the existing definition of critical habitat in the bill and substituted the following:

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49. Interagency Cooperation, 43 Fed. Reg. at 874-75.
50. Legislative History of the ESA, *supra* note 34, at 817 (emphasis added).
51. *See id.* at 801-18.
52. *Id.* at 818 (emphasis added).

> (6) The term "critical habitat" for a threatened or endangered species means—
>
> (A) the specific areas within the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (i) which are essential to the conservation of the species and (ii) which require special management consideration or protection; and
>
> (B) specific areas periodically inhabited by the species which are outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act (other than any marginal habitat the species may be inhabiting because of pioneering efforts or population stress), upon a determination by the Secretary at the time it is listed that such areas are essential for the conservation of the species.[53]

As discussed below, this definition is similar to the amended definition adopted by the Senate and ultimately included in the final version of the 1978 Amendments.

Representative Duncan explained that his amendment to the bill was intended to further narrow the scope of critical habitat, noting that the committee had relied on the Services' definition of critical habitat and "changed only the word 'appreciably' to the word 'significantly'."[54] In Representative Duncan's opinion, the committee had tried to address the lack of a critical habitat definition, "but failed miserably in doing so."[55] He went on to explain:

> I think that in order to be consistent with the purposes of this bill to preserve critical habitat that there ought to be a showing that it is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it.
>
> I think this goes to the heart of the problem which every Member has felt in his district. It is entirely consistent with good biological practices and furthermore it maintains intact

53. *Id.* at 879.
54. *Id.* at 880.
55. *Id.*

> the purpose of this bill, which is *to prevent the extinction of species who require this critical habitat*.[56]

Representative Duncan's amendment was approved by voice vote with no opposition, and was included in the final version of House Bill 14104.[57]

3. Senate Bill 2899

Senate Bill 2899, as reported out of the Committee on Environment and Public Works, focused on the creation of a process to exempt federal projects from Section 7 in the event of unavoidable conflicts.[58] Nevertheless, the committee expressed concern about the scope of critical habitat. Like the House, the committee emphasized that the purpose of critical habitat is to ensure the species' survival rather than serving as habitat for future recovery:

> It has come to our attention that under the present regulations, the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species. . . . *There seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species' continued survival*.[59]

The committee discussed the critical habitat proposed for the grizzly bear as an example of this regulatory overreaching, stating:

> [A]s much as 10 million acres of Forest Service land is involved in the critical habitat being proposed for the grizzly bear in three Western States. Much of the land involved in this proposed designation is not *habitat that is necessary for the continued survival of the bear*. *It instead is being*

56. Legislative History of the ESA, *supra* note 34, at 880 (emphasis added).
57. *Id.* at 880-81.
58. *See* S. 2899, 95th Cong., at § 3 (2d Sess. 1978).
59. S. Rep. No. 95-874, at 10 (1978) (emphasis added).

> *designated so that the present population within the true critical habitat can expand.*[60]

Senator Wallop, one of the Senate bill's sponsors and floor managers, repeated these concerns during the floor debate on Senate Bill 2899, stating: "[T]he committee has been concerned over the Fish and Wildlife Service's policy to treat areas used to extend the range of an endangered species the same as *areas critical for the species' survival*."[61] The Senator also discussed the proposed critical habitat for the grizzly bear, explaining that "[m]uch of this area is not critical to *the continued existence* of the [species], but is instead proposed so that populations within truly critical habitat can expand."[62]

The Senate debated Senate Bill 2899 over three days and a number of amendments were proposed and discussed.[63] Senator McClure proposed an amendment to the bill that included a new definition of critical habitat, which provided:

> (6) the term "critical habitat" for a threatened or endangered species means:
>
> (A) the specific areas within the geographic area occupied by the species, at the time it is listed in accordance with the provisions of Section 4 of this Act, on which are found those physical and biological features (1) essential to the conservation of the species and (2) which require special management considerations or protection;
>
> (B) "critical habitat" for a threatened or endangered species may include specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this act, into which the species can be expected to expand naturally upon a determination by the Secretary at the time it is listed, that such areas are essential for the conservation of the species[;]
>
> (C) critical habitat may be established for those species now listed as threatened or endangered for which no critical habitat

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60. *Id.* (emphasis added).

61. Legislative History of the ESA, *supra* note 34, at 970-71 (emphasis added).

62. *Id.* at 971 (emphasis added).

63. *See id.* at 951-1168.

> has heretofore been established as set forth in subsection (A) and (B) of this section;
>
> (D) except in those circumstances determined by the Secretary, critical habitat will not include the entire geographical area which can be occupied by the threatened or endangered species.[64]

Senator McClure explained that his amendment was intended to deal with "the establishment of a critical habitat, the manner in which that is to be done, and primarily and most importantly, the extension of the critical habitat once established."[65] He also explained that while the Secretary of Interior may include an unoccupied area, the population must be expected to "naturally expand" into the area, and that "the designation must be made at the time [species] are placed on the list."[66] He emphasized: "Mr. President, this is in response to the difficulty of how large an area should there be established and if that species then expands beyond that area must humans then be displaced in that area."[67] Senator Wallop added: "One of the things that the [Senate oversight] hearings brought out was that the [FWS] was having a difficult time [on] its own distinguishing between critical habitat and range."[68] Senator McClure's amendment was ultimately adopted without a vote.

Senator McClure's amendment was intended to require critical habitat designations to be made at the time of listing, based on currently occupied areas. While the amendment's critical habitat definition contained the phrase "at the time of listing," the definition did not clearly establish the timing of designation. A subsequent amendment, offered by Senator Garn, addressed that problem.

Initially, Senator Garn offered an amendment defining critical habitat that was very similar to Senator McClure's amendment, but would have also amended Section 4 to require designation "concurrently with determination of th[e] species' status," except

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64. *Id.* at 1065.
65. *Id.*
66. *Id.* at 1066.
67. Legislative History of the ESA, *supra* note 34, at 1066.
68. *Id.*

where an emergency exists or the species was listed prior to the ESA's enactment in 1973.[69] He explained:

> It may well be the case, Mr. President, that the designation of critical habitat is more important than the determination of an endangered species itself. In many cases, it will not be until habitat is declared to be *critical to the continued existence of an endangered species* that it will have impacts in the real world. . . .
>
> When a Federal land manager begins consideration of a project, or an application for a permit, it is essential that he know, not only of the existence of an endangered species, but also of the extent and nature of the habitat that is *critical to the continued existence of that species*. Unless he knows the location of *the specific sites on which the endangered species depends*, he may irrevocably commit Federal resources, or permit the commitment of private resources to the detriment of the species in question.[70]

However, because of the similarities between Senator McClure's amendment, which already had been adopted, and his amendment, Senator Garn modified his amendment to address only the timing of critical habitat designation.[71] In responding to questions about the purpose of the amendment, Senator Garn explained:

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69. *Id.* at 1108. Two federal laws preceded the ESA, under which species were listed and subject to certain protections. First, the Endangered Species Preservation Act of 1966 directed the Secretary of Interior to "carry out a program in the United States of conserving, protecting, restoring and propagating selected species of native fish and wildlife that are threatened with extinction." *See* Pub. L. No. 89-669, § 2(a), 80 Stat. 926, 926 (repealed 1973). The Secretary published the first official list of threatened species protected under the 1966 act on February 24, 1967. *See* Endangered Species, 32 Fed. Reg. 4001, 4001 (Mar. 11, 1967). Second, the Endangered Species Conservation Act of 1969 expanded the Secretary's authority beyond the listing of native wildlife, and authorized the listing of species that were "threatened with worldwide extinction." *See* Pub. L. No. 91-135, § 3(a), 83 Stat. 275, 275 (repealed 1973). For additional background on these laws, *see* BEAN & ROWLAND, *supra* note 9, at 194-98.

70. Legislative History of the ESA, *supra* note 34, at 1108-09 (emphasis added).

71. *Id.* at 1109.

> [W]e sincerely want to protect the endangered species. Placing it on the list does not necessarily do that. If you do not have the area designated for its critical habitat *necessary for its continued existence*, then you may have infringements upon that area that could endanger the species.
>
> On the other hand, it also would allow people who are looking at projects, and so on, to look into the future and decide whether or not they would be able to go ahead with their projects.[72]

Following this discussion, Senator Garn's amendment was also agreed to without a vote.[73]

4. The Final Law

House Bill 14104 differed in certain respects from Senate Bill 2899. These differences include the makeup of the Endangered Species Committee, the procedures to list species and designate critical habitat, and exemptions from the Act for certain federal projects.[74] By means of a conference committee, the two houses of Congress resolved these differences, and on October 14, 1978, enacted Public Law 95-632, which was signed into law on November 10, 1978.[75]

During the hearing on the conference report in the House, Representative Murphy explained that "the Senate and House bills were not really all that far apart," and that "the guts of the House bill [had] been retained . . . ."[76] One of the key provisions was "[a]n extremely narrow definition of critical habitat, virtually identical to the definition passed by the House."[77] That definition, which was virtually identical to Senator McClure's amendment to Senate Bill 2899 and similar to Representative Duncan's amendment to House Bill 14104, provided:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—

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72. *Id.* at 1111 (emphasis added).

73. *Id.*

74. *Id.* at 644.

75. *See id.* at 644-46; H.R. REP. NO. 95-1804 (1978) (Conf. Report), *reprinted in* 1978 U.S.C.C.A.N. 9484.

76. Legislative History of the ESA, *supra* note 34, at 1220.

77. *Id.* at 1221.

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are determined to be essential for the conservation of the species.[78]

This two-part definition, which has not changed since 1978, evidenced Congress' intent that critical habitat focus on areas that are currently occupied by members of the species, but allows unoccupied areas to be designated when they are essential to the species' continued existence.

ESA Section 3 was also amended to include the balance of Senator McClure's amendment:

> (B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.[79]

Again, these provisions have not been changed since 1978. Of particular importance here is the meaning of subparagraph (C), which is intended to ensure that critical habitat is limited to specific areas rather than including areas for population expansion.

The law also required that critical habitat be specified by regulation at the time a species is listed "to the maximum extent prudent," based on Senator Garn's amendment to the Senate bill. And it adopted notice-and-comment rulemaking

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78. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 2(2), 92 Stat. 3751, 3751 (codified at 16 U.S.C. § 1532(5)(A)(i)-(ii) (2012)).

79. *Id.*

requirements for the designation of critical habitat, including the publication of notice in local newspapers and, if requested, public hearings.[80] These amendments addressed Congress' concerns about the Services' designation process, including notice to the public, and its timing.

In addition, Congress added the requirement that economic costs and other non-biological factors be considered before areas are designated as critical habitat.[81] This amendment originated in House Bill 14104.[82] The House committee report explained that Section 4(b)(2) is intended to provide greater flexibility and reduce conflicts between critical habitat and other land use activities:

> The result of the committee's proposed amendment would be increased flexibility on the part of the secretary in determining critical habitat . . . . Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat . . . . *The committee expects that in some situations, the resultant critical habitat will be different from that which would have*

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80. *See id.* § 11(1), (4), 92 Stat. at 3764-66 (codified at 16 U.S.C. §§ 1533(a)(3)(A), (b)(3)(D), (b)(5)).

81. *Id.* § 11(7), 92 Stat. at 3766 (codified at 16 U.S.C. § 1533(b)(2)). This provision provided:

> In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

Id. This provision was amended in 2003 to also require consideration of "the impact on national security" when critical habitat is designated. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 318(b), 117 Stat. 1392, 1433 (2003).

82. *See* H.R. 14104, 95th Cong., at § 2(2) (2d Sess. 1978). Originally, this amendment would have applied only to invertebrate species. However, House Bill 14104 was amended by unanimous consent during the floor debate on the bill to apply generally to critical habitat designations. *See* Legislative History of the ESA, *supra* note 34, at 812-13, 884-85.

> *been established using solely biological criteria. In some situations, no critical habitat would be specified.*[83]

Representative Murphy stated that this provision, which was retained from the House bill, "is the most significant provision in the entire bill."[84] The requirement that economic costs and other land use impacts be considered was another repudiation of the Services' 1978 regulation defining critical habitat, under which the socioeconomic impacts of designating areas as critical habitat were not considered.[85]

In summary, Congress intended that critical habitat consist of specific areas that are essential to the species' continued existence. Given the purpose of critical habitat, the adverse modification standard parallels the jeopardy standard, which is also based on ensuring the continued existence of the species.[86] Furthermore, Congress intended that critical habitat focus on specific areas that are occupied at the time of listing, which is logical given the purpose of critical habitat. As the Senate Committee on Environment and Public Works emphasized, critical habitat should not include vast amounts of land for future population growth, as was the case of the then-proposed critical habitat for the grizzly bear. If unoccupied areas are designated, the legislative history, as well as the plain language of the definition, require that these areas must be essential to the species' conservation, which, as the legislative history shows, means essential to the species' continued existence. Finally, Congress intended that critical habitat be designated when the species is listed and that economic and other impacts be considered and, whenever appropriate, areas excluded from critical habitat to minimize resource conflicts, provided that exclusion does not result in the species' extinction.

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83. H.R. Rep. No. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 9467 (emphasis added).

84. Legislative History of the ESA, *supra* note 34, at 1221.

85. Interagency Cooperation, 43 Fed. Reg. 870, 872 (Jan. 4, 1978) (formerly codified at 50 C.F.R. pt. 402) (stating that socioeconomic factors are "irrelevant" to determining critical habitat, and their consideration would "diminish the effectiveness of conservation programs for the recovery of a listed species by distorting the estimate of its true habitat needs.").

86. *See* 16 U.S.C. § 1536(a)(2).

C. *Subsequent ESA Amendments*

The ESA was subsequently amended in 1979 and 1982.[87] These amendments did not change the narrow scope and limited role of critical habitat. Instead, the discussion in the legislative history reaffirmed Congress' view that critical habitat must be essential to the continued existence of the species.

1. 1979 ESA Amendments

The primary purpose of the 1979 Amendments was to increase the level of funding to the Services to carry out ESA program activities, which were expanded in the prior year's amendments.[88] These amendments also made certain changes and corrections to the Act in response to problems that were overlooked in the 1978 Amendments. But the definition of critical habitat and basic requirements for its designation were not changed.[89]

The House report contained a summary of critical habitat, including the requirement that the Services "evaluate the economic impact of designating critical habitat for listed species."[90] The report also noted the Services' 1978 regulatory definition of critical habitat, and explained that the 1978 Amendments had "significantly altered" that definition.[91]

The Senate committee report, by contrast, contained virtually no mention of critical habitat. The report did state, consistent with the 1973 committee reports, that "[s]ince protection of habitat is a key element of the protection of all species, the act authorizes the [Services] to acquire land for the conservation and propagation of affected plants and animals," again indicating Congress' intent that critical habitat areas on non-federal land

87. *See* Authorization, Appropriations—Endangered Species Act, Pub. L. No. 96-159, 93 Stat. 1225 (1979); Endangered Species Act Amendments of 1982, Pub. L. 97-304, 96 Stat. 1411 (1982).

88. *See* H.R. Rep. No. 96-167, at 8 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2557, 2564.

89. *See* H.R. Rep. No. 96-697, at 9-19 (1979) (Conf. Rep.), *reprinted in* 1979 U.S.C.C.A.N. at 2572, 2572-83 (summarizing the amendments in the final bill).

90. H.R. Rep. No. 96-167, at 4 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2557, 2560.

91. *Id.* at 5-6.

be acquired and protected, rather than regulated by the Services through the Section 7 consultation process.[92]

2. 1982 ESA Amendments

In 1982, Congress enacted more extensive amendments to the ESA, which, in addition to authorizing appropriations, were intended to address problems that arose following the 1978 and 1979 Amendments. These changes included authority to postpone critical habitat designations for up to one year after the species' listing so that the economic impact analyses mandated by Section 4(b)(2) could be completed without delaying listings.[93] The House committee report stated that notwithstanding these changes, the Services are expected "to make the strongest attempt possible to determine critical habitat within the time period designated for listing."[94] Otherwise, as the conference committee report explained, "[t]he standards in the Act relating to the designation of critical habitat remain unchanged."[95] Moreover, the discussion of critical habitat in the committee reports is consistent with the 1978 legislative history.

For example, the House report described critical habitat as "habitat *critical to the survival of the species* at the time of listing."[96] The Senate report noted that the Services were still failing to designate specific areas as critical habitat, and instead were designating large geographic areas:

> When designating critical habitat, the Secretary is expected to comply with the statutory definition and designate "specific areas." Several witnesses suggested that instead of such "specific areas" the Secretary was designating "geographic

92. S. Rep. No. 96-151, at 1 (1979).

93. *See* Endangered Species Act Amendments of 1982, Pub. L. 97-304, § 2(a), 96 Stat. 1411, 1411-16; H.R. REP. NO. 97-835, at 23-24 (1982) (Conf. Rep.), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2864-65 (summarizing final legislation).

94. H.R. Rep. No. 97-567, at 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2820.

95. H.R. Rep. No. 97-835, at 20 (1982) (Conf. Rep.), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2861; *see also* H.R. Rep. No. 97-567, at 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2820 ("[T]he provisions in the Act relating to designation of critical habitat remain unchanged.").

96. H.R. Rep. No. 97-567, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N 2807, 2810 (emphasis added).

> ranges." Section 3(5)(c) of the Act states as a general rule that "critical habitat shall not include the entire geographic area which can be occupied by the threatened or endangered species."[97]

Finally, Congress again explained that the consideration of economic impacts and exclusion of areas from critical habitat to avoid resource conflicts should play an important role in critical habitat designation:

> Although the Secretary is to determine whether a species should be listed based on biological information on the status of that population, the critical habitat designation, which is to accompany the species' listing to the maximum extent prudent, also takes into account the economic impacts of listing such habitat as critical. . . . Desirous to restrict the Secretary's decision on species listing to biology alone, *the committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests.* For this reason, the Committee elected to leave critical habitat as an integral part of the listing process but to prevent its designation from influencing the decision on the listing of a species.[98]

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97. S. Rep. No. 97-418, at 12 (1982).

98. H.R. Rep. No. 97-567, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2811-12 (emphasis added). The requirement that economic and other impacts be considered in connection with designating critical habitat is now largely irrelevant as a result of agency regulatory policy and court decisions. The most significant of these changes is the use of an incremental or baseline approach to evaluating the economic impacts of designating critical habitat, under which all or virtually all of the impacts on land and resource uses are attributed to the species' listing—the pre-existing regulatory "baseline"—and are not considered to be an impact of the critical habitat designation. *See* Ariz. Cattle Growers Ass'n v. Salazar, 606 F.3d 1160, 1172-74 (9th Cir. 2010) (affirming the validity and use of the baseline approach); *but see* N.M. Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv., 248 F.3d 1277, 1285 (10th Cir. 2001) (holding that the baseline approach renders the consideration of economic impacts required by Section 4(b)(2) "virtually meaningless" and is "not in accord with the language or intent of the ESA."). In 2013, the Services revised their regulations to formally adopt the baseline approach and affirm the agencies' broad discretion to decide whether to exclude particular areas under Section 4(b)(2). *See* Revisions to the Regulations for Impact Analyses of Critical Habitat, 78 Fed. Reg. 53,058 (Aug. 28, 2013) (to be codified at 50 C.F.R. § 424.19). As a result, a

In short, the legislative history subsequent to the 1978 Amendments lends additional support to the limited scope and role of critical habitat. It is apparent that Congress expected critical habitat to consist of specific areas that are essential to the species' continued existence, paralleling the jeopardy standard in Section 7(a)(2). As shown in the following section, the language and structure of the ESA also supports critical habitat's narrow scope and limited role in conserving species.

III.
THE LANGUAGE AND STRUCTURE OF THE ESA SHOWS THAT CRITICAL HABITAT CONSISTS OF AREAS ESSENTIAL FOR THE SPECIES' SURVIVAL

A. *The Definition of Critical Habitat Distinguishes Between Occupied and Unoccupied Areas, Reflecting Congress' Intent that Critical Habitat Focus on Occupied Areas*

As explained above, Congress added the definition of "critical habitat" to the ESA in 1978 to "narrow[] the scope of the term as it is defined in the existing regulations."[99] This definition deliberately distinguishes between occupied and unoccupied areas:

> (5)(A)(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.[100]

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cursory evaluation of economic impacts is normally performed, and land is almost never excluded from critical habitat on economic grounds, even when areas are designated as critical habitat for future population expansion.

99. H.R. Rep. No. 95-1625, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9475.

100. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632,

This two-part definition addressed Congress' concern about the Services' practice of designating unoccupied areas for future population expansion, rather than limiting critical habitat to areas that are truly critical to the species' survival.[101] It effectively creates a regulatory hierarchy, under which unoccupied areas should not be designated as critical habitat absent exceptional circumstances.[102] The deliberate distinction between occupied and unoccupied areas shows that the role of critical habitat under the ESA is limited—it is not intended to provide habitat for a species' population expansion, i.e., for recovery.

B. *The Timing of Critical Habitat Designation Is Consistent With Its Limited Role Under the ESA*

The Services are required to designate a species' critical habitat concurrently with its listing of the species "to the maximum extent prudent and determinable."[103] As discussed

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§ 2(1), 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532(5)(A)(i)-(ii)).

101. *See, e.g.,* S. Rep. No. 95-874, at 9-10 (1978) ("It has come to our attention that under present regulations the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to *the continued existence of a species*.") (emphasis added); *id.* at 10 ("There seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are *critical to a species* [sic] *continued survival*.") (emphasis added).

102. *See, e.g.*, *Ariz. Cattle Growers Ass'n*, 606 F.3d at 1163 (stating that 16 U.S.C. § 1532(5)(a) "differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas . . . ."). The court also explained that "occupied areas" are areas that "the [species] uses with sufficient regularity that [the species] is likely to be present during any reasonable span of time." *Id.* at 1165. Thus, for an area proposed as critical habitat to be occupied, there must be evidence of regular use by members of the species.

103. 16 U.S.C. § 1533(a)(3)(A) (1982). *See also, e.g.*, H.R. Rep. No. 95-1625, at 17, (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 ("The committee intends that in most situations the Secretary will . . . designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species."); H.R. Rep. No. 97-567, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2810 ("The Secretary is directed, to the maximum extent prudent, to designate habitat

above, both houses of Congress, in connection with the 1978 ESA Amendments, discussed the timing of designating critical habitat. Senator Garn explained, for example, because critical habitat is habitat "necessary for [the species'] continued existence," it should be designated when the species is listed to reduce resource conflicts.[104]

The courts have followed the plain language of the statute and legislative history in requiring that critical habitat be designated when listing occurs. For example, in *Natural Resources Defense Council v. Department of Interior*, the court rejected the FWS's "not prudent" determination with respect to critical habitat for the coastal California gnatcatcher, concluding that the agency "failed to discharge its statutory duty to designate critical habitat when it listed the gnatcatcher."[105] Similarly, in *Northern Spotted Owl v. Lujan,* the court explained that the "language employed in Section 4(a)(3) and its place in the overall statutory scheme evidence a clear design by Congress that designation of critical habitat coincide with the species listing determination."[106]

The requirement that critical habitat be designated concurrently with listing (or in no event later than 12 months after listing when additional information is needed[107]) also indicates that critical habitat is not recovery habitat. In *Northern Spotted Owl*, the court rejected the FWS's argument that it should be excused from designating critical habitat pending development of a comprehensive conservation plan for the species.[108] Relying on the plain language of the statute and legislative history, the court recognized that critical habitat plays a limited role under the ESA, stating:

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critical to the survival of the species at the time of listing.").

104. LEGISLATIVE HISTORY OF THE ESA, *supra* note 34, at 1111.

105. Natural Res. Def. Council v. Dep't of Interior, 113 F.3d 1121, 1127 (9th Cir. 1997). *See also* Conservation Council for Haw. v. Babbitt, 2 F. Supp. 2d 1280, 1288 (D. Hawaii 1998) (rejecting the agency's "not prudent" finding in holding that the agency's failure to timely designate critical habitat for 245 plant species was arbitrary and capricious).

106. N. Spotted Owl v. Lujan, 758 F. Supp. 621, 624 (W.D. Wash. 1991).

107. 16 U.S.C. § 1533(b)(6)(C)(ii) (2012).

108. *N. Spotted Owl*, 758 F. Supp. at 628-29.

> Thus, even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention.[109]

If the Services comply with the law and designate critical habitat when the species is listed, they are unlikely to know what specific actions are needed to recover species. Conversely, if Congress had intended that critical habitat include unoccupied areas for recovery purposes, Congress would have allowed the designation to be delayed pending the development of a recovery strategy for the species. As the *Northern Spotted Owl* court explained, Congress chose not to do so.

C. *The Services' Authority to Exclude Areas from Critical Habitat Is Consistent With Critical Habitat's Limited Role Under the ESA*

The language Congress employed in Section 4(b)(2),[110] which grants the Services broad authority to exclude areas from critical habitat, also is consistent with the limited scope and purpose of critical habitat. This provision states:

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, *unless* he determines, based on the best scientific and commercial data available, that *the failure to designate such area as critical habitat will result in the extinction of the species concerned.*[111]

Congress' use of the word "extinction" in Section 4(b)(2) is consistent with Congress' intent that critical habitat be limited to specific areas that are critical to the species' survival. Thus,

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109. *Id.* at 623. In a more recent case, the court quoted and followed *Northern Spotted Owl* in setting aside the critical habitat designated for the Rio Grande silvery minnow. *See* Middle Rio Grande Conservancy Dist. v. Babbitt, 206 F. Supp. 2d 1156, 1169 (D.N.M. 2000) (quoting *N. Spotted Owl*, 758 F. Supp. at 623), *aff'd sub nom.* Middle Rio Grande Conservation Dist. v. Norton, 294 F.3d 1220 (10th Cir. 2002).

110. 16 U.S.C. § 1533(b)(2).

111. *Id.* (emphasis added).

for example, Representative Duncan, who sponsored the floor amendment that further narrowed the definition of critical habitat in the House bill, explained:

> I think that in order to be consistent with the purposes of this bill to preserve critical habitat that there ought to be a showing that it is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it.
>
> I think this goes to the heart of the problem which every Member has felt in his district. It is entirely consistent with good biological practices and furthermore it maintains intact the purpose of this bill, which is *to prevent the extinction of species who require this critical habitat*.[112]

Representative Duncan also explained "that if we are concerned with critical habitat, *that word 'critical' implies essential to its survival*."[113]

When considered in light of the legislative history relating to critical habitat, the language Congress employed in Section 4(b)(2) is perfectly logical: Because critical habitat consists of areas essential to the species' continued existence, areas may be excluded as long as their exclusion does not cause the species' extinction. It is immaterial whether the exclusion of an area may impede the species' recovery as long as the species' survival is not jeopardized. Thus, the authority to exclude areas that otherwise qualify as critical habitat because they are essential to the conservation of the species to avoid conflicts with development is further evidence of critical habitat's limited role under the Act.

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112. Legislative History of the ESA, *supra* note 34, at 880 (emphasis added).
113. *Id.* at 818 (emphasis added).

IV.
THE *SIERRA CLUB* AND *GIFFORD PINCHOT* DECISIONS

A. *The Services' Post-Amendment Rulemakings*

Shortly after the ESA was amended in 1978, 1979 and 1982, the Services adopted regulations governing the process and criteria for listing species and designating critical habitat,[114] and governing the Section 7 consultation process (the "1986 Section 7 Rules").[115] The latter regulations are of particular importance because they contained the definition of "destruction or adverse modification" of critical habitat that was determined to conflict with the ESA and the intent of Congress in the *Sierra Club* and *Gifford Pinchot* decisions.[116]

Under the 1986 Section 7 Rules, the "jeopardy" and " adverse modification" standards were intended to emphasize impacts to critical habitat that jeopardized the species' continued existence—its survival. To "jeopardize the continued existence of" was defined as:

> [T]o engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.[117]

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114. *See* Rules for Listing Endangered and Threatened Species, Designating Critical Habitat, and Maintaining the Lists, 45 Fed. Reg. 13,010 (Feb. 27, 1980) (codified at 50 C.F.R. pt. 424) (creating a separate part for the agencies' regulations governing the listing of species and critical habitat designation and addressing the 1978 procedures for critical habitat designation); Listing Endangered and Threatened and Designating Critical Habitat; Amended Procedures to Comply with the 1982 Amendments to the Endangered Species Act, 49 Fed. Reg. 38,900 (Oct. 1, 1984) (codified at 50 C.F.R. pt. 424) (revising the 1980 regulations to incorporate the 1982 amendments to the ESA).

115. *See* Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926 (June 3, 1986) (codified at 50 C.F.R. pt. 402). Notably, the House Committee on Merchant Marine and Fisheries, which is responsible for oversight of the ESA and its administration, reviewed and submitted comments on the Services' proposed rules (issued in 1983), indicating which rules did not conform to Congress' intent. *Id.* at 19,927.

116. *See* Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 441-43 (5th Cir. 2001); *Gifford Pinchot*, 378 F.3d at 1069-72.

117. Interagency Cooperation–Endangered Species Act of 1973, as Amended,

The term "destruction or adverse modification" was similarly defined as:

> [A] direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and the recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.[118]

Both definitions, unfortunately, contain the phrase "survival and recovery," which has led to confusion.[119] This phrase originally appeared in the Services' 1978 regulations defining critical habitat and destruction or adverse modification.[120] As discussed previously, the Services' 1978 definition of critical habitat included areas for future population expansion, and the agencies suggested in their rulemaking preamble that impairment of a species' recovery would alone violate Section 7(a)(2).[121] As shown above, that interpretation was strongly criticized by Congress, and the ESA was amended to limit critical habitat to specific areas essential to the species' survival.[122]

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51 Fed. Reg. at 19,958.

118. *Id.*

119. *See, e.g.*, Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 932 (9th Cir. 2008) (rejecting the NMFS's reading of the regulation defining "jeopardize the continued existence of" because it focused on survival and describing the definition as incorporating a "joint survival and recovery concept").

120. *See* Interagency Cooperation, 43 Fed. Reg. 870, 875 (Jan. 4, 1978) (formerly codified at 50 C.F.R. pt. 402) (defining "destruction or adverse modification").

121. *See id.* at 872 (stating that consideration of socioeconomic factors in determining a species' critical habitat would "diminish the effectiveness of conservation programs for the recovery of a listed species by distorting the estimate of its true habitat needs.").

122. *See, e.g.,* H.R. Rep. No. 97-567, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N 2807, 2810 (describing critical habitat as "habitat *critical to the survival of the species* at the time of listing" (emphasis added)); Legislative History of the ESA, *supra* note 34, at 817 (statement of Rep. Bowen) ("What we want [the FWS] to do is make a very careful analysis of *what is actually needed for survival of this species*." (emphasis added)); *id.* at 818 (statement of Rep. Duncan) ("[I]f we are concerned with critical habitat, that word 'critical' implies *essential to its survival*." (emphasis added)); *id.* at 970 (statement of Sen.

To comply with the ESA Amendments and the intent of Congress, the Services added the word "both" to the definitions of "jeopardize the continued existence of" and "destruction or adverse modification." This change was intended to "emphasize that, except in exceptional circumstances, injury to recovery alone would not warrant the issuance of a 'jeopardy' biological opinion."[123] The Services also rejected comments that they should prohibit actions that, regardless of the impact on the species' survival, would adversely affect the recovery of a species, explaining:

> The "continued existence" of the species is the key to the jeopardy standard, placing an emphasis on injury to a species' "survival." However, significant impairment of recovery efforts or other adverse effects which rise to the level of "jeopardizing" the "continued existence" of a listed species can also be the basis for issuing a jeopardy opinion. . . .
>
> Congress intended that the "jeopardy" standard be the ultimate barrier past which Federal actions may not proceed, absent the issuance of an exemption.[124]

In short, the jeopardy and adverse modification definitions adopted by the Services were intended to emphasize impacts to the species' survival. This shift in emphasis was mandated by the 1978, 1979 and 1982 ESA Amendments and their legislative history. Under the definitions, while the impact of an action on a species' recovery may be considered, only in exceptional circumstances would the impairment of recovery cause an action to be prohibited under Section 7(a)(2). As discussed below, the Services' emphasis on survival rather than recovery was determined to be unlawful by the *Sierra Club* and *Gifford Pinchot* courts.

Wallop) ("[T]he committee has been concerned over the Fish and Wildlife Service's policy to treat areas to extend the range of an endangered species the same as *areas critical for the species' survival*." (emphasis added)); *id.* at 971 (statement of Sen. Wallop) ("Much of the proposed critical habitat for the grizzly bear is not *critical to the continued existence* of the [species], but is instead proposed so that populations within truly critical habitat can expand." (emphasis added)).

123. Interagency Cooperation–Endangered Species Act of 1973, as Amended, 51 Fed. Reg. at 19,934.

124. *Id.*

B. *The Fifth Circuit's Decision in Sierra Club*

In *Sierra Club*, an environmental organization challenged the Services' failure to designate critical habitat for the Gulf sturgeon in 1998.[125] The agencies had determined that the designation of critical habitat would not be prudent because it would not provide any additional benefit to the species.[126] Thus, the challenged agency action in *Sierra Club* was a determination made pursuant to ESA Section 4(a)(3); the Services' definition of "destruction or adverse modification" was not directly at issue. Instead, the definition became an issue because the Services relied on the similarities between the jeopardy and adverse modification standards to support their decision that the designation of critical habitat would not be prudent.[127]

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125. Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 436-37 (5th Cir. 2001). During this period, the Services had relegated critical habitat to its lowest priority of all actions under Section 4 and in many cases failed to designate critical habitat until ordered to do so by a court. *See* Steven P. Quarles & Thomas R. Lundquist, *Critical Habitat: Current Centerpiece of Endangered Species Act Litigation and Policymaking: Critical for Whom? The Species or the Landowner?*, 48 Rocky Mountain Min. L. Found. Proc. 18-1, 18-20 to 18-26 (2002).

126. One of the exceptions to the requirement that critical habitat be designated at the time of listing is when designation would not be prudent. *See* 16 U.S.C. § 1533(a)(3)(A) (1994). Under the Services' regulations, the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and the identification of critical habitat can be expected to increase the degree of threat to the species, or (2) the designation of critical habitat would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1) (2012). As discussed above, courts have rejected the agencies' attempts to avoid designating critical habitat on prudency grounds. *See, e.g.,* Natural Res. Def. Council v. Dep't of Interior, 113 F.3d 1121, 1125-27 (9th Cir. 1997) (rejecting the FWS's argument that critical habitat would provide no benefit to the species and, therefore, was not prudent).

127. *See Sierra Club*, 245 F.3d at 439-40; *see also* Decision on Designation of Critical Habitat for the Gulf Sturgeon, 63 Fed. Reg. 9967, 9972-73 (Feb. 27, 1998). In their decision, the Services relied on the Gulf sturgeon's recovery plan and prior biological opinions issued after the sturgeon was listed as a threatened species in 1991, explaining that no high priority recovery actions had been identified for unoccupied areas, and, for occupied areas, consultation under the jeopardy standard would necessarily involve consideration of impacts on habitat and adequately protect the species. *Id.* Given these circumstances, the Services' concluded that the designation of critical habitat would not provide any additional conservation benefit to the sturgeon. *Id.* at 9973.

In addressing the appellant's arguments, the Fifth Circuit rejected the contention that the similarity between the Services' definitions of jeopardy and adverse modification impermissibly conflated the two statutory phrases, resulting in a single Section 7 consultation standard. The court explained that the "mere fact that both definitions are framed in terms of survival and recovery does not render them equivalent."[128]

> Significantly, the destruction/adverse modification standard is defined in terms of actions that diminish the "value of critical habitat" for survival and recovery. Such actions conceivably possess a more attenuated relationship to the survival and recovery of the species. The destruction/adverse modification standard focuses on the action's effects on critical habitat. In contrast, the jeopardy standard addresses the effect of the action itself on the survival and recovery of the species. The language of the ESA itself indicates two distinct standards; the regulation does not efface this distinction.[129]

However, the court went on to declare (unnecessarily[130]) that the Services' definition of adverse modification was invalid because the definition "imposes a higher threshold than the statutory language permits."[131] In support of this holding, the court relied, first, on the statutory definition of critical habitat, under which areas designated as critical habitat must be "essential to the conservation of the species."[132] The court concluded that Congress' use of the word "conservation" was intended to expand the purpose of critical habitat beyond "mere survival," concluding that "conservation" "speaks to the recovery

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128. *Sierra Club*, 245 F.3d at 441.

129. *Id.* (footnote omitted).

130. The Fifth Circuit acknowledged that it was reviewing the validity of the regulatory definition of adverse modification even though it was not challenged in the complaint, and the administrative record concerning the 1986 Section 7 Rules was not before the court. *Id.* at 440 n.37. Instead, the court's "review was limited to the extent to which the regulation is consistent with the statute—a task we are competent to perform without the administrative record." *Id.* Consequently, it is arguable that the court's ruling on the validity of the regulatory definition of adverse modification was dicta.

131. *Id.* at 442.

132. *See* 16 U.S.C. § 1532(A)(i)-(ii) (2012).

of a threatened or endangered species."[133] As discussed below, however, it is apparent from the manner in which "conservation" is used in the ESA that it refers to the management and protection of wildlife in the ordinary sense and is not synonymous with recovery. The court did not consider any other aspects of the ESA, such as the two-part definition of critical habitat or the timing of designation, which indicates that critical habitat is not intended to be "recovery" habitat.

Second, and more troubling, the court relied on the legislative history of the 1978 Amendments to support its holding, concluding that the legislative history "affirms the inconsistency of 50 C.F.R. § 402.02 and the statute."[134] In doing so, the court badly misread the legislative history. The court correctly stated that Congress had rejected the Services' 1978 regulatory definition of critical habitat (under which critical habitat included unoccupied areas for population expansion), but erroneously explained that Congress intended to expand the scope of critical habitat rather than limiting it.[135] For the reasons discussed previously, this reading of the legislative history is obviously incorrect.[136]

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133. *Sierra Club*, 245 F.3d at 441-43.

134. *Id.* at 442.

135. *Id.* at 442-43.

136. *See, e.g.*, H.R. Rep. No. 95-1625, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 9475 ("Under the present regulations, the Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured."); *id.* at 18, *reprinted in* 1978 U.S.C.C.A.N. at 9468 (The Services should "be exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species."); Legislative History of the ESA, *supra* note 34, at 817 (statement of Rep. Duncan) ("I believe the majority of the House is in agreement . . . that the Office of the Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species."); *id.* at 818 (statement of Rep. Duncan) ("[I]f we are concerned with critical habitat, that word 'critical' implies essential to its survival."); S. REP. NO. 95-874, at 10 (1978) ("It has come to our attention that under the present regulations, the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species."); *id.* ("[T]he committee has been

Finally, the Fifth Circuit believed that the emphasis on survival in the definition of "destruction or adverse modification" would make it less likely that critical habitat would be designated.[137] The court believed this result would conflict with the intent of Congress that only in rare circumstances would the designation of critical habitat not be prudent.[138] In that respect, the decision is consistent with the legislative history and other court decisions.[139] It was unnecessary, however, for the court to transform critical habitat into "recovery" habitat to support its ultimate ruling. While Congress intended that critical habitat should be designated in most cases, Congress also intended that critical habitat be limited to specific areas essential to the species' continued existence.

In summary, *Sierra Club*'s invalidation of the regulatory definition of "destruction or adverse modification" was based on its erroneous belief that Congress, in amending the ESA in 1978, intended to expand the scope and purpose of critical habitat. In fact, the opposite was true. This error undermined the court's holding.

C. *The Ninth Circuit's Decision in Gifford Pinchot*

Gifford Pinchot involved challenges to a group of biological opinions issued by the FWS under ESA Section 7(a)(2) rather than a critical habitat designation.[140] These opinions addressed whether timber harvesting on federal land in the Pacific Northwest would jeopardize the continued existence of the northern spotted owl, a threatened species under the ESA, or

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concerned over the Fish and Wildlife Service's policy to treat areas to extend the range of an endangered species the same as areas critical for the species' survival.").

137. *Sierra Club*, 245 F.3d at 443.

138. *Id.*

139. *See, e.g.*, Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 624-27 (W.D. Wash. 1991) (discussing the legislative history and concluding that the "designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances").

140. Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1062-65 (9th Cir. 2004).

adversely modify that species' critical habitat.[141] The FWS concluded that although small numbers of spotted owls would be incidentally taken, the proposed timber harvesting would not jeopardize the species or adversely modify its critical habitat.[142]

The appellants challenged the biological opinions on multiple grounds,[143] including a facial challenge to the validity of the Services' definition of "destruction or of adverse modification."[144] In analyzing that challenge, the Ninth Circuit began by summarizing the Services' interpretation of "destruction or adverse modification," stating:

> [T]he FWS has interpreted "destruction or adverse modification" as changes to the critical habitat "that appreciably diminish[] the value of critical habitat for *both* the survival *and* recovery of a listed species." 50 C.F.R. § 402.02 (emphases added). This regulatory definition explicitly requires appreciable diminishment of the critical habitat necessary for survival before the "destruction or adverse modification" standard could ever be met. Because it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species[ʻ] survival, the regulation's singular focus becomes "survival." Given this literal understanding of the regulation's express definition of "adverse modification," we consider whether that definition is a permissible interpretation of the ESA.[145]

Referring to the familiar *Chevron* test,[146] the court found that there was no need to go beyond step one in analyzing the

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141. *Id.* at 1064-65. As explained in the decision, a biological opinion addresses "both the jeopardy and the critical habitat prongs of Section 7 by considering the current status of the species, the environmental baseline, the effects of the proposed action, and the cumulative effects of the proposed action." *Id.* at 1063 (citing 50 C.F.R. § 402.14(g)(2)-(3)).

142. *Id.* at 1064-65.

143. *Id.* at 1065. The court also rejected the challenge to the jeopardy analyses in the biological opinions. *Id.* at 1066-68.

144. *Id.* at 1069.

145. *Id.*

146. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Under *Chevron*, judicial review of an agency's interpretation of a statute proceeds in two steps. First, the court must determine whether the intent of Congress regarding the meaning of the statute is clear from the statute's plain language; if it is, the court must give effect to the plain language

regulation's validity. Following the reasoning of *Sierra Club*, the court noted that the ESA defines "conservation" to include all methods that may "bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary." It further noted that critical habitat includes areas that are "essential to the conservation of the species."[147] On that basis, the court concluded that "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery."[148]

Based on the statutory language, the court reasoned that "Congress intended that conservation and survival be two different—though complementary—goals of the ESA."[149] The Services' definition of "destruction or adverse modification," by contrast, focuses on survival, which, according to the court, conflicted with the intent of Congress:

> [A]dverse modification to critical habitat can only occur when there is so much critical habitat lost that a species' very survival is threatened. *The agency's interpretation would drastically narrow the scope of protection commanded by Congress* under the ESA. To define "destruction or adverse modification" of critical habitat to occur only when there is appreciable diminishment of the value of the critical habitat for both survival and conservation [*sic*] fails to provide protection of habitat when necessary only for species' recovery. The narrowing construction implemented by the regulation is regrettably, but *blatantly, contradictory to Congress' express command*. Where Congress in its statutory language required "or," the agency in its regulatory definition substituted "and."

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of the statute. *Id.* In determining the intent of Congress, the traditional tools of statutory construction are employed, including review of the legislative history. *See, e.g.*, N. Cal. River Watch v. Wilcox, 633 F.3d 766, 773 (9th Cir. 2011) ("If the proper interpretation is not clear from th[e] textual analysis, the legislative history offers valuable guidance.") (quoting Resident Councils of Wash. v. Leavitt, 500 F.3d 1025, 1031 (9th Cir. 2007)). Second, if the intent of Congress is uncertain, the court must determine whether the agency's interpretation of the statute is a permissible construction of the statute. *See Chevron*, 467 U.S. at 843.

147. *Gifford Pinchot*, 378 F.3d at 1070.

148. *Id.*

149. *Id.*

> This is not merely a technical glitch, but rather *a failure of the regulation to implement Congressional will*.[150]

Thus, like the Fifth Circuit in *Sierra Club*, the Ninth Circuit purportedly relied on the intent of Congress as the basis for its holding.

After providing its analysis, the Ninth Circuit proceeded to discuss *Sierra Club*, explaining that the Fifth Circuit also had equated "conservation" with recovery and "bolstered its conclusion from the legislative history where Congress had considered an earlier critical habitat regulation that required effects on both recovery and survival and had rejected such an interpretation."[151] Thus, while the Fifth Circuit misread the legislative history and misapprehended the intent of Congress, the *Gifford Pinchot* court relied on *Sierra Club* rather than conducting its own review of the legislative history. As a result, the Ninth Circuit erroneously held that the Services' definition of adverse modification is unlawful.

D. *The Meaning of the Term "Conservation"*

The *Sierra Club* and *Gifford Pinchot* courts plainly misapprehended the ESA's legislative history and the intent of Congress in declaring the Services' definition of "destruction or adverse modification" invalid. But both courts also misapprehended the meaning of "conservation" by improperly equating conservation with recovery. As shown below, the term "conservation" and its variants, "conserve" and "conserving," are defined broadly in the ESA, and include actions that benefit species by assisting in their survival.

The common meaning of "conservation" is "a careful preservation and protection of something," especially "planned management of a natural resource to prevent exploitation, destruction, or neglect."[152] Likewise, "conserve" is defined as, "to keep in a safe or sound state," especially "to avoid wasteful or

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150. *Id.* (emphasis added).

151. *Id.* at 1071 (citing Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 443 (5th Cir. 2001)).

152. Merriam-Webster's Collegiate Dictionary 245 (10th ed. 2000).

destructive use of" something, such as "natural resources."[153] In other words, the ordinary meaning of "conservation" is to protect and manage a resource, whether that resource is water, forest, rangeland, minerals or wildlife. This is the sense in which the term "conservation" is used in the ESA and its legislative history.

The definition of "conservation" and its variants, "conserve" and "conserving," was originally enacted in 1973, and these terms appear dozens of times and in numerous sections of the ESA. The original definition provided:

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act [chapter] are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.[154]

The 1973 conference committee report explained the purpose for this definition:

> The Senate bill contained language defining the term "conservation and management" as these concepts relate to endangered species; the House bill did not. In view of the varying responsibilities assigned to the administrative agencies in the bill, the term was redefined to include generally the kinds of activities that might be engaged in to improve the status of endangered and threatened species so that they would no longer require special treatment. The concept of conservation covers the full spectrum of such activities: from total "hands-off" policies involving protection

153. *Id.* at 246.

154. Endangered Species Act of 1973, Pub. L. No. 93-205, § 3(2), 87 Stat. 884, 885. With the exception of the substitution of "chapter" for "Act," as shown in brackets in the text above, the current definition of these terms is identical to the original version. *See* 16 U.S.C. § 1532(3) (2012).

> from harassment to a careful and intensive program of control. In extreme circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where this pressure can be relieved in no other feasible way, this "conservation" might include authority for carefully controlled taking of surplus members of the species. To state that this possibility exists, however, in no way is intended to suggest that this extreme situation is likely to occur—it is just to say that the authority exists in the unlikely event that it ever becomes needed.[155]

Thus, Congress' broad definition was intended to clarify that agencies carrying out the ESA have available the "full spectrum" of wildlife management tools, including, in extreme cases, killing or capturing members of the species. Although the definition refers to "bring[ing] any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary," it does not mention recovery nor does it limit conservation to activities that aid in species' recovery. The definition is broad enough to generally encompass activities that benefit species—the ordinary meaning of "conservation." And given the legislative history, it is apparent that Congress did not regard the "conservation" as being synonymous with the recovery of listed species.[156]

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155. H.R. Rep. No. 93-740, at 23 (1973) (Conf. Report), *reprinted in* 1973 U.S.C.C.A.N. 3002.

156. *See*, *e.g.*, H.R. REP. NO. 97-567, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N 2810 (defining critical habitat as "habitat *critical to the survival of the species* at the time of listing." (emphasis added)); S. REP. NO. 95-874, at 10 (1978) ("It has come to our attention that under the present regulations, the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to *the continued existence of a species*." (emphasis added)); *id.* ("There seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are *critical to a species' continued survival*." (emphasis added)); LEGISLATIVE HISTORY OF THE ESA, *supra* note 34, at 817 (statement of Rep. Bowen) ("What we want [the FWS] to do is make a very careful analysis of *what is actually needed for survival of this species*." (emphasis added)); *id.* at 818 (statement of Rep. Duncan) ("[I]f we are concerned with critical habitat, that word 'critical' implies *essential to its survival*." (emphasis added)).

Moreover, it is apparent from the manner in which "conserve," "conserving" and "conservation" are used in the ESA that these words are intended to have their ordinary meaning. In fact, these words appear some fifty times in the ESA in a variety of different contexts, indicating that they are not limited to actions that recover listed species.

For example, the Congressional findings in ESA Section 2 provide:

> (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and *conservation*; . . . [.]
>
> (4) the United States has pledged itself as a sovereign state in the international community to *conserve* to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—[listing wildlife-related treaties and conventions, including migratory bird treaties with Canada, Mexico and Japan, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora;][.]
>
> (5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain *conservation* programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.[157]

It makes little sense to say species "have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and *recovery*." Instead, these species have been rendered extinct due to lack of adequate management and protection. Similarly, the United States has not pledged that it will *recover* fish and wildlife species under various international treaties, but instead has pledged to take steps to manage and protect them. And it makes little sense to interpret the last finding to require that national and

157. 16 U.S.C. § 1531(a)(1), (4)-(5) (emphasis added).

international *recovery* standards be met, given that such standards do not exist.

In determining whether to list a species, the Services must "tak[e] into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other *conservation* practices, within any area under its jurisdiction; or on the high seas."[158] Again, it is apparent that "conservation" means wildlife management and protection, as these conservation efforts necessarily occur *prior to* the species' listing under the ESA and may preclude the need to list the species.

The term "State agency" is defined in ESA Section 3 as "any State agency, department, board, commission, or other governmental entity which is responsible for the management and *conservation* of fish, plant, or wildlife resources within a State."[159] In this definition, "conservation" has its ordinary meaning: State agencies manage and protect wildlife, including regulating hunting and fishing. "Conservation" refers to those types of management activities, not to recovering species that have been listed under the ESA.

Section 5 of the ESA provides that the Secretary of the Interior and the Secretary of Agriculture (with respect to the National Forest System) "shall establish and implement a program *to conserve* fish, wildlife, and plants, *including* those which are listed as endangered species or threatened species pursuant to section 1533 of this title."[160] If "to conserve" means to recover species, then this provision requires that the Interior Department and Forest Service establish and implement recovery programs for all fish, wildlife and plants, the vast majority of which are not listed and will never be listed under the ESA. This would be illogical.

ESA Section 8 (International Cooperation)[161] provides that the Secretaries of Interior and Commerce (i.e., the appropriate

158. *Id.* § 1533(b)(1)(A) (emphasis added).
159. *Id.* § 1532(18) (emphasis added).
160. *Id.* § 1534(a) (emphasis added).
161. *Id.* § 1537.

Service), through the Secretary of State, "shall encourage" "foreign countries to provide for the *conservation* of fish or wildlife and plants including endangered and threatened species . . . ." and may enter into "bilateral or multilateral agreements with foreign countries to provide for such conservation." [162] Again, these provisions address programs and activities that generally concern the management and protection of fish, wildlife and plants, and are not limited to recovering species that are listed under the ESA.

Another example of Congress' deliberate use of "conservation" in the ordinary sense of the word is found in the legislative history of the 1982 Amendments, which adopted provisions authorizing the issuance of incidental take permits.[163] To obtain an incidental take permit, a landowner must submit and the Services must approve a "conservation plan."[164] In discussing the scope of conservation plans, the conference committee report stated:

> Although the regulatory mechanisms of the [ESA] focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species. This is consistent with the purposes of several other fish and wildlife statutes (e.g. Fish and Wildlife Act of 1956, Fish and Wildlife Coordination Act) which are intended to authorize the Secretary to cooperate with the states and private entities on matters regarding conservation of all fish and wildlife resources of this nation. The conservation plan will implement the broader purposes of all of those statutes and allow unlisted species to be addressed in the plan.[165]

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162. *Id.* § 1537(b) (emphasis added).

163. *See* Endangered Species Act Amendments of 1982, Pub. L. 97-304, § 6(1), 96 Stat. 1411, 1422-23. The ESA generally prohibits the "take" of (i.e., killing or injuring) members of a listed species. *See* 16 U.S.C. § 1538(a)(1). *See also* Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1237-38 (discussing ESA Section 9). Incidental take permits are used to authorize the taking of members of a listed species in instances where the taking results unintentionally from an otherwise lawful activity. *See* 16 U.S.C. § 1539(a)(1)(B).

164. 16 U.S.C. § 1539(a)(2)(A).

165. H.R. Rep. No. 97-835, at 30 (1982) (Conf. Rep.), *reprinted in* 1982

The committee report refers to "conservation" in the ordinary sense of the term. Thus, a "conservation plan" is intended to address the management and protection of fish and wildlife, regardless of whether the species is actually listed under the ESA. It is not a plan to recover listed species.

The foregoing examples are not exhaustive; however, they clearly show that the terms "conservation," "conserve," and "conserving" are used throughout the ESA in the ordinary sense of managing and protecting a resource—in this case, fish, wildlife and plants. As the Fifth Circuit explained in *Sierra Club*, "identical terms used in different parts of the same act are intended to have the same meaning."[166] Thus, "essential to the conservation of the species" does not mean "essential to the recovery of the species." To conclude otherwise, as the *Sierra Club* and *Gifford Pinchot* courts erroneously did, would make various provisions in the ESA inexplicable.

In addition, the Services have used "conservation" in the ordinary sense of the word in their own regulatory documents. For example, in 1999, the Services issued their Policy for Candidate Conservation Agreements with Assurances.[167] A candidate conservation agreement with assurances is a voluntary agreement between a non-federal property owner and a Service under which the property owner agrees to implement conservation measures for a species that has been proposed for listing or may be proposed for listing in the near future. If the species subsequently is listed, the property owner receives an incidental take permit along with assurances that no additional requirements will be imposed.[168] In responding to comments questioning the Services' legal authority for this policy, the Services stated that "conservation" as used in the ESA refers generally to the management and protection of fish and wildlife:

U.S.C.C.A.N. 2860, 2971.

166. Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 442 n.49 (5th Cir. 2001) (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990)).

167. *See* Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726 (June 17, 1999).

168. *Id.* at 32,733-34.

> The Services believe that sections 2, 7, and 10 of the [ESA] allow the implementation of this policy. For example, section 2 states that "encouraging the States and other interested parties through Federal financial assistance and a system of incentives, to develop and maintain conservation programs . . . is a key . . . to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants." The Services believe that establishing a program for the development of Candidate Conservation Agreements with assurances provides an excellent incentive to encourage conservation of the Nation's fish and wildlife. Section 7 requires the Services to review programs they administer and to "utilize such programs in furtherance of the purposes of this Act." The Services believe that, in establishing this policy, they are utilizing their Candidate Conservation Programs to further the conservation of the Nation's fish and wildlife.[169]

Similarly, in the preamble to the final rule implementing the Safe Harbor Agreement and Candidate Conservation Agreement with Assurances Programs, the Services explained:

> Much of the nation's current and potential habitat for listed, proposed, and candidate species exists on property owned by private citizens, States, municipalities, Tribal governments, and other non-Federal entities. Conservation efforts on non-Federal lands are critical to the long-term conservation of many declining species. More importantly, a collaborative stewardship approach is critical for the success of such an initiative. Many property owners would be willing to manage their lands voluntarily to benefit fish, wildlife, and plants, especially those that are declining, provided that they are not subjected to additional regulatory restrictions as a result of their conservation efforts.[170]

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169. *Id.* at 32,729 (ellipses in original).

170. Safe Harbor Agreements and Candidate Conservation Agreements With Assurances, 64 Fed. Reg. 32,706, 32,707 (June 17, 1999) (codified in portions of 50 C.F.R. pt. 13, pt. 17). *See also, e.g.*, Policy Regarding Voluntary Prelisting Conservation Actions; Announcement of Draft Policy and Solicitation of Public Comment, 79 Fed. Reg. 42,525 (July 22, 2014) (discussing circumstances under which voluntary "conservation actions" for unlisted species may be used as mitigation for adverse effects if the species is subsequently listed under the ESA).

> Thus, even in the Services' regulatory documents, the word "conservation" refers broadly to the management and protection of wildlife, including species that have not, and may never be, protected under the ESA.

In short, "conservation," as used throughout the ESA, is not restricted to actions that further the recovery of listed species. Instead, "conservation" refers broadly to actions that benefit fish, wildlife, and plants, regardless of whether the species is listed. There is nothing in the ESA or the Act's legislative history suggesting that "conservation" is intended to have a special or unique meaning, particularly in light of the various contexts in which the word is used in the ESA and other federal wildlife conservation laws.[171] Finally, the legislative history concerning critical habitat reinforces the ordinary meaning of "conservation" by emphasizing that the purpose of critical habitat is to ensure the species' continued existence.

Thus, the reasoning of the courts in *Gifford Pinchot* and *Sierra Club* was simplistic and ultimately erroneous. Both courts improperly construed a common term that is used in a number of different contexts in the ESA as being limited to recovering listing species. In fact, the ESA has many goals, including the conservation of fish and wildlife that are not listed and may never be listed, as the Services have explained in their regulatory documents. The designation of critical habitat conserves species by helping to ensure their ability to survive pending development of a recovery plan, land acquisition and protection, and other actions directed specifically at the species' recovery needs.

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171. *See, e.g.*, 16 U.S.C. § 670k(6) (2012) (definition of "conservation and rehabilitation programs" in the Sikes Act); 16 U.S.C. § 1362(2) (2012) (definition of the terms "conservation" and "management" in the Marine Mammal Protection Act). In fact, Title 16 of the United States Code is called "Conservation." That title contains some 90 chapters that address the conservation of natural resources, including various types of fish and wildlife.

V.
CONCLUSION

Congress deliberately amended the ESA in 1978 to narrow the scope of critical habitat. At that time, Congress criticized the Services' regulatory definition of critical habitat as overbroad as well as the agencies' practice of designating critical habitat consisting of extensive areas for population expansion, such as the then-proposed critical habitat for the grizzly bear. By its amendments, Congress intended to limit critical habitat to areas that are truly essential to the species' continued existence, i.e., its survival, and to allow the Services to exclude areas from critical habitat to minimize conflicts with land uses, unless exclusion would result in the species' extinction. Given this especially robust legislative history, it is not surprising that the first court to squarely address the role of critical habitat in species' conservation, *Northern Spotted Owl*, concluded that "even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention."[172]

Yet two federal circuits have relied on the same legislative history to conclude that the purpose of critical habitat is to recover species. The *Sierra Club* court misread the legislative history, believing erroneously that Congress intended to expand the role of critical habitat under the ESA,[173] while the *Gifford Pinchot* court relied on *Sierra Club*'s analysis and harshly criticized the FWS for emphasizing survival in defining "destruction or adverse modification."[174] Notwithstanding these errors, a number of courts have followed *Sierra Club* and *Gifford Pinchot*, accepting their mischaracterization of the intent of Congress.[175] These cases demonstrate the steady march away

172. N. Spotted Owl v. Lujan, 758 F. Supp. 621, 623 (W.D. Wash. 1991).

173. Sierra Club v. U.S. Fish and Wildlife Serv., 245 F.3d 434, 442-43 (5th Cir. 2001).

174. Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1069-71 (9th Cir. 2004), *amended by* 378 F.3d 968 (9th Cir. 2004).

175. *See supra* note 28 and accompanying text. Indeed, some cases have gone even farther, and have emphasized impairment of recovery in applying the

from the intent of Congress as well as the plain language of ESA Section 7(a)(2) itself, which, as the Services explained in their 1986 rulemaking, emphasizes the survival of the species.[176]

In short, the erroneous holdings of *Sierra Club* and *Gifford Pinchot* have strongly influenced recent ESA jurisprudence and the manner in which the ESA is being administered. These cases have undermined the 1978 Amendments by concluding that the principal purpose of critical habitat is the recovery of the species and requiring that an impairment-of-recovery standard be used under Section 7(a)(2). Based on *Sierra Club* and *Gifford Pinchot*, the Services have proposed regulations that would codify the erroneous characterization of critical habitat as recovery habitat, allowing areas to be designated for population expansion regardless of whether these areas are occupied by members of the species and contain habitat capable of supporting the species.[177] If these regulations are adopted, we will have come full-circle, with critical habitat consisting of vast expanses of

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Section 7 jeopardy standard, citing *Gifford Pinchot*. For example, in *National Wildlife Federation*, which involved a challenge to a biological opinion addressing the impact of the operation of Columbia River dams on listed species of salmon, the court held that the regulatory definition of "jeopardize the continued existence of" requires an analysis of the effects of the action on the species' recovery. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 931-33 (9th Cir. 2007). The court explained that "[a]s in [*Gifford Pinchot*], we conclude that the jeopardy regulation requires NMFS to consider both recovery and survival impacts." *Id.* at 931. In support of this conclusion, the court selectively quoted from the preamble to the 1986 Section 7 Rules and provided its own interpretation of the Services' regulatory definition of "to jeopardize the continued existence of," which the court characterized as a "joint recovery and survival concept." *Id.* at 932. By contrast, in their 1986 rulemaking, the Services rejected comments that jeopardy should be a recovery-based standard, explaining that the phrase "continued existence of the species" found in ESA Section 7(a)(2) "is the key to the jeopardy standard, placing an emphasis on a species' 'survival.'" 1986 Section 7 Rules, Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,934 June 3, 1986) (codified at 50 C.F.R. pt. 402).

176. Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. at 19,934.

177. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 79 Fed. Reg. 27,060 (proposed May 12, 2014) (to be codified at 50 C.F.R. §§ 424.01, 424.02, 424.12); Definition of Destruction or Adverse Modification of Critical Habitat, 79 Fed. Reg. 27,060 (proposed May 12, 2014) (to be codified at 50 C.F.R. § 402.02).

land deemed necessary for recovery purposes, and adverse modification consisting of land alterations that merely impede the species' future recovery. The regulations cannot be squared with the legislative history that accompanies the 1978 Amendments and should be reconsidered in light of that legislative history and the limited role that Congress intended critical habitat to play under the ESA.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Center for Biological Diversity, et al., Plaintiffs, v. Sally Jewell, et al., Defendants.	No. CV-15-00019-TUC-JGZ (l) No. CV-15-00179-TUC-JGZ (c) No. CV-15-00285-TUC-JGZ (c) No. CV-16-00094-TUC-JGZ **ORDER**

On January 16, 2015, the United States Fish and Wildlife Service (FWS) published a final agency action entitled "Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf," pursuant to Section 10(j) of the Endangered Species Act, 16 U.S.C. § 1539. The 2015 "10(j) rule" sets forth FWS's procedures for the release, dispersal, and management of the only existing wild population of Mexican gray wolves in the United States. In the litigation presently before this Court, four sets of Plaintiffs seek to set aside the 10(j) rule and related agency actions as arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).[1] Plaintiffs each allege that, in promulgating the 10(j) rule, Federal Defendants

[1] Case No. CV-15-00019-TUC-JGZ was filed by Plaintiffs Center for Biological Diversity, *et al.* (collectively, "CBD"), on January 16, 2015. (Doc. 1.) Case No. CV-15-00179-TUC-JGZ was filed by Plaintiffs Arizona and New Mexico Coalition of Counties for Economic Growth, *et al.* (collectively, "the Coalition"), in the District of New Mexico on February 12, 2015, and transferred to the District of Arizona on April 28, 2015. (*D*oc. 29.) It was consolidated with Case No. CV-15-00019-TUC-JGZ on May 12, 2015. (Doc. 35.) Case No. CV-15-00285-TUC-JGZ was filed by Plaintiffs WildEarth Guardians, *et*

violated the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, and the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*

Currently pending before the Court are twelve related cross-motions for summary judgment, filed by the Plaintiffs, Federal Defendants, and Defendants-Intervenors in the above captioned consolidated cases and in related case No. CV-16-00094-TUC-JGZ.[2] The motions are fully briefed. Oral argument was held on April 26, 2017. After consideration of the parties' arguments and the administrative record in this case, and for the reasons discussed herein, the Court will grant the motions in part, deny the motions in part, and remand this matter to FWS for further consideration consistent with this Order.

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al. (collectively, "WEG"), on July 2, 2015, and consolidated with the aforementioned cases on July 20, 2015. (Doc. 58.) The Court consolidated these three cases for the purposes of discovery and case management only. Filings for these cases can be found in the docket for lead case No. CV-15-00019-TUC-JGZ.

Case No. CV-16-00094-TUC-JGZ was filed by Plaintiffs Safari Club International, *et al.* (collectively, "SCI"), on October 16, 2015 in the District of Arizona. Due to the differing stages of litigation, the Court declined to consolidate case No. CV-16-00094-TUC-JGZ with the three earlier cases. (Doc. 120.) While case No. CV-16-00094-TUC-JGZ is substantively related to the earlier cases, it retains its own docket. Throughout this Order, citations to docket entries refer to documents filed in lead case No. CV-15-00019-TUC-JGZ, unless otherwise noted.

[2] The cross-motions for summary judgment, memoranda and statements of facts in case No. CV-15-00019-TUC-JGZ are filed at docs. 114, 115, 116 (Plaintiff CBD); 123, 124, 125, 126 (Federal Defendants); and 129, 130, 131, 132 (Defendant-Intervenor State of Arizona). The cross-motions for summary judgment, memoranda, and statements of facts in case No. CV-15-00179-TUC-JGZ are filed at 108, 109, 110 (Plaintiff the Coalition); 137, 138, 139, 140 (Federal Defendants); and 147, 148, 149 (Defendant-Intervenor CBD). The cross-motions for summary judgment, memoranda and statements of facts in case No. CV-15-00285-TUC-JGZ are filed at docs. 111, 112, 113 (Plaintiff WEG); 133, 134, 135, 136 (Federal Defendants); and 141, 142, 143, 144 (Defendant Intervenor State of Arizona). The cross-motions for summary judgment, memoranda and statements of facts in case No. CV-16-00094-TUC-JGZ are filed in that case's docket at docs. 67, 68, 69 (Plaintiff SCI); 70, 71, 72, 73 (Federal Defendants); and 78, 79 (Defendant-Intervenor CBD).

STANDARDS OF REVIEW

I. Summary Judgment

Summary judgment is appropriate if the pleadings and supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A court presented with cross-motions for summary judgment should review each motion separately, giving the nonmoving party for each motion the benefit of all reasonable inferences from the record. *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 786 (9th Cir. 2008). "Summary judgment is a particularly appropriate tool for resolving claims challenging agency action." *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1215 (D. Mont. 2010). In such cases the Court's role is not to resolve facts, but to "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).[3]

II. The Administrative Procedure Act

Judicial review of agency actions under the Endangered Species Act and the National Environmental Policy Act is governed by the Administrative Procedure Act (APA). *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002).

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[3] Several of the parties filed controverting statements of facts. (*See* docs. 128, 132, 136, 140, 144, 149, 154, 156, 157; docs. 83, 84 in case No. CV-16-00094-TUC-JGZ.) Upon review, the Court concludes that the facts are not in dispute; rather, the parties dispute the legal significance of the facts. The content and accuracy of the administrative record is also undisputed. Therefore, this case is appropriate for resolution by summary judgment. *See Occidental Eng'g Co.*, 753 F.2d at 769-70 (noting that in its review of an administrative proceeding the district court decides the legal question of whether the agency could reasonably have found the facts as it did).

The Amended Administrative Record (AR) in the above-captioned consolidated cases is identical to the Administrative Record filed in related case No. CV-16-00094-TUC-JGZ. (*See* doc. 100; docs. 39–41 in case No. CV-16-00094-TUC-JGZ.) Many of the AR documents cited by the Court are also published in the Federal Register or codified in the Code of Federal Regulations. For the purposes of setting forth the undisputed facts, the Court has elected to include only the AR citation.

Under APA Section 706(2), the court may set aside agency action where it is found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with applicable law. 5 U.S.C. § 706(2)(A). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In order to determine whether an agency action is arbitrary and capricious, a reviewing court looks to the evidence the agency has provided to support its conclusions, along with other materials in the record, to ensure the agency made no clear error of judgment. *See Judulang v. Holder*, 565 U.S. 42, 52–53 (2011); *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008), *overruled on other grounds by Am. Trucking Assns., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). That task involves examining the reasons for agency decisions, which must be based on non-arbitrary, relevant factors that are tied to the purpose of the underlying statute. *See Judulang*, 565 U.S. at 53, 55. The agency must articulate a rational connection between the facts found and the choice made. *Forest Guardians v. United States Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003). Post hoc explanations of agency action by appellate counsel cannot substitute for the agency's own articulation of the basis for its decision. *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008) (citing *Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974)). Similarly, the reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Rather, the court's review is "limited to the explanations offered by the agency in the administrative record." *Arrington*, 516 F.3d at 1113.

"The arbitrary and capricious standard is 'highly deferential, presuming the agency action to be valid and [requires] affirming the agency action if a reasonable basis

exists for its decision.'" *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000)). When examining scientific determinations, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). This is particularly true when the scientific findings are within the agency's area of expertise. *See Lands Council*, 537 F.3d at 993. Moreover, "[w]hen not dictated by statute or regulation, the manner in which an agency resolves conflicting evidence is entitled to deference so long as it is not arbitrary and capricious." *Trout Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009).

Nevertheless, the APA requires a "substantial inquiry" to determine whether the agency acted within the scope of its authority. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Thus, although the agency is entitled to a "presumption of regularity," the effect of that presumption is not to shield the agency's action from a "thorough, probing, in-depth review," and the court's inquiry into facts should be "searching and careful." *Id.*

STATUTORY BACKGROUND

I. The Endangered Species Act

Passed in 1973, the Endangered Species Act (ESA or "the Act"), 16 U.S.C. § 1531, *et seq.*, sets forth a comprehensive scheme for the protection of endangered and threatened species in the United States. *Cal. ex rel. Lockyer v. United States Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009). Under the ESA, the Secretary of the Interior must identify endangered species, designate their critical habitats, and develop and implement recovery plans. *Natural Res. Def. Council, Inc. v. United States Dept. of Interior*, 13 F. App'x 612, 615 (9th Cir. 2001). An "endangered species" is a species or subspecies which is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (16). A "threatened species" is a species or subspecies that "is likely to become an endangered species within the foreseeable future throughout all or

a significant portion of its range." *Id.* § 1532(20). The Secretary's duties under the ESA are delegated to FWS pursuant to 50 C.F.R. § 402.01(b).

Described by the Supreme Court as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," the ESA reflects Congress's desire "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Congress pronounced the purpose of the ESA to be the conservation of listed species and the ecosystems upon which they depend, 16 U.S.C. § 1531(b), and declared a policy that all federal agencies shall utilize their authorities in furtherance of this purpose. 16 U.S.C. § 1531(c)(1). Thus, the ESA "reflects a conscious decision by Congress" to give listed species primacy over the primary missions of federal agencies, *Lockyer*, 575 F.3d at 1018, and to afford those species "the highest of priorities." *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1033 (9th Cir. 2007).

"Conservation," also referred to as "recovery," is at the heart of the ESA. Conservation is defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary." *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d at 438 (citing 16 U.S.C. § 1532(3)). It is the "process that stops or reverses the decline of a species and neutralizes threats to its existence." *Ctr. for Biological Diversity v. Kempthorne*, 607 F. Supp. 2d 1078, 1088 (D. Ariz. 2009) (quoting *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001)).[4] The ESA's conservation purpose "is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 699 (1995) (quoting *Hill*, 437 U.S. at 184); *see also Red Wolf Coal. v. United States Fish & Wildlife Serv.*, 210 F. Supp. 3d 796, 803 (E.D.N.C. 2016).

[4] "Recovery" is defined in the implementing regulations as the "improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act." 50 C.F.R. § 402.02. For the purposes of this Order, the Court uses the terms "conservation" and "recovery" interchangeably.

In carrying out its conservation mandate, FWS must consider the long term viability of the species. To this end, the agency may not ignore recovery needs and focus entirely on survival. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 932 (9th Cir. 2008). Rather, recovery envisions self-sustaining populations that no longer require the protections or support of the Act. *Gifford Pinchot Task Force v. United States Fish and Wildlife Serv.*, 378 F.3d 1059, 1070 ("[T]he ESA was enacted not merely to forestall the extinction of species (i.e., promote a species survival), *amended*, 387 F.3d 968 (9th Cir. 2004), but to allow a species to recover to the point where it may be delisted."); *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) ("[T]he objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status.").

In addition, the agency must determine recovery based on the viability of species, not in captivity but in the wild. "In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element." H.R. Conf. Rep. No. 97-835, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2871; H.R. Rep. 95-1625, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455 (purpose of ESA is not only to reduce threats to the species' existence, but "to return the species to the point where they are viable components of their ecosystems."). Or, as the Ninth Circuit explained, "the ESA's primary goal is to preserve the ability of natural populations to survive in the wild." *Trout Unlimited*, 559 F.3d at 957; *accord Cal. State Grange v. Nat. Marine Fisheries Serv.*, 620 F. Supp. 2d 1111, 1156–57 (E.D. Cal 2008). Thus, while the agency may rely on captive populations to reestablish a species in the wild, the goal of recovery is "to promote populations that are self-sustaining without human interference." *Trout Unlimited*, 559 F.3d at 957.

The ESA contains multiple sections, each governing a piece of the Act's comprehensive scheme for the listing, management, and protection of endangered species. Sections 10(j) and 10(a)(1) are relevant to the Court's conclusions herein and are

summarized below.

A. Section 10(j): Experimental Populations

In 1982, Congress amended the ESA to include Section 10(j), 16 U.S.C. § 1539(j), which established procedures for the designation and management of "experimental populations." 49 Fed. Reg. 33,885, 33,885 (Aug. 27, 1984). Under Section 10(j), the Secretary of the Interior may authorize the release of an experimental population of an endangered species outside the species' current range if the Secretary determines that the release will further the conservation of that species. *See* 16 U.S.C. § 1539(j). An "experimental population" is defined as "any population (including any offspring arising solely therefrom) authorized by the Secretary for release . . . , but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species." *Id.* § 1539(j)(1). Once designated, an experimental population is treated as "threatened" under the Act, irrespective of the species' designation elsewhere. 50 C.F.R. § 17.82; s*ee* 49 Fed. Reg. at 33,885.

A Section 10(j) rule is issued in accordance with the APA, which affords the benefit of public comment and serves to address the needs of each particular population proposed for designation. *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1232 (10th Cir. 2000) (citing H.R. Conf. Rep. No. 97-835 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2875); 49 Fed. Reg. at 33,886. Before releasing an experimental population under Section 10(j), the Secretary must also develop regulations identifying the experimental population, 16 U.S.C. § 1539(j)(2)(B), the geographic area where the regulations apply, 50 C.F.R. § 17.81(c)(1), and the specific management restrictions that apply to the population. *Id.* § 17.81(c)(3). The regulations are species-specific and are developed on a case-by-case basis. 49 Fed. Reg. at 33,886. Once the regulations are finalized and published, the management and conservation of the population is then carried out by FWS in conjunction with other management agencies, including county, state, tribal, and federal entities, often pursuant to a memorandum of understanding signed by all parties. *Id.*

Before designating an experimental population, the Secretary must make two specific findings. *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998). First, an experimental population may only be released if the Secretary finds the release will "further the conservation of [the] species." 16 U.S.C. § 1539(j)(2)(A). Factors that must be considered by the Secretary in making this finding include:

> (1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;
> (2) The likelihood that any such experimental population will become established and survive in the foreseeable future;
> (3) The relative effects that establishment of an experimental population will have on the recovery of the species; and
> (4) The extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area.

50 C.F.R. § 17.81(b). The Secretary is required to make this determination using the best scientific and commercial data available. *Id.*

Second, prior to releasing an experimental population, the Secretary must determine whether the population is essential to the continued existence of the species in the wild. 16 U.S.C. § 1539(j)(2)(B); *see also* 50 C.F.R. § 17.81(c)(2). "Essential" means the experimental population's loss "would be likely to appreciably reduce the likelihood of the survival of the species in the wild." 50 C.F.R. § 17.80(b). All other populations are to be classified as "nonessential." *Id.* The essentiality finding must be "based solely on the best scientific and commercial data available, and the supporting factual basis[.]" *Id.* § 17.81(c)(2). Congress anticipated that in most cases experimental populations would be nonessential. S. Rep. No. 97-418, at 9 (1982). This is because the loss of a single experimental population will rarely appreciably reduce the likelihood of the entire species' or parent populations' survival in the wild. *See* 49 Fed. Reg. at 33,888. Whether a population is designated "essential" or "nonessential" affects whether federal agencies have a duty to consult with FWS on certain federal actions under ESA Section 7(a)(2). Where a population is designated "nonessential," federal agencies are not required to

formally consult with FWS on actions likely to jeopardize the continued existence of the species. 16 U.S.C. § 1536(a)(2). Instead, federal agencies must engage in a conferral process that results in conservation recommendations that are not binding upon the agency. *Id.* § 1536(a)(4). Additionally, the Secretary may not designate critical habitat for an experimental population designated as nonessential. *Id.* § 1539(j)(2)(C)(ii). To date, the "essential" designation has never been applied to an experimental population of any species. *See* 50 C.F.R. §§ 17.11, 17.84.

As with the other provisions of the ESA, conservation and recovery are at the heart of Section 10(j). *See Defs. of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1117 (D. Ariz. 2009) ("USFWS has a non-discretionary duty to ensure that the Final Rule for the Reintroduction Program, 50 C.F.R. § 17.84(k), provides for conservation of the Mexican Wolf."). Congress enacted Section 10(j) in 1982 as a means of giving greater administrative flexibility to the Secretary in managing reintroduced species. Although Section 10(j) permits the Secretary to treat the species as threatened, irrespective of the species' designation elsewhere, 49 Fed. Reg. at 33,886, 33,889, Congress believed that this flexibility would facilitate the reintroduction effort and enhance recovery efforts. *See* H.R. Rep. No. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833; 49 Fed. Reg. at 33,887–88; *McKittrick*, 142 F.3d at 1174 (management flexibility afforded under Section 10(j) "allows the Secretary to better conserve and recover endangered species"). The use of Section 10(j) was accordingly limited to "those instances where the involved parties are reluctant to accept the reintroduction of an endangered or threatened species without the opportunity to exercise greater management flexibility on the introduced population." 49 Fed. Reg. at 33,888–89. Even in such cases, the experimental designation would only be applied when "necessitated by the conservation and recovery needs of a listed species," and an experimental designation based on nonconservation purposes would not be supported. *Id.* at 33,889.

B. Section 10(a)(1): Permits

Under Section 10(a)(1)(A) of the ESA, the Secretary may permit actions otherwise

prohibited by Section 9 of the Act for scientific purposes or to enhance the propagation or survival of the affected species. 16 U.S.C. § 1539(a)(1)(A). The Secretary's authority includes issuing permits for actions necessary for the establishment and maintenance of experimental populations. *Id.* The permits may authorize lethal or nonlethal "take," which means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). As with the other provisions of the Act, the issuance of individual permits must not conflict with recovery of the species as a whole. "[T]he Secretary is subject to the requirement of Section 10(d) that issuance will not operate to the disadvantage of the listed species," and the permit issued must be consistent with the ESA's conservation purpose and policy. S. Rep. No. 97-418 at 8; 16 U.S.C. § 1539(d).

FACTUAL BACKGROUND

A subspecies of the gray wolf, the Mexican gray wolf or "Mexican wolf" (*Canis lupus baileyi*) is native to the forested and mountainous terrain of the American Southwest and northern Mexico. (Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf (January 16, 2015), AR FR000136 at FR000138 (hereinafter 2015 10(j) Rule).) The Mexican wolf is relatively small, weighing between 50 and 90 pounds and measuring up to six feet in length. It is patchy black, brown, cinnamon, and cream in color. (*Id.*) It is the rarest and most genetically distinct subspecies of all the North American gray wolves. (Final Environmental Impact Statement (Nov. 25, 2014), AR N042613 at N042617 (hereinafter FEIS).) A wanderer and a forager, Mexican wolves may roam across many square miles of available habitat. (1982 Mexican Wolf Recovery Plan, R000887 at R000894, R000905 (hereinafter 1982 RP).) The Mexican wolf preys principally on elk and other wild ungulates, but will also eat small mammals or birds and prey or scavenge on livestock. (*Id* at R000894; 2015 10(j) Rule at FR000138.)

Though historically numbering in the thousands, by the 1970s the Mexican wolf hovered on the brink of extinction. (2015 10(j) Rule at FR000138.) Like other North

American wolves, the Mexican wolf was much maligned during the twentieth century, due to "its reputation as a livestock killer." (Establishment of a Nonessential Experimental Population of the Mexican Wolf in Arizona and New Mexico (January 12, 1998), AR FR000001 at FR000001 (hereinafter 1998 10(j) Rule).) In the American Southwest, concerted eradication efforts by both public and private entities commenced around the turn of the century, resulting in a rapid reduction in Mexican wolf numbers. (*See* 1982 RP at R000895–96; 2010 Conservation Assessment, AR N052264 at N052283 (hereinafter 2010 CA).) By the 1920s the Southwest's population of resident wolves had been reduced to "a very few scattered individual predators." (1982 RP at R000896.) Though occasionally wolves reappeared in Arizona and New Mexico, the product of migration from Mexico, "increasingly effective poisons and trapping techniques during the 1950s and 1960s" effectively eliminated remaining wolves north of the Mexican border. (2010 CA at N052283-84; 1982 RP at R000896.) "No wild wolf has been confirmed since 1970," and the subspecies was thought to be completely extirpated from its historic range by the 1980s. (2015 10(j) Rule at FR000138.)

In the late 1970s and early 1980s, the United States and Mexico formally commenced efforts to save the Mexican wolf from extinction. (2014 FEIS at N042655–56.) In 1976, the Mexican wolf was first listed under the ESA as an endangered subspecies.[5] (2015 10(j) Rule at FR000137.) In 1977, a binational program aimed at growing and maintaining a captive population of Mexican wolves was initiated, and in 1981 captive breeding officially began. (*See id.* at FR000139; 1998 10(j) Rule at FR000002; 2010 CA at N052270.) All Mexican wolves alive today originated from the seven founding wolves that by 1980 constituted the last of the subspecies. (*See* FEIS at

[5] In 1978, the subspecies listing was subsumed by the designation of the entire gray wolf species as endangered throughout North America, with the exception of Minnesota, where the species was listed as threatened. In 2015, the Mexican wolf was again listed as an endangered subspecies. *See* 80 Fed. Reg. 2488 (Jan. 16, 2015); 50 C.F.R. § 17.11(h). In spite of the changes in legal designation, the Mexican wolf has continuously been recognized as a separate subspecies for the purposes of research and conservation. (*See* 2015 10(j) Rule at FR000137.)

N042656.)

1982 Recovery Plan

In 1982, in accordance with Section 4(f) of the ESA, FWS published the first Mexican Wolf Recovery Plan, which created a five-part step-down plan for the implementation of the captive breeding program and the eventual reestablishment of wolf populations in the wild. (*See* 1982 RP at R000887, *et seq.*) Written against a backdrop of near-extinction, the 1982 Recovery Plan did not provide criteria for delisting the Mexican gray wolf. (*Id.* at R000913; 2010 CA at N052270; 2015 10(j) Rule at FR000138.) Rather, the recovery team determined that the more "realistic" course of action was to set a limited goal of ensuring the wolf's survival by "re-establishing a viable, self-sustaining population of at least 100 Mexican wolves in the middle to high elevations of a 5,000-square-mile area within the Mexican wolf's historic range." (1982 RP at R000913; *see also* Mexican Wolf Blue Range Reintroduction Project 5-Year Review (Dec. 31, 2005), AR N000556 at N000574 (hereinafter 5-Yr Review).) At that time, the reintroduction of the subspecies to the wild was seen as a remote possibility, to be taken in the "unseeable future," and the recovery team's recommendations were accordingly made with the caveat that future revisions to the plan would be necessary to fully implement reintroduction and recover the species. (*See* 1982 RP at R000891.)

Over the next several decades, FWS continued to breed wolves in facilities throughout the United States and Mexico. (*See, e.g.*, 2015 10(j) Rule at FR000139.) Though by 1997 the captive population had grown to 148 wolves, no wolves had been released back into the wild, due in large part to controversy surrounding reintroduction. (5-Yr Review at N000559.) As FWS noted, the Mexican wolf reintroduction was "prominent in the American public's eye" long before reintroduction plans formally commenced. (*Id.*) The questions of "[w]hether reintroduction and recovery should be allowed, and if so where and how, were hotly debated through the 1990s[.]" (*Id.*) Eventually, in response to litigation against FWS by seven environmental organizations for failure to implement provisions of the ESA, FWS finalized a Section 10(j) rule to

reintroduce the Mexican wolf to the wild. (*See* 2010 CA at N052285.)

1998 10(j) Rule

Like the 1982 Recovery Plan, the 1998 10(j) rule did not purport to set forth criteria sufficient for the recovery of the Mexican wolf. Rather, consistent with the 1982 Recovery Plan, the goal of the 1998 rule was to restore a self-sustaining population of 100 Mexican wolves to the wild. (1998 10(j) Rule at FR000001; 2010 CA at N052286; Mexican Wolf Recovery: Three-Year Program Review and Assessment (June 2001), AR N046730 at N046737 [hereinafter 3-Yr Review].) This number was deemed a "starting point to determine whether or not [FWS] could successfully establish a population of Mexican wolves in the wild that would conserve the species and lead to its recovery." (2015 10(j) Rule at FR000150.) As in years prior, FWS anticipated that recovery objectives, including a population goal sufficient for delisting, would be defined in a future, revised recovery plan. (*Id.* at FR000002.)

In March 1998, pursuant to the 1998 10(j) rule, eleven wolves were released into the Blue Range Wolf Recovery Area (BRWRA), constituting the first reintroduction of the subspecies into the wild. (*See* 1998 10(j) Rule at FR000003.) The rule designated the population as "nonessential experimental" and set forth management directives for the population. (*Id.*) The rule contemplated that 14 family groups of wolves would be released over the course of five years into the BRWRA, a 6,854 square-mile stretch of primarily national forest land spanning central Arizona and New Mexico. (*Id.* at FR000003.) The BRWRA was contained within the larger Mexican Wolf Experimental Population Area (MWEPA), which was a geographic area used to identify members of the population; the MWEPA was not designated as an area for release or translocation of wolves. (*Id.* at FR000002.) Although the 1998 10(j) rule set a population goal of 100 wolves, authorized agencies could take, remove, or translocate wolves in specified circumstances, and private citizens were given "broad authority" to harass wolves for purposes of scaring them away from people, buildings, pets, and livestock. (*Id.* at FR000003–04.) Killing or injuring wolves was permitted in defense of human life or

livestock. (*Id.*)

In the 1998 rule, FWS designated the experimental population as "nonessential." (*Id.* at FR000004.) FWS found that the nonessential designation was appropriate because only genetically "redundant" wolves from the captive breeding program would be released into the wild. FWS reasoned that the loss of the experimental population would not significantly affect the likelihood of the survival of the captive population, and that this was true, even though the total population of the subspecies would not constitute a minimum viable population under conservation biology principles. (*Id.* at FR000005-06; 2010 CA at N052286.) FWS also found that the "nonessential" designation was necessary to obtain needed state, tribal, local, and private cooperation and would allow for additional "management flexibility" in response to negative impacts, such as livestock depredation. (1998 10(j) rule at FR000004; 2010 CA at N052286.) Without such flexibility, FWS reasoned, intentional illegal killing of wolves likely would harm the prospects for success. (*Id.*) FWS indicated that it did not intend to change the population's status to "essential" and could foresee "no likely situation which would result in such changes in the future." (1998 10(j) rule at FR000004; *see also* 2010 CA at N052286.)

Identification of the Need for Improvement to Wolf Recovery

Over the next 17 years, with no published recovery criteria in place, the Mexican wolf recovery and reintroduction programs continued to be implemented in accordance with the 1982 Recovery Plan and the 1998 10(j) Rule. Progress toward the 100-wolf population goal was slower than anticipated (*see* FEIS at N042671; 2015 10(j) Rule at FR000175), and efforts to improve the program's regulatory framework were largely unsuccessful.[6] (*See* 2010 CA at N052273; 3-Yr Review at N046797-N046804.) Public opposition to the reintroduction program remained strong.[7] By the time FWS published

[6] For example, FWS's 2005 Five-Year Review observed that recommendations from the agency's Three-Year Review had not been implemented. (5-Yr Review at N000559–60.)

[7] Over 10,000 comments were received in conjunction with the Five-Year Review

its 2010 Conservation Assessment, there had been no formal changes to the reintroduction program, and the agency again noted the need for regulatory improvements. (*See* 2010 CA at N052273.) Although in the 2010 Conservation Assessment, FWS determined that public opinion was not a threat to the Blue Range population, illegal shooting of wolves remained the single greatest source of wolf mortality in the reintroduced population, accounting for almost half of all deaths between 1998 and June 1, 2009. (*Id.* at N052273–74.)

Meanwhile, efforts to revise the 1982 Mexican Wolf Recovery Plan were similarly unsuccessful. FWS convened teams to revise the recovery plan in the early 1990s and early 2000s, but without success. (1998 10(j) Rule at FR000002; 5-Yr Review at N000559; 2010 CA at N052270–71.) In 2010, FWS convened a third wolf recovery team. (*See* Draft Mexican Wolf Revised Recovery Plan, AR C043009, *et seq.*, [hereinafter 2012 Draft RP].) That team, comprised of leading wolf scientists, drafted a Mexican Wolf Revised Recovery Plan in full. (*See id.*) However, FWS thereafter halted the recovery planning process, and the draft was never published. (*See* AGFD Letter to FWS (Sept. 23, 2014), AR C085274 at C085281–82; Email from Tracy Melbihess (Oct. 23, 2013), AR N077606 at N077606.)

2015 10(j) Rule

Litigation in 2010 prompted revision to the 1998 10(j) rule. In settlement of *Center for Biological Diversity v. Jewell,* No. 1:12-CV-1920 (D.D.C. 2013), FWS agreed to publish a 10(j) rule modification by January 16, 2015. (Doc. 22 in case No. 1:12-CV-1920; s*ee* Email from Jonathan Olson (Dec. 16, 2013), AR N006047, *et seq.*) In 2013, in anticipation of this deadline, FWS commenced the public scoping process required by federal law. As part of this process, the agency solicited peer review opinions from six scientists with expertise that included familiarity with wolves, the geographic region in

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and the review team found that a significant portion of the population had "strongly held attitudes toward wolves in the BRWRA," both in support of and in opposition to wolf reintroduction. (5-Yr Review N000559–60, N000856.) The team noted the vehemence with which these groups held their position on the wolf and the anger they held for the opposition. (*Id.*)

which wolves occur, and conservation biology principles. (2015 10(j) Rule at FR000137, FR000150.) FWS invited 84 federal and state agencies, local governments, and tribes to participate as cooperating agencies in the development of the environmental impact statement, 27 of which participated. (*Id.* at FR000158.) FWS maintained a list of individual stakeholders and a Web site to ensure that interested and potentially affected parties received information on the EIS. (*Id.*) In November 2014, following additional opportunity for public comment, FWS published the Final Environmental Impact Statement (FEIS), which analyzed four alternatives for improving the effectiveness of the reintroduction program. (*See* FEIS at N042619–21, N042688.) On January 6, 2015, FWS issued a Record of Decision, selecting Alternative One as the preferred alternative. (Record of Decision, AR N034602, *et seq.*) Alternative One contained the following key provisions.

1. Population Cap and Effective Migration Rate

The rule sets a population objective of a single population of 300–325 Mexican wolves within the MWEPA, with a minimum one to two effective migrants per generation entering the population, depending on its size, over the long term. (2015 10(j) Rule at FR000141.) Although FWS does not expect to reach the 300–325-wolf objective until after year 13 (2014 FEIS at N043054), FWS nevertheless concluded the population objective "would provide for the persistence of [the] population and enable it to contribute to the next phase of working toward full recovery of the Mexican wolf and its removal from the endangered species list." (2015 10(j) Rule at FR000138–39A). Additionally, "[i]n the more immediate future, FWS may conduct additional releases in excess of 1–2 effective migrants per generation to address the high degree of relatedness of wolves in the current BRWRA." (*Id.* at FR000141.) Finally, so as not to exceed the population objective, FWS will exercise "all management options," with a preference for translocation. (*Id.* at FR000173.) In support of the population objective, FWS relied upon two scientific studies: Carroll, et al. (2014) and Wayne and Hedrick (2010).

. . .

2. Expanded MWEPA

The rule also expands the MWEPA to encompass all of Arizona and New Mexico south of Interstate 40 ("I-40"), totaling 153,871 square miles. (*Id.* at FR000143.) The term "BRWRA" was discontinued, and the MWEPA was divided geographically into three zones, each designated for the release, translocation, or dispersal of wolves. (*Id.* at FR000144, FR000147.) In Zone 1, Mexican wolves may be initially released or translocated. In Zone 2, Mexican wolves will be allowed to naturally disperse and occupy, and wolves may be translocated within the zone. Pups under five months of age will be released on federal land in Zone 2. In Zone 3, neither initial releases nor translocations will occur, but Mexican wolves will be allowed to disperse into and occupy this zone. Zone 3 is an area of less suitable Mexican wolf habitat where Mexican wolves will be more actively managed to reduce conflict with the public. (*Id.* at FR000143–48.) Unlike the BRWRA, which included principally national forest land, the expanded MWEPA includes a significant amount of non-federal land. (*Id.* at FR000149.) The rule does not authorize the use of suitable wolf habitat north of I-40. FWS explained that expansion north of I-40 would require coordination with Utah and Colorado and must be implemented through a revised recovery plan. (*Id.* at FR000162, FR000164.)

3. Expanded Take Provisions

The 2015 rule modifies the circumstances in which lethal and nonlethal take are authorized, with the aim to provide greater management flexibility and "make reintroduction compatible with current and planned human activities, such as livestock grazing and hunting." (*Id.* at FR000148–49.)

Most notably, the rule authorizes lethal and non-lethal take in response to unacceptable impacts to wild ungulate herds. If an Arizona or New Mexico game and fish agency determines that Mexican wolf predation is having an unacceptable impact to a wild ungulate herd, the respective agency may request approval from FWS that the wolves be removed from the impacted area. (*Id.*) Along with its request, the state agency must submit a science-based document that has been subjected to peer-review and public

comment, describing what data indicate that the wild ungulate herd is below management objectives and demonstrating that attempts were made to identify other causes of herd declines. (Permit at P000668–69.) An "unacceptable impact" is determined by the state game and fish agency, based upon ungulate management goals, or a 15 percent decline in an ungulate herd as documented by the state agency using its preferred methodology. (2015 10(j) Rule at FR000173.) If all of the requirements are met, FWS will "to the maximum extent allowable under the Act, make a written determination of what management action is most appropriate for the conservation of the subspecies." (*Id.* at FR000168; 50 C.F.R. § 17.84(k)(7)(C).) In the FEIS, FWS reported that, since reintroduction commenced, state-collected data demonstrates that there has been "no discernable impact" from Mexican wolf predation on elk in the BRWRA. (2014 FEIS at N043840.) FWS further projected that wolves would have "little or no effect on the abundance of elk and deer across most of Arizona and New Mexico where elk and deer abundance is stable, or above population objectives." (*Id.* at N042840.)

4. Nonessential Designation

Finally, the 2015 rule maintains the experimental population's "nonessential" status, which was first designated in the 1998 rulemaking. In support of this decision, FWS noted the Mexican wolf population that is in the wild in Arizona and New Mexico today is the same population that was designated in the 1998 final rule. (2015 10(j) Rule at FR000163.) FWS reasoned that because the purpose of the 2015 rule is to revise management protocols for an existing population, reconsideration of the population's nonessential status was "outside the scope" of the rulemaking. (*Id.*)

Scientists' Response to FWS's Selection of Alternative One

Prior to FWS's publication of the 2015 10(j) rule, a group of scientists informed FWS, through submission of a formal public comment, that FWS misstated and misinterpreted the scientists' findings. (Comment from Carroll, *et al.*, (December 19, 2014), AR N057614 at N057615 (hereinafter Carroll Comment).) Among the scientists who joined in the comment were Drs. Carroll, Wayne, and Hedrick, whose publications

were cited by FWS in support of the FEIS and the 2015 10(j) rule.[8] (*See* 2014 FEIS at N042672; 2015 10(j) rule at FR000141.) The scientists asserted FWS misrepresented their conclusions with respect to: (1) the relationship between population size and extinction risk for the experimental population, and (2) the relationship between effective migration rate and the long-term genetic health of the population. (Carroll Comment at N057616–18.) These concerns were largely premised on the fact that the cited publications analyzed effects on a population present within a metapopulation (*i.e.*, three populations connected by dispersal), whereas the FEIS assumed the same outcomes for a single isolated population. (*See id.*) In light of this discrepancy, the scientists opined that FWS's population objective and effective migration rate failed to prevent long-term erosion in the genetic health of the experimental population of Mexican wolves and that the selected course of action would therefore hinder the recovery of the species. As stated in the comment from the scientists:

> [G]iven the current depauperate genetic composition and the high relatedness of the Blue Range population, in order for this population to contribute to recovery it is necessary to not only forestall further genetic degradation but also reduce the high relatedness of the Blue Range population and increase its levels of genetic variation. The success of this effort depends on it being initiated while the population is still small, when each newly released individual has a greater genetic effect on the recipient population. Releases from the captive population at a rate equivalent to 2 effective migrants per generation would therefore be inadequate to address current genetic threats to the Blue Range population.

(*Id.* at N057618.) The scientists concluded that their "fundamental concern" was that the EIS gave "an overly optimistic depiction of the long term viability of the Blue Range population." (*Id.*)

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[8] The scientists who authored the comment were Drs. Carlos Carroll, Richard J. Fredrickson, Robert C. Lacy, Robert K. Wayne, and Philip W. Hedrick. (*See* Carroll Comment at N057619.) Some or all of these scientists have been cited in the major agency publications on Mexican wolf recovery since 1998, including the Three- and Five-Year Reviews of the reintroduction program, the 2010 Conservation Assessment, the 2012 Draft Recovery Plan, the 2014 DEIS and FEIS for the 2015 10(j) rule, the 2015 listing rule, and the 2015 10(j) rule.

In spite of the scientists' concern for the impacts on wolf recovery, on January 16, 2015, FWS published the 10(j) rule with the key provisions of Alternative One described above.[9] (2015 10(j) Rule at FR000136, *et seq.*) The present lawsuit, challenging the 2015 rule, was filed that same day.

FWS's Stated Purpose of Rule

Like the 1998 10(j) rule before it, the 2015 10(j) rule was not intended to provide full recovery of the species, but to help the agency achieve the "'first step toward recovery,' as envisaged by the 1982 Recovery Plan." (*See* 2014 FEIS at N042669, N042672, N042692.) As defined by FWS, the purpose of the rule is "to improve the *effectiveness* of the reintroduction project to achieve the necessary population growth, distribution, and recruitment, as well as genetic variation within the Mexican wolf experimental population *so that it can contribute to recovery in the future*." (2015 Rule at FR000148 (emphasis added).) FWS found that by improving the effectiveness of the project, the "potential for recovery of the species" would increase. (*Id.* at FR000136; *see also* FR000148.) With this purpose in mind, FWS notes that specific measures not yet implemented by the agency will likely be necessary to recover the species, including objective and measurable criteria for delisting, a scientifically based population goal, and expanded dispersal area based upon the establishment of a metapopulation. (*Id.* at FR000141, FR000148, FR000150, FR000164; 2014 FEIS at N042692.) FWS will review the progress of reintroduction under the new rule in year five, with a focus on modifications needed to improve the efficacy and the contribution the population is making toward recovery of the Mexican wolf. (2015 10(j) Rule at FR000150.)

Current Status of the Species

In the 2014 FEIS, FWS acknowledged that the experimental population was not thriving. (2014 FEIS at N042674; *see also* 2010 CA at N052341.) As described by FWS,

[9] The rule is published in the Federal Register at 80 Fed. Reg. 2512 and codified at 50 C.F.R. § 17.84(k). Concurrently with the Section 10(j) rule, FWS issued a final rule changing the designation of the Mexican wolf from endangered species to endangered subspecies. 80 Fed. Reg. 2488 (Jan. 16, 2015).

"the experimental population is considered small, genetically impoverished, and significantly below estimates of viability appearing in the scientific literature." (FEIS at N042674.) In the 2015 10(j) rule, FWS acknowledged that the goal of a viable, self-sustaining population of 100 wolves has never been met. (*See* 2015 10(j) Rule at FR000175.) Although in 2014 the number of wolves in the experimental population jumped to 110, it dropped again in 2015 to 97. (Doc. 135, pp. 3–4.) FWS estimated that between 1998 and 2013, the "initial release success rate" was about 21 percent, which meant that for every 100 wolves released, only 21 of them survived, bred, and produced pups, therefore becoming "effective migrants." (2015 10(j) Rule at FR000148.) It is undisputed that the growth of the experimental population has been hindered by escalating adult mortalities, illegal takings, and pup mortality. Lawful wolf removals by the agency have also hindered population growth: from 1998 to 2002, 110 wolves were released and 58 were removed; from 2003 to 2007, 68 wolves were released and 84 were removed; from 2008 and 2013, 19 wolves were released and 17 were removed. (*Id.* at FR000140; 2014 FEIS at N042666–67, N042670.) The agency has recognized that permanent removals have the same practical effect on the wolf population as mortality. (2010 CA at N052324.) Moreover, past removals and lethal control measures have led to the loss of genetically valuable animals. (*See* Comment by David Parsons (Dec. 2007), AR N043398, at N043404 (discussing the agency's killing of AM574, the sixth most genetically valuable wolf, and the removal of wolves from the Aspen pack).) As one employee of FWS stated: "Our management/recovery actions are propping up the subspecies but without that it would tank (extinct within immediate future)." (J006456, Internal FWS edits to Draft Mexican Wolf Listing Rule (Sept. 23, 2012)).

FWS has repeatedly recognized that one of the chief threats to the species is loss of genetic diversity. Genetically depressed wolves have lower reproductive success, including smaller litter sizes, low birth weights, and higher rates of pup mortality, as well as lowered disease resistance and other accumulated health problems. (2015 Listing Rule at J016142.) FWS estimates that the captive population retains only three founder

genome equivalents—*i.e.*, more than half of the genetic diversity of the seven original founders has been lost from the population. (Mexican Wolf Listing Rule, AR J016124, at J016143 (Jan. 16, 2015) (hereinafter 2015 Listing Rule).) By 2014, the captive population had reached approximately 258 wolves, but 33 of those wolves were reproductively compromised or had very high inbreeding coefficients. The age structure of the captive population was also heavily skewed, such that sixty-two percent of the population was composed of wolves that would die within a few years. This, combined with the release of captive wolves into the wild, means that the overall genetic diversity of the captive population will decline in coming years. (*Id.*)

The state of the captive population, in turn, affects the level of genetic fitness achieved by the experimental population. (2015 Listing Rule at J016143 ("The gene diversity of the experimental population can only be as good as the diversity of the captive population from which it is established.")). In 2014, the experimental population had 33 percent less genetic representation than the captive population. (2014 FEIS at N042673.) Members of the reintroduced population were, on average, as related to each other as full siblings. (*Id.*) As described by Dr. Fredrickson, "the reintroduced population is a genetic basket case in need of serious genetic rehab. Failing to do so is irresponsible and also managing for extinction." (Email to FWS (Nov. 24, 2013), AR J017818.)

Future Recovery Requirements

In its 2014 FEIS, FWS discussed the relationship between population size, distribution, and genetic fitness, and the impacts these factors have on species viability. (*See* 2014 FEIS at N042669–75.) According to the agency, "[a] species with a small population, narrowly distributed, is less likely to persist (in other words it has a higher risk of extinction) than a species that is widely and abundantly distributed." (*Id.* at N042671.) The combination of a small number of animals with low genetic variation is particularly harmful, as it can lead to an "extinction vortex," a self-amplifying cycle which results in decreased fitness and lower survival rates. (*Id.*) According to FWS, "[t]he Mexican wolf, in particular, is more susceptible to population decline than other

gray wolf populations because of smaller litter sizes, less genetic variation, lack of immigration from other populations, and potential low pup recruitment." (*Id.* (citations omitted).)

Scientists have concluded that establishing a metapopulation is necessary to achieve the recovery of the species. In their 2014 publication, Drs. Carroll, Fredrickson and Lacy found that the "viability of the existing wild population is uncertain unless additional population can be created and linked by dispersal of >0.5 migrants/generation." (Carroll, *et al.*, Developing Metapopulation Connectivity Criteria from Genetic and Habitat Data to Recover the Endangered Mexican Wolf (2014), AR N004225, at N004233.) Likewise, in its 2012 draft recovery plan, the Mexican wolf recovery team determined that establishment of a metapopulation was one of five criteria necessary to accomplish the delisting of the subspecies. (2012 Draft RP at C043106–07.) Although FWS stated in the 2014 FEIS it lacks "sound, peer-reviewed, scientific basis" to determine what is needed for full recovery (2014 FEIS at N042692), FWS has also recognized that the future success of the Mexican wolf "is likely to depend on the establishment of a metapopulation or several semi-disjunct populations spanning a significant portion of its historic range in the region." (2015 10(j) Rule at FR000175.) FWS asserts that this must be accomplished through the development of a revised recovery plan, which may, in turn, require further revision to the experimental population regulations and any necessary analysis pursuant to NEPA. (2015 10(j) Rule at FR000141, FR000148.)

November 2017 Draft Revised Recovery Plan & Related Litigation

On November 30, 2017, in response to litigation by environmental groups and the State of Arizona, FWS completed a revised recovery plan for the Mexican gray wolf.[10]

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[10] *See* doc. 55 in case No. CV-14-02472-TUC-JGZ; doc. 49 in case No. CV-15-00245-TUC-JGZ. The Court takes judicial notice of the first revision to the 2017 Mexican Wolf Recovery Plan, which is a publicly available document. *See* https://www.fws.gov/southwest/es/mexicanwolf/pdf/2017MexicanWolfRecoveryPlanRevision1Final.pdf (last visited March 27, 2018); 82 Fed. Reg. 29,918. The information from the 2017 plan is discussed herein as background only.

FWS received 101,010 public comments on the draft plan. (Doc. 57, p. 2 in case No. CV-14-02472-TUC-JGZ.) The 2017 draft recovery plan, which provides criteria for the delisting of the species, anticipates two inter-connected populations of Mexican wolves in the United States and Mexico. (2017 RP at 10, 18–20.) In the United States, implementation of the new plan will involve a single population in Arizona and New Mexico, south of I-40. (*Id.* at 11.) FWS anticipates that under the new plan the Mexican wolf will be recovered in 25-35 years. (*Id.* at ES-3.) The Center for Biological Diversity *et al.* filed a separate action challenging the 2017 revised recovery plan on January 30, 2018, alleging that the plan fails to provide for the recovery of the Mexican wolf. (*See* doc. 1, in case No. CV-18-00047-TUC-JGZ.)

DISCUSSION

For the reasons discussed below, the Court finds that the 2015 10(j) rule fails to further the conservation of the Mexican wolf. The Court further finds that the essentiality determination is arbitrary and capricious. Because these two requirements of Section 10(j) have not been met, the Court will remand to the agency for further proceedings consistent with this Order.

I. The 2015 Section 10(j) rule fails to further the recovery of the Mexican wolf.

Before authorizing the release of an experimental population under ESA Section 10(j), the Secretary must, by regulation, determine that such release will "further the conservation of [the] species." 16 U.S.C. § 1539(j)(2)(A); *see also* 50 C.F.R. § 17.81(b). Plaintiffs CBD, WEG, the Coalition, and SCI each ask the Court to invalidate all or part of the 2015 10(j) rule on the ground that the rule fails to further the recovery of the species.[11,12] Alternatively, Federal Defendants and Defendant-Intervenor Arizona

[11] The question of whether the 2015 10(j) rule furthers recovery of the species is raised in each of the four cases, and the Court's resolution of this issue thus affects each of the 12 pending motions for summary judgment. Although CBD, WEG, the Coalition, and SCI each argue that the rule fails to further recovery of the species, their arguments as to *why* often vary so greatly that the Court may agree with the proposition set forth by a party, but nevertheless reject that party's reasoning. In an effort to fully address the parties' claims and to give guidance to the agency on remand, the Court addresses all of

(collectively "Defendants" for the purposes of this section) ask this Court to uphold the 2015 10(j) rule on the ground that it complies with the ESA's requirement to further the recovery of the species. Having considered the parties' arguments, the Court concludes that the 2015 rule only provides for the survival of the species in the short term and therefore does not further recovery for the purposes of Section 10(j). The Court also agrees with CBD and WEG that, by failing to provide for the population's genetic health, FWS has actively imperiled the long-term viability of the species in the wild.

A. The 2015 10(j) rule provides only for short-term survival of the species and fails to further the long-term recovery of the Mexican wolf in the wild.

FWS implemented the 2015 10(j) rule as an interim measure that would improve the effectiveness of the reintroduction program, until such time as further recovery actions may be accomplished. Although the rule contemplates an increase in certain metrics, such as population size and geographic range, it does not, in and of itself, further the recovery of the species. Rather, the rule only ensures the short-term survival of the species.

The rule's provision for a single, isolated population of 300-325 wolves, with one to two effective migrants per generation, does not further the conservation of the species and is arbitrary and capricious. When FWS approved the population size and effective migration rate, it misinterpreted the findings of Carroll et al. (2014) and Wayne & Hedrick (2010), which it had relied upon to support its population objective. Specifically,

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the arguments related to furthering recovery together in this section. In sum, the Court finds the reasoning of CBD and WEG persuasive on this issue, and rejects the reasoning of the Coalition and SCI.

[12] In a related argument, SCI contends that the Secretary violated Section 4(d) of the ESA, 16 U.S.C. § 1533(d), by (1) failing to issue experimental population regulations necessary and advisable for the conservation of the species, and (2) failing to include SCI's requested escape clause. (Doc. 69 in case No. CV-16-00094-TUC-JGZ, pp. 31–33, 35–38.) The Ninth Circuit has rejected the argument that a Section 10(j) regulation must meet the requirements of ESA Section 4(d). *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998). Accordingly, the Court will deny summary judgment on SCI's claims raised under ESA Section 4(d).

the population size and effective migration rate that was selected for the final rule fails to account for the fact that the Blue Range population is not connected to a metapopulation and suffers from a higher degree of interrelatedness than is assumed in those studies. When these circumstances are factored in, Drs. Carroll, Wayne and Hedrick, among others, conclude that the effective migration rate and population size in the 2015 rule are insufficient to ensure the long-term viability of the species. In their public comment to FWS, Drs. Carroll et al. state that "[r]eleases from the captive population at a rate equivalent to 2 effective migrants per generation would . . . be inadequate to address current genetic threats to the Blue Range population." They further note that forestalling genetic degradation and reducing the high relatedness of the population are actions that must be taken early on, while the population is still small, "*in order for this population to contribute to recovery*." (Carroll Comment at N057618.) To the extent that FWS now seeks to argue in this litigation that the population size and effective migration rate further the recovery of the species, the Court finds that that position is not entitled to deference. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 969 (9th Cir. 2002) ("While we give deference to an administrative agency's judgment on matters within its expertise, here the Forest Service's own scientists have concluded that the 'Forest Plan approach to sustaining old growth through the planning period is invalid'. . . .").

Indeed, FWS itself acknowledges in the 2015 rule that "a small isolated Mexican wolf population, such as the existing experimental population, can neither be considered viable nor self-sustaining." (2015 10(j) Rule at FR000138–39A). FWS nevertheless justified the population objective on the grounds that it "would provide for the persistence of the population and enable it to contribute to the next phase of working toward full recovery of the Mexican wolf . . . ." (*Id.*) "Persistence" is antithetical to the ESA's recovery mandate. *Gifford Pinchot Task Force v. United States Fish and Wildlife Serv.*, 378 F.3d 1059, 1070, ("[T]he ESA was enacted not merely to forestall the extinction of species (i.e., promote a species survival), *amended*, 387 F.3d 968 (9th Cir. 2004), but to allow a species to recover to the point where it may be delisted."); *Sierra*

Club v. United States Fish & Wildlife Serv., 245 F.3d 434, 438 (5th Cir. 2001) ("[T]he objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status."). Ensuring the short-term survival of the species falls short of Section 10(j)'s requirement that the release of an experimental population further the recovery of the species. 16 U.S.C. § 1539(j)(2)(A). In sum, in approving the population size and effective migration rate, FWS first failed to articulate a rational connection between the facts in the record and the choice made, *Forest Guardians*, 329 F.3d at 1099, and second justified its deficiency on the "short-term" nature of the rule, which is legally insufficient under the ESA. *See Judulang*, 565 U.S. at 53, 55 (agency decision must be based on relevant factors that are tied to the purpose of the underlying statute).[13] Accordingly, the Court concludes that the population size and effective migration rate, which do not further the conservation of the species, are arbitrary and capricious.

In addition, the expanded take provisions contained in the new rule do not contain adequate protection for the loss of genetically valuable wolves. The agency's authority to manage a 10(j) population includes the option to authorize lethal and nonlethal take. This authority stems not from biological considerations, but from the agency's need to coordinate the recovery effort with affected stakeholders. However, in issuing take

[13] The remaining provisions of the 2015 rule fail to remedy this deficiency and, in some instances, threaten to compound the problem. In spite of the fact that the rule does not provide a minimum population size and effective migration rate to protect against genetic deterioration, FWS imposed a population cap that creates the potential for removal or killing of genetically valuable wolves. The rule permits the agency to use "all available management options" so as not to exceed the cap. Although the rule expresses the agency's "preference for translocation," it permits the agency to use "all available management options" so as not to exceed the cap. (*See* Comment by David Parsons (Dec. 2007), AR N043398, at N043404 (discussing the agency's killing of AM574, the sixth most genetically valuable wolf, and the removal of wolves from the Aspen pack). Similarly, although FWS acknowledges that territory north of I-40 will likely be required for future recovery and recognized the importance of natural dispersal and expanding the species' range, it nevertheless imposed a hard limit on dispersal north of I-40. Any wolves that venture outside the MWEPA will be captured and returned. The agency again relied on the limited scope of the rule to justify this provision, stating that the purpose of the rule is to improve the effectiveness of the reintroduction project and citing to the recovery plan as the likely means of addressing the insufficient geographic range that is provided by the present rule.

permits, "the Secretary is subject to the requirement of Section 10(d) that issuance will not operate to the disadvantage of the listed species," S. Rep. No. 97-418 at 8, and the permit issued must be consistent with the ESA's conservation purpose and policy, 16 U.S.C. § 1539(d). FWS has repeatedly recognized that one of the chief threats to the species is loss of genetic diversity, *see* discussion, *supra* p. 21, yet the expanded take provisions lack protections for loss of genetic diversity. Instead, FWS justifies the expanded take provisions on the ground that they will "make reintroduction compatible with current and planned human activities, such as livestock grazing and hunting." This explanation fails to show that FWS considered the requirements of Section 10(d), or that its decision adhered to the ESA's conservation purpose.

Defendants concede that the 2015 rule is not sufficient in the long term, and offer a series of justifications for the rule's short-term focus, each of which the Court rejects. First, Defendants urge the Court to find that the rule is sufficient in light of the recovery plan, which, at the time of briefing, was forthcoming, but has since been issued and subject to legal challenge. The Court concludes that the substance or terms of future recovery actions, do not relieve FWS of its obligations under Section 10(j). Moreover, the provisions of a recovery plan are discretionary, not mandatory. Thus, even if the recovery plan contained all terms promised by Defendants here, there is no guarantee that those terms will protect against the harms that the Court finds presented by 10(j) rule.[14]

[14] The Court rejects the Coalition's argument that the 2015 10(j) rule fails to further recovery because it does not conform to the terms of the existing recovery plan or that the rule is necessarily deficient because it was finalized in advance of the forthcoming revised recovery plan. (Doc. 109, pp. 14–17, 22–23.) Recovery plans do not govern all aspects of recovery under the ESA, but rather are non-binding statements of intention with regards to the agency's long-term goal of conservation. *See Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012) (a recovery plan is a non-binding, "statement of intention," and not a contract); *Conservation Cong. v. Finley*, 774 F.3d 611, 620 (9th Cir. 2014) (declining to adopt particular recommendations in a recovery plan, which is nonbinding on an agency, does not constitute failing to consider them). The agency may move forward with conservation goals under other sections of the ESA, even in the absence of an updated recovery plan. *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008), *aff'd sub nom. Arizona Cattle*

Defendants next contend that the rule is sufficient as an interim measure, under the agency's stepwise approach to recovery, and that any deficiencies in the rule will not result in harm the Mexican wolf in the foreseeable future. This argument completely misconstrues the principles guiding recovery, which focus on long-term viability of the species, and again requires that the Court rely on the promise of future action that may never be implemented. The Court declines to do so. The experimental population that is the subject of this litigation is the only population of Mexican wolves in the wild. *See Motor Vehicle Mfrs. Ass'n of United States, Inc.*, 463 U.S. at 43. It is undisputed that recovery of the population is in genetic decline and that the present agency action will have long-term effects on the genetic health of the species.

Nor does the significant "management flexibility" afforded to the agency under Section 10(j) justify the failure to further the long-term recovery of the Mexican gray wolf. Section 10(j) was added to the ESA by amendment in 1982 as a means of providing FWS with administrative and management flexibility to transplant an endangered species into previously uninhabited habitat. *See* 49 Fed. Reg. 33,885, 33,886, 33,889 (Aug. 27, 1984). Indeed, as the Ninth Circuit has noted, "Congress's specific purpose in enacting section 10(j) was to 'give greater flexibility to the Secretary.'" *United States v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998) (quoting H.R. Rep. No. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833.). However, there is no indication that the management flexibility afforded to the agency under Section 10(j) was intended to displace the ESA's broader conservation purpose, or that it overrides the duty to use the best available science. On the contrary, it is clear from the legislative history that the management flexibility afforded under Section 10(j) "*allows the Secretary to better conserve and recover endangered species*." *McKittrick*, 142 F.3d at 1174 (emphasis added). The Court is not unsympathetic to the challenges the agency faces in its efforts to

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Growers' Ass'n v. Salazar, 606 F.3d 1160 (9th Cir. 2010) (rejecting the argument that the agency cannot move forward with a conservation effort without first identifying in a recovery plan the precise point at which conservation will be achieved).

recover such a socially controversial species. As FWS observed in 1982, any recovery effort must deal with the residue of a long history of anti-wolf sentiment by the public. (1982 RP at R000895.) However, any effort to make the recovery effort more effective must be accomplished without undermining the scientific integrity of the agency's findings and without subverting the statutory mandate to further recovery. The agency failed to do so here.

In reaching its conclusions, the Court is mindful that when reviewing scientific findings within the agency's area of expertise, it is at its most deferential. *The Lands Council*, 559 F.3d at 1052; *accord Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). However, this is not a case in which the agency was required to choose between conflicting scientific evidence. On the contrary, the best available science consistently shows that recovery requires consideration of long-term impacts, particularly the subspecies' genetic health. Moreover, this case is unique in that the same scientists that are cited by the agency publicly communicated their concern that the agency misapplied and misinterpreted findings in such a manner that the recovery of the species is compromised.[15] To ignore this dire warning was an egregious oversight by the agency. *Idaho Sporting Cong., Inc.*, 305 F.3d at 969 (declining to defer to the agency's judgment on matters within agency expertise where the Forest Service's own scientists concluded a forest plan standard was invalid).

In sum, FWS failed to consider recovery, in accordance with 50 C.F.R. § 17.81(b), or to further the conservation of the species under Section 10(j), 16 U.S.C. § 1539(j)(2)(A). The rule as a whole fails to further recovery: FWS did not create a population in the 2015 rule that would be protected against the loss of genetic diversity,

[15] The Court rejects the Coalition's argument that FWS did not have the scientific data necessary to make an informed decision about recovery. (*See* doc. 153, p. 12.) The Coalition's principal challenge is that Dr. Carroll's 2014 study utilized data collected from North American gray wolves, rather than Mexican gray wolves. The Coalition fails to explain why this renders the data invalid or present better existing data. *See* 50 C.F.R. § 17.81(b) (Secretary shall utilize the "best scientific and commercial data *available*" in considering effects on recovery) (emphasis added).

and there are no other viable populations to cushion the subspecies from the long-term harm that is predicted to result under the 2015 rule. Accordingly, the Court concludes that the 2015 10(j) rule is arbitrary and capricious, and will grant summary judgment in favor of CBD and WEG on this ground in cases Nos. CV-15-00019-TUC-JGZ and No. CV-15-00285-TUC-JGZ.

B. The revised rule does not need to be the product of an agreement with state and private stakeholders.

The Court rejects SCI's argument that the 2015 10(j) rule is invalid because it was adamantly opposed by state and private stakeholders. (*See* doc. 69 in case No. CV-16-00094-TUC-JGZ, pp. 18–31, 33 – 35.) Section 10(j) of the ESA does not require that the 10(j) rule be the product of an agreement with state and private stakeholders. S*ee* 16 U.S.C. § 1539(j). The Court disagrees with SCI's assertion that Congress intended such a requirement and concludes SCI has failed to demonstrate any "clearly contrary congressional intent" in the legislative history to the 1982 ESA amendments. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 884 (9th Cir. 2001) (where statute's plain meaning is clear, a review of the legislative history is strictly limited to ensure no clearly contrary congressional intent). On the contrary, the legislative history demonstrates that, although Congress anticipated Section 10(j) regulations would be implemented in consultation with affected parties, the Secretary would retain the authority and management flexibility to issue regulations that further the conservation of the species. *See* H.R. Rep. 97-567, 97th Cong., 2d Sess. § 5 (May 17, 1982); *see also Wyo. Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1366 (D. Wyo. 1997), *rev'd on other grounds*, 199 F.3d 1224 (10th Cir. 2000).

The Court similarly rejects SCI's argument that FWS violated 50 C.F.R. § 17.81(d)'s requirement that regulations represent, "to the maximum extent practicable," a cooperative agreement between state and federal agencies and private landowners. Although FWS revised the 1998 10(j) rule to increase the number of wolves permitted in the MWEPA against the wishes of New Mexico's hunting community and New Mexico

state wildlife management authorities (doc. 69 in case No. CV-16-00094-TUC-JGZ, pp. 29–30), the Court cannot conclude that FWS violated 50 C.F.R. § 17.81(d) when it declined to adopt the position of certain stakeholders. The record in this case reveals that prior to finalizing the FEIS and Section 10(j) rule, FWS consulted and coordinated with many parties, including New Mexico wildlife management agencies and private stakeholders. FWS held formal and informal meetings with New Mexico's wildlife management authorities, maintained stakeholder mailing lists, and worked with state agencies to collect and analyze data on biological and economic factors. (*See* FEIS at N042931–41; 2015 10(j) Rule at FR000176.) FWS also invited 84 state, tribal, and federal government entities to participate as cooperating parties pursuant to memoranda of understanding. (*See* 2015 10(j) Rule at FR000158.) SCI's contention that these efforts do not constitute an agreement "to the maximum extent practicable" is unpersuasive. The Court cannot find that FWS abdicated its duty when it declined to adopt a position of a select few parties that would be tantamount to a veto on the agency action, as this would effectively prevent the agency from carrying out its statutory mandate in the absence of complete consent. Accordingly, the Court will deny summary judgment to SCI on this ground.

C. The rule provides sufficient suitable habitat for the species.

The Court rejects the Coalition's argument that in the 2015 10(j) rule, FWS failed to provide sufficient suitable habitat for the Mexican wolf. Under agency regulations, an experimental population shall be "*released* into suitable natural habitat…." 50 C.F.R. § 17.81(a) (emphasis added). FWS asserts in its 2014 FEIS it "will not release or translocate Mexican wolves into areas that do not have suitable habitat." (2014 FEIS at N043074.) In its 2015 rulemaking the agency repeatedly notes that it expects wolves to occupy areas of suitable habitat, and that portions of the MWEPA considered unsuitable for permanent occupancy are necessary to permit wolves to roam and travel to new territories.[16] (2014 FEIS at N042677–78.) Neither the ESA, nor 50 C.F.R § 17.81(a),

[16] Moreover, restricting the agency's use of unsuitable habitat would go against

requires FWS to limit the total geographic range of an experimental population to suitable habitat. Moreover, the Coalition has not provided any authority that would restrict the agency's use of unsuitable habitat for purposes other than release. Accordingly, the Court will deny the Coalition's motion for summary judgment on these grounds.[17]

II. FWS's essentiality determination was arbitrary and capricious.

In 1998, when FWS first designated the experimental population of Mexican wolves, the agency determined in accordance with ESA Section 10(j)(2)(B) that the population was not essential to the continued existence of the species. In 2015, the population's "nonessential" designation was carried over to the revised rulemaking: FWS declared that nothing in the 2015 rule changed the designation and the agency was not "revisiting" the 1998 determination. (2015 10(j) Rule at FR000174.) FWS explained that because the purpose of the 2015 rule was to revise management protocols for an existing population, reconsideration of the population's nonessential status was "outside the scope" of the rulemaking. (*Id.* at FR000163.)

In its present Motion for Summary Judgment, WEG argues that FWS's decision to maintain the experimental population's nonessential status was arbitrary and capricious.[18] (Doc. 112, pp. 12–26.) WEG contends that the change in listing status of the Mexican wolf, from endangered species to endangered subspecies, triggered a duty to perform a

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Congress's intent to further the conservation of threatened and endangered species and to minimize potential conflicts with local landowners. *See Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000) ("Congress added section 10(j) to the Endangered Species Act in 1982 to address the Fish and Wildlife Service's and other affected agencies' frustration over political opposition to reintroduction efforts perceived to conflict with human activity.").

[17] The Coalition's argument that the agency failed to meet its "stated requirements for suitable habitat as an area with 'limited or no livestock grazing' and 'minimal human use'" is similarly unpersuasive. Although livestock grazing and human use are discussed in the 2014 FEIS in the context of "suitable habitat," FWS does not explicitly state that the criteria for suitable habitat are limited to these factors.

[18] Plaintiff WEG is the only party to challenge the 2015 essentiality determination, and accordingly the resolution of the present issue affects only the motion and cross-motions for summary judgment filed in case No. CV-15-00285-TUC-JGZ.

new essentiality determination, and that the agency's reliance on the outdated 1998 determination failed to use the best available science. (*Id.*) Federal Defendants and Defendant-Intervenor Arizona (collectively "Defendants," for the purposes of this section) argue that there is no obligation under the ESA or agency regulations to perform a new essentiality determination when the agency voluntarily revises an existing 10(j) rule, as FWS did in 2015. (Doc. 134, pp. 19–25; doc. 142, pp. 9–12.) According to Defendants, the experimental population of Mexican wolves was released in 1998, and the essentiality determination performed at that time is in full satisfaction of the Secretary's duty under Section 10(j). (*Id.*)

The Court concludes that because the effect of the 2015 rulemaking was to authorize the release of an experimental population outside its current range, a new essentiality determination was required and the agency's decision to maintain the population's nonessential status without consideration of the best available information was arbitrary and capricious.

A. FWS is required to perform a new essentiality determination when it authorizes the release of an experimental population outside the species' current range.

Section 10(j)(2) of the ESA requires the Secretary to perform an essentiality determination prior to authorizing the release of any population of an endangered species *outside the current range of such species*. *See* 16 U.S.C. § 1539(j)(2)(A), (B). In 1998, there was no existing range for the Mexican wolf; the subspecies had been completely extirpated from the wild. At that time, FWS authorized a release of wolves into the BRWRA, a 6,854 square-mile area. The 2015 rule provides for the release of Mexican wolves outside the BRWRA—the species' only existing current range. Specifically, the rule expressly authorizes the release of wolves into two of the three zones of the expanded MWEPA and during all three phases of the 12-year reintroduction period. (2015 10(j) Rule at FR000144.) In fact, in the 2015 rule, FWS acknowledges that the "designated experimental population area for Mexican wolves classified as a nonessential experimental population by this rule . . . *is wholly separate geographically from the*

current range of any known Mexican wolves." (*Id.* at FR000183 (emphasis added).) Because the 2015 rule authorizes releases outside of the current range of the species, the Court finds that an essentiality determination was required under the plain language of Section 10(j). *See* 16 U.S.C. § 1539(j)(2)(A), (B).

Defendants nevertheless claim that an essentiality determination is not required because the 2015 rule was a "revision" to an existing rule and neither the statute nor the regulations require a new essentiality determination for a revision. Defendants urge the Court to accept that the statute and regulations are therefore ambiguous and that the agency's interpretation that a revision is not required is entitled to deference under *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), and *Auer v. Robbins*, 519 U.S. 452 (1997).

The Court is not persuaded that deference is warranted here. First, the Court rejects Defendants' argument that the statute is ambiguous as to when an essentiality determination is required. As discussed above, the ESA is clear that an essentiality determination is required prior to authorizing the release of any population of an endangered species outside the current range of such species. 16 U.S.C. § 1539(j)(2)(A), (B). To the extent FWS argues that an essentiality determination is not required for a revised rulemaking, that interpretation conflicts with the plain language of the statute. Under Defendants' interpretation, the Court would be required to find that an essentiality determination is not required, even where all of the conditions set forth in the statute are met, simply because the rule is denominated a revision by the agency. The Court declines to read the statute in a manner that negates the plain language of the statute. *Chevron*, 467 U.S. at 844 (agency's interpretation is permissible unless "arbitrary, capricious, or manifestly contrary to the statute."); *see also Marsh v. J. Alexander's LLC*, 869 F.3d 1108, 1116–17 (9th Cir. 2017) ("[A] court need not accept an agency's interpretation of its own regulations if that interpretation is inconsistent with the statute under which the regulations were promulgated." (internal changes, quotation marks and citations

omitted)).[19]

Second, the agency's proposed interpretation would negate Congress's intent that the essentiality determination be made by regulation. 16 U.S.C. § 1539(j)(2)(B) ("Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species."). The regulation requirement ensures the benefit of public comment. H.R. Conf. Rep. 97-835, reprinted in 1982 U.S.C.C.A.N 2860, 2875; *accord Wyo. Farm Bureau Fed'n*, 199 F.3d at 1232-33 (citing same); *see also* 49 Fed. Reg. at 33,886 ("Regulations for the establishment or designation of individual experimental populations will be issued in compliance with the informal rulemaking provisions of the [APA], in order to secure the benefit of public comment…."). The importance of proceeding by regulation is apparent here. The Mexican wolf's range is greatly expanded under the new rule, from 6,854 square miles to 153,871 square miles, without the opportunity for public comment on the decision to retain the population's nonessential status.

In sum, the Court concludes that FWS was required to perform a new essentiality determination when it issued the 2015 10(j) rule, which authorized the release of an experimental population outside the species' current range. The agency's suggestion that an essentiality determination is not required for revisions is not a plausible construction of Section 10(j) and conflicts with Congress's express intent that the agency perform an essentiality determination anytime it authorizes the release of a species outside of its current range and that the agency proceed by regulation. *See Resident Councils of Wash.*

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[19] Defendants rely on Section 10(j)'s implementing regulations, found at 50 C.F.R. § 17.81. These regulations require an essentiality determination whenever the Secretary designates an experimental population that has been or will be released into suitable natural habitat *outside the species' current natural range*. 50 C.F.R. § 17.81(a), (c)(2) (emphasis added). The Court does not find any conflict between Section 10(j)(2) and 50 C.F.R. § 17.81. The ESA's implementing regulations effectively restate the requirements of Section 10(j). *See Gonzales v. Oregon*, 546 U.S. 243, 915–16 (2006) ("the near equivalence of the statute and regulation belies the Government's argument for *Auer* deference").

v. Leavitt, 500 F.3d 1025, 1034 (9th Cir. 2007) (The *Chevron* test "is satisfied if the agency's interpretation reflects a plausible construction of the statute's plain language and does not otherwise conflict with Congress' expressed intent.") (internal quotation marks and citations omitted). FWS's failure to perform this requirement under the ESA prior to authorizing the release of the population under the 2015 10(j) rule was arbitrary and capricious.[20]

B. Alternatively, FWS's decision to maintain the experimental population's 1998 nonessential designation is not based upon the best available information and is arbitrary and capricious.

Under Section 10(j), the Secretary's determination of whether a population is essential to the continued existence of the species in the wild must be made "on the basis of the best available information." 16 U.S.C. § 1539(j)(2)(B). Agency regulations similarly require that the essentiality finding be "based solely on the best scientific and commercial data available, and the supporting factual basis[.]" 50 C.F.R. § 17.81(c)(2). The Secretary must consider whether the loss of the experimental population "would be likely to appreciably reduce the likelihood of the survival of the species in the wild." *See* 50 C.F.R. §§ 17.80(b), 17.81(c)(2). This is a fundamentally biological inquiry and requires the agency to consider existing circumstances and science. FWS failed to do so

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[20] Defendants also argue that FWS's decision not to revisit the 1998 essentiality determination is not a final agency action that is reviewable under APA Section 706(2)(A), and is more properly characterized as a "failure to act" under APA Section 706(1). *See* 5 U.S.C. § 706(1) (reviewing court shall compel agency action unlawfully withheld or unreasonably delayed). Although FWS did not perform a new analysis, the decision to maintain the 1998 designation nevertheless constitutes a final agency action. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). First, the decision was included in a final rulemaking that marked the consummation of the agency's decision-making process. *See ONRC Action v. Bureau of Land Mgm't*, 150 F.3d 1132, 1136 (9th Cir. 2003). Second, the agency's decision to retain the nonessential status implicated the level of interagency cooperation required under Section 7, 16 U.S.C. § 1536 (requiring federal agencies to confer or consult with FWS on federal actions likely to jeopardize the continued existence of the species, depending on essential or nonessential status). Similarly, the nonessential designation relieved FWS of the duty to designate critical habitat under Section 10(j)(2)(C)(ii). *See* 16 U.S.C. § 1539(j) (2)(C)(ii).

here.

FWS made no findings regarding the current state of the Mexican wolf experimental population. Rather, it relied on findings it made in 1998, when circumstances were markedly different than they are today. In 1998, the Mexican wolf was part of the listing the North American gray wolf as an endangered species. Under the 1998 rule, the population would occupy the BRWRA, a 6,854 square-mile area. FWS authorized 11 wolves for the initial release, and set a goal of a self-sustaining population of 100 wolves in the wild. There were approximately 150 wolves in captivity to support this reintroduction effort.

In contrast, the 2015 rule pertains to the Mexican wolf as its own newly designated subspecies. The 2015 rule authorizes the release, translocation and dispersal of wolves throughout a greatly expanded MWEPA, which encompasses all of Arizona and New Mexico south of I-40 and totals 153,871 square miles. Although initial releases will only occur in Zones 1 and 2, wolves will be permitted to disperse naturally into all of the expanded MWEPA. Moreover, although in the 17 years since the wolf was first introduced the captive population has grown to approximately 250 wolves, that population is aging and has lost much of its genetic diversity. Finally, the Court notes that the body of scientific knowledge surrounding the Mexican wolf species has grown significantly since 1998, as is demonstrated by many of the recent studies cited by FWS in other portions of the 2015 rule.

In sum, in deciding to maintain the 1998 essentiality determination, FWS failed to account for or consider the present circumstances of the experimental population. Although it is for the agency to interpret and weigh the facts, adopting a decision made 17 years prior without explanation does not satisfy the agency's duty to base its decision on the best available science and information or to articulate a rational connection between the facts found and the conclusion reached. Accordingly the Court finds that the agency's decision to maintain the Mexican wolf's nonessential status in the 2015 rulemaking was arbitrary and capricious. *See Forest Guardians*, 329 F.3d at 1099

(agency must articulate a rational connection between the facts found and the choice made); *Judulang v. Holder*, 565 U.S. at 53, 55 (reasons for agency decisions must be based on non-arbitrary, relevant factors that are tied to the purpose of the underlying statute). The Court will grant summary judgment in favor of WEG in case No. CV-15-00285-TUC-JGZ on this ground.

REMEDY

Having found that the 2015 10(j) rule is not compliant with the ESA, the Court must determine the proper remedy. Plaintiffs CBD and WEG ask the Court to sever and vacate only the challenged portions of the Section 10(j) rule.[21] Federal Defendants and the State of Arizona request that the Court remand the rule without *vacatur* for agency reconsideration.

Although not without exception, *vacatur* of an unlawful agency rule normally accompanies a remand. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007), *rev'd and remanded on other grounds sub nom. Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1185 (9th Cir. 2004). This is because "[o]rdinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). The usual effect of invalidating an agency rule is to reinstate the rule previously in force. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005).

When equity demands, however, the regulation can be left in place while the agency reconsiders or replaces the action, or to give the agency time to follow the necessary procedures. *See Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th

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[21] CBD asks the Court to vacate (1) the challenged provisions of the Revised 10(j) Rule (50 C.F.R. § 17.84(k)(9)(iii) (imposing population cap); 50 C.F.R. § 17.84(k)(7)(vi) (allowing taking in response to ungulate impacts); and 50 C.F.R. § 17.84(k)(9)(iv) (providing for phased management in Arizona); and (2) the challenged provision of the section 10(a)(1)(A) permit restricting Mexican wolf occupancy outside the experimental population area in areas north of Interstate 40. (Doc. 115, p. 47.) WEG similarly requests that the Court "set aside portions of the revised rule, portions of the section 10(a)(1)(A) permit, . . . and remand this matter back to the Service for further proceedings and analysis . . . ." (Doc. 112, p. 50.)

Cir. 2010); *Idaho Farm Bureau Fed'n*, 58 F.3d at 1405. A federal court "is not required to set aside every unlawful agency action," and the "decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (citations omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Harm to endangered or threatened species is considered irreparable harm, and the balance of hardships will generally tip in favor of the species. *See Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1073 (9th Cir. 1996) ("Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species."); *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."); *see also*, *e.g.*, *Defs. of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156, 1174 (D. Or. 2005) (lethal and non-lethal harm to gray wolf found to be irreparable injury that warranted injunction and *vacatur* of final rule changing status of gray wolf from endangered to threatened in some regions); *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, No. 16-CV-04294-WHO, 2017 WL 512807, at *24 (N.D. Cal. Feb. 8, 2017) ("Evidence that the Coho salmon will suffer imminent harm of any magnitude is sufficient to warrant injunctive relief.").

Here *vacatur* of the 2015 rule and return to the provisions of the 1998 rule would constitute a further setback for the species that serves no purpose. *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1107 (E.D. Cal. 2013) (rejecting *vacatur* of management framework that was "environmentally preferable" to the prior one). Instead, the Court will remand and require the agency to address the deficiencies discussed herein within a

reasonable time.[22] This approach will also give the agency the opportunity to coordinate any remedial action with the recovery recommendations in the recently published revised recovery plan. Accordingly, the final rule shall remain in effect until the Service issues a new rulemaking, at which time the January 16, 2015 final rule will be superseded.

Because further agency action will be required, the Court will not reach the parties' challenges to the November 17, 2014 Biological Opinion or the parties' arguments under NEPA.

CONCLUSION

While the prospect of further delays in wolf recovery is discouraging, it is not the province of this Court to make policy decisions, but to ensure compliance with statutory requirements. Where, as here, the agency achieved an outcome that fails to adhere to the guidelines set by Congress, the Court may not uphold that action, no matter how carefully negotiated or hard-fought it may have been. For all of the reasons stated herein,

IT IS ORDERED as follows:

1. In lead case No. CV-15-00019-TUC-JGZ, Plaintiff CBD's Motion for Summary Judgment (doc. 114) is GRANTED IN PART and DENIED IN PART to the extent provided herein. Federal Defendants' Cross-Motion for Summary Judgment (doc. 123) is DENIED. Defendant-Intervenor Arizona's Cross-Motion for

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[22] The Court declines Plaintiffs CBD and WEG's request to sever and vacate the challenged portions of the Section 10(j) rule. The Court concludes that the equities weigh in favor of retention of the current rule, including the challenged provisions, as these provisions are unlikely to cause irreparable harm in the near future. With regards to the population cap and the limitation on dispersal north of I-40, the number of wolves in the experimental population is not expected to reach 300-325 wolves until year 13 of the program and the agency anticipates that few wolves will initially disperse north of I-40 under the phased management approach. With respect to the provision that allows for take in response to unacceptable impacts to wild ungulate herds, the evidence suggests that since reintroduction commenced, there has been "no discernable impact" from Mexican wolf predation on elk in the BRWRA, and it is anticipated that wolves will have little or no effect on the abundance of elk and deer across most of Arizona and New Mexico. Moreover, it is clear that in drafting the present Section 10(j) rule, the take provisions are critical to conciliating those opposed to the reintroduction effort, and severing them would be contrary to the agency's intent to draft a rule that furthers the effectiveness of the reintroduction effort. See *MD/DC/DE Broadcasters Assoc. v. FCC*, 236 F. 3d 13, 22 (D.C. Cir. 2001) (whether the offending portion of a regulation is severable depends upon the intent of the agency).

Summary Judgment (doc. 129) is DENIED.

2. In consolidated case No. CV-15-00285-TUC-JGZ, Plaintiff WEG's Motion for Summary Judgment (CV-15-00019-TUC-JGZ, doc. 111) is GRANTED IN PART and DENIED IN PART to the extent provided herein. Federal Defendants' Cross-Motion for Summary Judgment (CV-15-00019-TUC-JGZ, doc. 133) is DENIED. Defendant-Intervenor Arizona's Cross-Motion for Summary Judgment (CV-15-00019-TUC-JGZ, doc. 141) is DENIED.
3. In consolidated case No. CV-15-00179-TUC-JGZ, Plaintiff the Coalition's Motion for Summary Judgment (CV-15-00019-TUC-JGZ, doc. 108) is DENIED. Federal Defendants Cross-Motion for Summary Judgment (CV-15-00019-TUC-JGZ, doc. 137) is GRANTED IN PART and DENIED IN PART to the extent provided herein. Defendant-Intervenor CBD's Cross-Motion for Summary Judgment (CV-15-00019-TUC-JGZ, doc. 147) is GRANTED IN PART and DENIED IN PART to the extent provided herein.
4. In related case No. CV-16-00094-TUC-JGZ, Plaintiff SCI's Motion for Summary Judgment (doc. 67) is DENIED. Federal Defendants Cross-Motion for Summary Judgment (doc. 70) is GRANTED IN PART and DENIED IN PART to the extent provided herein. Defendant-Intervenor CBD's Cross-Motion for Summary Judgment (doc. 78) is GRANTED IN PART and DENIED IN PART to the extent provided herein.

IT IS FURTHER ORDERED that the January 16, 2015 final rule, 80 Fed. Reg. 2512, *et seq.*, is hereby REMANDED to the Service for further action consistent with this order. The final rule shall remain in effect until the Service issues a new final rule for the experimental population of Mexican gray wolves, or otherwise remedies the deficiencies identified in this Order, at which time the January 16, 2015 final rule will be superseded.

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IT IS FURTHER ORDERED that within 30 days of the date of this Order, the parties shall provide to the Court a proposed deadline for the publication of a revised 10(j) rulemaking or other remedial action.

Dated this 30th day of March, 2018.

Honorable Jennifer G. Zipps
United States District Judge