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Re: Introduction of Mexican Wolf in Mexico

Dear Clients:

I have been reading the recent notifications from the federal government that Mexico plans to release Mexican wolves in Mexico, south of the United States/Mexico border in Sonora. While I have not seen an "official" position from the U.S. Fish and Wildlife Service ("FWS" or "Service") on how these wolves will be treated if (when) they migrate into New Mexico or Arizona, I have seen speculation that the migrating wolves will be or should be treated as "endangered" under the Endangered Species Act ("ESA") and that compliance with the National Environmental Policy Act ("NEPA") will not be

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required by the FWS. Even if the FWS does not take this legal position, I strongly suspect that the environmental groups will file litigation arguing that Mexican released wolves should be treated as endangered once they enter the United States.

This letter contains this firm's legal research on this issue. Based upon a case from the Tenth Circuit Court of Appeals, I believe that if Mexican released Mexican wolves migrate to the United States, they should be classified as part of the "nonessential experimental" population of existing wolves. Additionally, I think a strong argument can be made that NEPA compliance is necessary, although I do not think that there is any authority for the U.S. government to argue that Mexico has to halt its release plans until NEPA compliance is finished.

I. STATUS OF MIGRATING MEXICAN WOLVES

The reintroduction of the Mexican gray wolf into the Southwestern United States began in 1998. US Fish and Wildlife Service, *Welcome to the Gray Wolf Recovery Program*, http://www.fws.gov/southwest/es/mexicanwolf/Information (accessed August 31, 2009). The rules and regulations pertaining to this recovery program are found in the Code of Regulations at 50 C.F.R. § 17.84(k)(2009). The wolves were reintroduced into a designated area called the "Mexican Wolf Experimental Population Area" (MWEPA)[1]. The population of wolves reintroduced under this program are classified as a "nonessential experimental population." 50 C.F.R. § 17.84(k)(1).

The Endangered Species Act (section 10(j)) requires that "experimental populations" released back into the wild be "wholly separate geographically from nonexperimental populations of the same species." 16 U.S.C. § 1539(j)(2009). The regulations state that a designation of "experimental population" is appropriate where "the population is wholly separate geographically from nonexperimental populations of the same species." 50 C.F.R. § 17.80(a). That section goes on to state that:

> [w]here part of an experimental population overlaps with natural populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will only be recognized outside the areas of overlap. Thus, such population shall be treated as experimental only when the times of geographic separation are reasonably predictable; e.g., fixed migration

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[1] This area includes the Blue Range Wolf Recovery Area and the "back-up area" of the White Sands Wolf Recovery Area. 50 C.F.R. § 17.84(k)(9)(i) and (ii).

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> patterns, natural or man-made barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.

Id.

The regulations go on to explain that the Mexican wolves released under this program are to be managed according to the following provisions, including:

> . . . that the experimental population is wholly separate geographically from any other wild gray wolf population or individual wild gray wolves; that no wild Mexican wolves are known to exist in the experimental population area or anywhere else; and that future migration of wild Mexican wolves into the experimental population area is not possible.

50 C.F.R. § 17.84(k)(2).

A. Potential Loss of "Experimental Population" and Effect Thereof

If Mexican officials do release the wolves in the presently planned location (just south of the U.S./Mexican border in Sonora, Mexico) then these findings by the FWS would no longer be accurate. Specifically the wolves released in the U.S. Recovery Area might no longer be geographically separated from other wild gray wolves and "future migration into the experimental population" might now be possible. An issue that might be raised in light of these changed circumstances is whether the Mexican wolf experimental population will still be considered an "experimental population."

ESA's section 10(j) was analyzed in a gray wolf case out of Yellowstone National Park. Wyoming Farm Bureau Federation v. Babbitt, 199 F.3d 1224 (10th Cir. 2000). In that case the Department of the Interior's ("Department") rules and regulations pertaining to the reintroduction of gray wolves into Yellowstone National Park and other areas was challenged. Id. at 1228. One argument the plaintiffs made was that the reintroduced population was not a properly characterized "experimental population" under the ESA because of the potential commingling of naturally occurring wolves with the reintroduced population. Id. at 1233.

The Court analyzed the issue within the context and spirit of the Endangered Species Act along with the various rules implemented by the Department of the Interior. The Department has defined "population" to mean "a group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement that interbreed when mature." 50 C.F.R. § 17.3 (2009). Further, the Court cited the Department's explanation of a "population" within section 10(j) of the ESA, that was advocated at the

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trial court level, as "a potentially self-sustaining group 'in common spatial arrangement.'" Wyoming Farm Bureau, 199 F.3d at 1234. This led the Department to determine that a "'geographic separation' is any area outside the area in which a particular population sustains itself[2]." Id. at 1234 (citing Wyoming Farm Bureau Federation v. Babbitt, 987 F.Supp. 1349, 1373 (Wyo. 1997). On this interpretation of section 10(j) of the ESA, the appellate court reasoned that the occurrence of "individual dispersing [naturally occurring] wolves" into an established experimental population area, would not result in the "overlapping" of populations in violation of the ESA. Wyoming Farm Bureau, 199 F.3d at 1235. Thus, the court rejected the plaintiff's contentions that "overlap" occurred merely where individual naturally occurring wolves might wander into the area occupied by the reintroduced wolves. Id. at 1233.

One argument that the environmental groups might raise is that under 50 C.F.R. § 17.80, if a species is designated as experimental because total separation with natural populations occurs, then those species are to be treated under their legal classification as either endangered or threatened.[3] If this is the case, then the environmental groups may argue that the presence of the wolves released from Mexico could cause the status of the reintroduced wolves to jump back up to "endangered[4]," if any commingling with the reintroduced wolves occurs. Because this issue has already been dealt with by the Tenth Circuit, the New Mexico District Court would be bound by that precedent. However another Circuit Court could make a different finding.

B. Similar Commingling Issues Arising During the Gray Wolf Reintroduction into Yellowstone

The Wyoming Farm Bureau case also gives insight into how the FWS might classify wolves released in Mexico and found in the United States. Another issue on appeal was the FWS's treatment of "naturally occurring wolves" under the reintroduction program. Under the Yellowstone reintroduction program, it was the

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[2] Before reintroducing the wolves, the Service had determined through field studies that there was no population of gray wolves in the area where the experimental population was released. 59 Fed. Reg. 60252, 60256 (Nov. 22, 1994).

[3] 50 C.F.R. § 17.81(a) states that "[t]he Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into suitable natural habitat outside the species' current natural range (but within its probable historic range . . .)."

[4] "In 1978 the Secretary [of the Department of the Interior] listed the entire gray wolf species as endangered in the lower forty-eight states, except Minnesota." Wyoming Farm Bureau 199 F.3d at 1228.

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policy of the Department that those individual (loan dispersers) naturally occurring wolves that migrated into the "designated experimental population area" would be treated as part of the "nonessential experimental population" and not as "endangered" or "threatened." Id. at 1236. Specifically, the rules and regulations pertaining to the "Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana" states that "[a]fter the effective date of the experimental population rules, any such [naturally occurring] wolves and their offspring [found inside the experimental population boundaries] would be treated as experimental population animals." 59 Fed. Reg 60252, 60261 (Nov. 22, 1994).

The plaintiffs had challenged this policy as being in violation of the Endangered Species Act with respect to the protection of animals where experimental and nonexperimental populations overlapped. Wyoming Farm Bureau, 199 F.3d at 1228. Specifically, the plaintiffs charged, and the District Court had held, that treating naturally occurring wolves as "nonessential experimental" rather than "endangered" effected a "de facto" delisting of these wolves under the ESA. Id. at 1236. The plaintiffs also argued that naturally occurring wolves should be treated as "endangered" whether or not found within the experimental population boundaries. Id. The Tenth Circuit Court of Appeals disagreed holding that such treatment "ignores biological reality, and misconstrues the larger purpose of the Endangered Species Act." Id.

In the rules and regulations regarding the Yellowstone wolves, the FWS acknowledged the difficulty that would come with the types of classifications the plaintiffs sought. Initially the reintroduced wolves would be collared and thus would be distinguishable from naturally occurring wolves. 59 Fed. Reg. at 60261. However, once those wolves had offspring (which would not be collared) "it would be impossible to determine if the wolf was a wild dispersing animal or progeny of experimental wolves. The rule as written helps avoid the possible conflict." Id. The Department also stated that "[f]rom a practical wildlife management perspective, the Service cannot be expected to determine if an individual wolf had naturally dispersed into the area or been reintroduced." Id.

With respect to the commingling of animals who originated from different locations with different legal statuses, the goals of the ESA should also be kept in mind. Those goals being to "protect natural populations" and to "avoid potentially complicated problems of law enforcement." Wyoming Farm Bureau, 199 F.3d at 1235-1236. The court reasoned that these goals were met with the FWS's interpretation of the meaning of "geographic separation" to mean a separation of species "populations" and not mere individuals of those species. The court also stated that as the goals of the ESA are implemented (through Department rules and regulations) it is a "well-established fact [that] individual animals can and do lose Endangered Species Act protection simply by

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moving about the landscape[5]." Id. at 1235. Thus, the Court of Appeals upheld the Department's policy of classifying those naturally occurring wolves that were found to have migrated into the experimental population boundary as "nonessential experimental animals" and rejected the plaintiff's arguments that those animals should be treated as endangered. Id. at 1236.

The issues surrounding the Mexican gray wolf are similar to those encountered in the above case. First, before the reintroduction of the gray wolves in Yellowstone, the Service determined that there was currently no population of gray wolves in Yellowstone National Park. 59 Fed. Reg. at 60256. Similarly, before the Mexican Wolf Experimental Population Area was created and wolves released there, it was determined by the Service that "[c]urrently, no population or individuals of the Mexican gray wolf subspecies are known to exist anywhere in the wild." 63 Fed. Reg. 1752, 1755 (Jan. 12, 1998). Further the Service determined "the Recovery Area was deemed to be completely geographically separate from any extant populations or individual gray wolves." Id. Second, and more importantly, like with the Yellowstone reintroduction, the Service will have to deal with the issue of the presence of wolves that were not part of the reintroduction plan.

Using the Yellowstone gray wolf introduction program as a guide, the wolves released in Mexico which cross the border into the U.S. and are found within the Recovery Area should be treated as part of the "experimental nonessential population." As explained above, such treatment would be ideal for management purposes because it would be impossible to tell whether the wolf came in from Mexico or was the offspring of U.S. wolves that were reintroduced. It would make sense to treat the wolves originating in Mexico similarly to "naturally occurring wolves" because their presence likely cannot be controlled by the Service. It is likely that neither the U.S. nor the Fish and Wildlife Service can prevent Mexico from releasing the wolves[6], and preventing those same wolves from crossing the border would likely be difficult. Therefore, a strong argument can be made that if individual (lone) wolves are found in designated experimental areas, they should be treated as "nonessential experimental animals."[7]

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[5] The court then listed various instances of endangered status that changed with the crossing of either an international boundary line, a state line, or a county line. Wyoming Farm Bureau, 199 F.3d at 1236.

[6] See discussion on treaties pertaining to the preservation of endangered species.

[7] The rules and regulations contain a provision which calls for the capture and collaring of wild-born Mexican wolves of the reintroduced population. 63 Fed. Reg. at 1754. Therefore, it may be argued that because pups are caught and collared once they are old enough, it is not a sufficient justification to argue that wild born pups of the

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C. The Fish and Wildlife Service's Response to Public Comment on the Commingling Issue

Some of the comments submitted by the public in response to the proposed rules and regulations pertaining to the "Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico (50 C.F.R. Part 17) touched on the issue of the possibility of "wild wolves" recolonizing in the area of the experimental population. 63 Fed. Reg. at 1757. For the most part, the Service dismissed such comments citing its field study findings that there were no Mexican wolf populations to be found in the wild. Id. The Service also rejected a comment suggesting that if such wild wolves were to colonize in the same locations as the reintroduced wolves then the designation of all the wolves in the area should automatically revert back to "full-endangered status." Id. The Service acknowledged that it considered such an occurrence to be an impossibility, but went on to reason that "it would be unwise to allow for an automatic status change of all wolves in the area from experimental to endangered if non-reintroduced wolves suddenly appeared[8]." Id.

There is also the issue of wolves originating in Mexico found within U.S. territory but *outside* the boundaries of the recovery area. One comment to the rules and regulations touched on this issue when the individual asserted that "[w]olves found outside the Mexican Wolf Experimental Population Area (MWEPA) should not have full endangered status under the Act; there are no wild wolves left, therefore any wolves found in the Southwest, even if unmarked, most likely will have originated from the reintroduced population." 63 Fed. Reg. 1752 at 1758. The Service responded that "[w]olves found outside the MWEPA that can be identified as a member of the experimental population will retain their nonessential, experimental status for management purposes." Id. The regulations did not say what the designation would be if the wolf could *not* be identified as a member of the experimental population.

Though the Service could have addressed the possibility of wild Mexican wolves migrating into the experimental area boundaries, it chose to rely whole-heartedly on its findings of no wild Mexican wolf population existing anywhere. However, the past treatment and handling of Yellowstone gray wolves can offer guiding principals as to how to deal with these wolf issues.

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reintroduced population could not be distinguished from wolves crossing over from Mexico.

[8] Compare to the discussion above on §§ 17.80 and 17.81(a) on the loss of "experimental" status.

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D. Impact of Mexico's Classification of Wolves and the Effect of Treaties

Another aspect to address is the fact that a foreign country is involved in the present issue. In 2001, the Mexican gray wolf was classified by Mexican authorities as "probably extinct in the wild" meaning the only live species found were in captivity. Ministry of Environmental & Natural Resources, Secretariat for Environmental Protection Management (SEMARNAT), Department of Wildlife, June 2008, http://translate.google.com/translate ?hl=en&sl =es& u= http://app1.semarnat.gob.mx/dgeia/informe_2008/ compendio_2008/ compendio2008/10.100.8.236_8080/ibi_apps/WFServlet932e.html&ei=B-ObSoGcLpLatgPmlsmUDg&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3DSEMARNAT%2Bcanis%2Blupus%2Bbaileyi%26hl%3Den%26rlz%3D1T4DKUS_enUS282US340 (accessed August 31, 2009)[9]. With this in mind, the various treaties to which the U.S. and Mexico are a party were analyzed to determine if any guidance would be provided as to the effect of Mexico's classification of the wolf as endangered and any deference the United States might have to give with respect to this classification.

The first treaty analyzed was the North American Agreement on Environmental Cooperation ("NAAEC"). The U.S., along with Canada and Mexico, entered into this agreement as a "side accord" to the North American Free Trade Agreement ("NAFTA") and it came into force on January 1, 1994. Commission for Environmental Cooperation, *North American Agreement on Environmental Cooperation* Article 47 http://www.cec.org/pubs_info_resources/law_treat_agree /naaec/index.cfm?varlan=english(accessed September 1, 2009). The purpose of the Agreement was to expand on Article 1114 of NAFTA which dealt with environmental measures. Article 8(1) of the NAAEC established the Commission for Environmental Cooperation ("CEC") which is a tripartite commission consisting of a national from each of the respective Parties (countries).[10] The commission has many listed functions including serving as a forum for discussion of environmental matters of the Parties to the Agreement. Id. at Art. 10(1)(a). Also the Commission "address[es] questions and differences that may arise between the Parties regarding the interpretation or

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[9] The environmental law of Mexico is called the *Ley General del Equilibrio Ecólogico y la Proteción al Ambiente* (LGEEPA) [The General Law of Ecological Equilibrium and Environmental Protection]. The Norma Oficial Mexicana (NOM-ECOL-059) is akin to the *Federal Register* Notices in the United States and "Diario Oficial" is the equivalent of the *Federal Register* in the U.S.

[10] 19 U.S.C. § 3472(a)(1) (2009) authorizes the United States to participate in the CEC in accordance with the NAAEC.

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implementation of [the] agreement." Id. at Art. 10(1)(d). Further the Commission "promot[es] and facilitat[es] cooperation between the Parties with respect to environmental matters." Id. at Art. 10(a)(f).

In addition to these functions "[t]he [commission] may consider, and develop recommendations regarding: . . . transboundary and border environmental issues [between the Parties]. . . ." Id. at Art. 10(2)(g). With respect to transboundary environmental issues, the [commission] may "consider and develop recommendations with respect to: assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including full evaluation of comments provided by other Parties and persons of the Parties." Id. at Art. 10(7)(a).

Though these functions of the CEC sound nice and appear to be a possible solution to the potential wolf problem with Mexico, the CEC's powers are rather limited and its primary responsibilities are to ensure that the respective countries are implementing environmental laws in accordance with the Agreement and that they subsequently follow those environmental laws. For example the CEC can impose fines and trade sanctions on Parties that fail to implement and follow environmental laws. Neil Carter, *The Politics of the Environment: Ideas, Activism, Policy* 281 (2d ed., 2007). However, as long as a Party is following its own environmental laws, the CEC has no authority to act.

The NAAEC specifically states that "[n]othing in this agreement shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party." NAAEC at Art. 37. For instance, Mexican authorities could not compel U.S. authorities under the NAAEC to give the Mexican wolf a more protected classification if the Service decided to treat those wolves found in the MWEPA as "nonessential experimental animals" (see discussion above). Further, U.S. authorities cannot force Mexican officials to halt the releasing of the wolves or to release the wolves in a different location.

In a document composed by the CEC in 2000, the issue of cross-boundary conservation efforts of the Mexican wolf was addressed. The CEC proposed the creation of "collaborative recovery program for the Mexican wolf between the United States and Mexico, including a captive breeding program." Commission for Environmental Cooperation, *Species of Common Conservation Concern in North America,* 56 http://www.cec.org/files/pdf/ BIODIVERSITY/ sccc-web-e_EN.PDF (accessed August 31, 2009). Another proposal was the "creation of public education and landowner compensation programs" as possible means of increasing conservation and recovery efforts of the Mexican gray wolf. Id. The FWS may analyze these proposals and determine that it will enter into such a cooperative

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with Mexico that includes an accommodation of the two countries listing statuses of the wolf along with programs that compensate landowners suffering damages from the wolf depredation.

The next treaty analyzed was the Convention on International Trade in Endangered Species of Wild Fauna and Flora which came into force on July 1, 1975. Convention on International Trade in Endangered Species of Wild Fauna and Flora, http://www.cites.org/eng/ disc/what.shtml (accessed August 27, 2009)(hereinafter "CITES"). The purpose of the Convention was to protect those wild plants and animals that are involved in international trade. Id. The United States implemented the provisions of CITES through passage of the Endangered Species Act (16 U.S.C. § 1531 *et al.* (2009)). With respect to foreign animals, Section 1537 of the ESA (also called Section 8) allows for the placement of foreign species on the Endangered Species List. Though the term "foreign species" is not defined in the ESA, it is unlikely the Mexican wolf would be considered a foreign species because it is currently found in Arizona and New Mexico after being released by the Service into the wild, and its historical roaming range included the areas of Arizona, New Mexico and Texas.[11] The Mexican wolf is already listed as an "endangered" species within the general endangered listing of the gray wolf;[12] section 8 of the ESA would not be helpful to Mexico in obtaining "endangered" status for the wolves that cross into U.S. territory.

One issue that might arise under the CITES treaty is that the species of *canis lupus* (gray wolf) is listed on Appendix II of the CITES Convention (this likely includes the sub-species *canis lupus baileyi*). Convention on International Trade in Endangered Species of Wild Fauna and Flora, http://www.cites.org/eng/app/appendices.shtml (accessed September 1, 2009) (hereinafter "CITES Appendices"). Placement of a species on Appendix II indicates those "species that are not necessarily now threatened with extinction but that may become so unless trade is closely controlled. It also includes so-

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[11] U.S. Fish and Wildlife Service, *Welcome to the Mexican Wolf Recovery Program*, http://www.fws.gov/southwest/es/ mexicanwolf/ (accessed August 31, 2009).

[12] The US Fish and Wildlife Service generally lists the status of the gray wolf as endangered except for those listed locations. U.S. Fish and Wildlife Service, *Species Profile: Gray Wolf (Canis Lupus)*, http://ecos. fws.gov/ species Profile /profile/speciesProfile.action?spcode=A00D (accessed August 31, 2009). This site does not specifically list the Mexican gray wolf; however, the Mexican gray wolf is a recognized subspecies of the gray wolf. U.S. Fish and Wildlife Service, *Welcome to the Mexican Wolf Recovery Program*, http://www.fws.gov/southwest/es/ mexicanwolf/ (accessed August 31, 2009).

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called 'look-alike species,' i.e. species of which the specimens in trade look like those of species listed for conservation reasons."

E. Possible Distinct Vertebrate Population Designation by Service

Another route the Service might take is to designate those wolves coming into the United States from Mexico as distinct vertebrate population segments ("DPS"). The Endangered Species Act defines "species" to include "any subspecies of fish and wildlife or plants, and any distinct population segment of vertebrate fish or wildlife that interbreeds when mature." 16 U.S.C. § 1532(16). Delineating a species as a DPS can allow for the recovery of the species "in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover an entire species or subspecies." 61 Fed. Reg. at 4725. Further, "[t]he Services' ability to address local issues (without the need to list, recover, and consult rangewide) will result in a more effective program of recovery of the species." Id.

The elements considered when deciding to list a species as a DPS are:

1. Discreteness of the population segment in relation to the remainder of the species to which it belongs;

2. The significance of the population segment to the species to which it belongs; and

3. The population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).

61 Fed. Reg. 4722, 4725 (Feb. 7, 1996).

A population segment may be considered "discrete" if it satisfies either one of the following conditions:

1. It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.

2. It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

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Id. Because there are international boundaries involved, the Service could choose to treat those wolves released by Mexico as a DPS. Once it is established that a species meets the requirements of a DPS, the Service must then determine how the DPS should be classified under the ESA. 70 Fed. Reg. 28895, 28898 (May 19, 2005). If the Service takes this approach, those wolves released in Mexico could be designated a DPS with an endangered status (the same as wolves outside of specifically stated locations within the U.S.) or have a threatened status. Using this approach would create numerous management and other issues, especially if commingling of these wolves occurs with those reintroduced wolves in the southwest; they would still have two different classifications.

II. APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

Federal agencies are required to comply with the National Environmental Policy Act ("NEPA") by considering the "environmental impacts" of any proposed actions by the agency and whether there are any "reasonable alternatives" to those proposed actions. National Environmental Policy Act, http://www.epa.gov/compliance/nepa/ (accessed August 31, 2009). The Service issued a Final Environmental Impact Statement on Mexican wolf reintroduction on December 20, 1996. 63 Fed. Reg. at 1753. With respect to supplemental environmental impact statements ("SEIS"), 40 C.F.R. § 1502.9(c)(2009) requires that "agencies (1) [s]hall prepare supplements to either draft or final environmental impact statements if: (i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Expanding on this, courts have held that an SEIS is required where a "new proposal will have significant impact on the environment in a manner not previously evaluated and considered." Westlands Water District v. U.S. Department of Interior, 376 F.3d 853, 873 (9th Cir. 2009).

A "rule of reason" is to be employed by agencies when making the determination of whether to prepare a supplemental environmental impact statement. Forest Conservation Council v. Espy, 835 F. Supp. 1202, 1216 (Idaho 1993). The "rule of reason" standard was explained by the Supreme Court in Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989). This standard does not require an agency to issue an SEIS every time new information is obtained. Marsh, 490 U.S. at 374. Rather the "value" of the new information must be evaluated with respect to preparing an SEIS; this analysis is similar to the analysis involved in deciding to prepare an EIS to begin with. Id.

In the instant situation, when the Service implemented the Mexican wolf reintroduction program, it had determined there were *no* Mexican wolves to be found anywhere in the wild. 63 Fed. Reg. at 1755. Thus, the presence of these wolves was not

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considered by the Service nor was their potential impact on the reintroduced population evaluated. The presence of wolves which the Service had previously discounted as an "impossibility" may well qualify as a "significant new circumstance" requiring the preparation of a supplemental environmental impact statement to the final EIS that was issued.

Before such a determination is made, the Service will likely consider the number of wolves that may migrate into U.S. territory, including the experimental area, and the likelihood of such migration. If the number of wolves originating in Mexico expected to migrate north into experimental territory is small, the Service might treat them as "nonessential experimental animals" as discussed above. Such treatment likely would not impact the environment in such a "significant way" as to require a supplemental EIS.[13]

III. CONCLUSION

Again, I think that there are good arguments to support a decision by the FWS or by the Courts that Mexican released wolves should be treated as nonessential experimental if they migrate into the U.S. I also think that the FWS should complete a NEPA analysis, although I do not think that we can argue that the Mexican release should be stayed pending completion of the document. I do think an issue that needs to be discussed is how we raise these points to the FWS and/or whether we take the offensive in what will likely be a campaign or litigation by the environmental groups particularly since there is no Ninth Circuit precedence on the issue, only favorable precedence in the Tenth Circuit. I will have my staff follow the environmental group web sites to see if we can find out what they are planning.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

/s/Karen Budd-Falen

Karen Budd-Falen
BUDD-FALEN LAW OFFICES, LLC

KBF:vld

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[13] "An agency decision not to issue an SEIS is reviewed under an arbitrary and capricious standard. . ." Westland, 376 F.3d at 873.