Case No. 16-2189 (consolidated with 16-2202)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NEW MEXICO DEPARTMENT OF GAME AND FISH,
Plaintiff-Appellee,

vs.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants-Appellants,

and

DEFENDERS OF WILDLIFE, *et al.*,
Intervenor-Defendants-Appellants.

On Appeal From The United States District Court For The District Of New Mexico, Case No. 1:16-cv-004620WJ-KBM (Hon. William P. Johnson)

Brief of the States of Colorado, Alabama, Alaska, Arizona, Arkansas, Idaho, Kansas, Michigan, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, South Dakota, Texas, Utah, Wisconsin, and Wyoming as Amici Curiae in Support of Plaintiff-Appellee New Mexico Department of Game and Fish and in Support of the Decision of the District Court

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the States of Colorado, Alabama, Alaska, Arizona, Arkansas, Idaho, Kansas, Michigan, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, South Dakota, Texas, Utah, Wisconsin, and Wyoming. Federal Rule of Appellate Procedure 29(a) permits the States to file this brief without the consent of the parties or leave of the Court.

The Amici States' interests in this case arise from their statutory and, in some cases, public trust obligations to manage wildlife in their states, including the duty to conserve nongame wildlife and the habitat on which it depends. Carrying out these obligations can create conflicts with federal agencies charged with the protection of federally endangered or threatened species. Congress has determined, and experience has shown, that cooperation between federal and state wildlife agencies yields the best conservation outcomes.

The issue presented in this appeal is whether the United States Fish and Wildlife Service (Service) was properly enjoined from releasing additional Mexican wolves into a nonessential experimental population in the State of New Mexico, pending the Service's procurement of

relevant permits from the State or a decision on the merits of this case. This issue affects the Amici States in three ways. First, the outcome will have long-lasting implications for the States' ability to manage the introduction and release of wildlife within their borders and to coordinate releases by the Service with other elements of a State's plans for management of all game and nongame wildlife in the State. Second, this case presents the first opportunity for the courts to review the Service's compliance with a federal regulation requiring it to adhere to state permit requirements prior to releasing wildlife under certain federal programs. The regulation protects States' ability to manage wildlife effectively while still recognizing federal statutory responsibilities under the Endangered Species Act. The Amici States have a strong interest in the regulation serving as a check on federal intrusion into this field of traditional state authority. Finally, from a state perspective, issuance of a preliminary injunction on these or similar facts is an appropriate way to manage a dispute such as this. Preserving the status quo protects the district court's ability to issue a meaningful decision on the merits and protects the State's sovereign interests until the dispute is resolved.

INTRODUCTION

Appellants[1] have asked this Court to lift the district court's preliminary injunction so that Defendant-Appellant the Service may release Mexican wolves into the State of New Mexico in violation of state permit requirements, before a decision in this case can be reached on the merits. The district court enjoined further releases of Mexican wolves into a "nonessential experimental population" in New Mexico because a federal regulation requires the Service to (1) comply with state permit requirements before releasing wildlife for purposes of species recovery, (2) unless doing so would prevent the Secretary of the Interior (Secretary) from carrying out her statutory responsibilities under the Endangered Species Act (ESA or Act). *See* 43 C.F.R. § 24.4(i)(5)(i).

The parties do not dispute the relevance or validity of the first part of the regulation, requiring Department of Interior agencies, as a

[1] Appellants are the United States Department of the Interior, Sally Jewell (Secretary of the Interior), the U.S. Fish & Wildlife Service, Daniel M. Ashe (Director of the U.S. Fish & Wildlife Service), and Benjamin N. Tuggle (Southwest Regional Director for the U.S. Fish & Wildlife Service) (collectively, Federal Defendants). In addition, Appellant-Intervenors are Defenders of Wildlife, Center for Biological Diversity, WildEarth Guardians, and New Mexico Wilderness Alliance (collectively Intervenor-Defendants).

general rule, to comply with state permit requirements before releasing wildlife into a state for purposes of species recovery. The dispute arises over the second part: whether complying with New Mexico's permit requirements for release of the wolves would impede the Secretary's ability to carry out her responsibilities under the ESA.

New Mexico has argued, and the district court agreed, that compliance with New Mexico's permit requirements would not prevent the Secretary from carrying out her statutory responsibilities because the relevant activity—release of individual animals into a "nonessential experimental population"—does not fall within the Secretary's nondiscretionary statutory responsibilities under the Act. Use of experimental populations in wildlife recovery programs is entirely discretionary; the Secretary can and does fulfill her responsibilities to conserve species under the ESA without ever using an experimental population as part of a recovery process.

The Amici States submit this brief to explain the importance of 43 C.F.R. § 24.4(i)(5)(i) as a check on federal authority to intrude into wildlife management, an area that is generally the purview of the States. As with other federal laws and regulations regarding wildlife

management, and particularly in the implementation of the ESA, Congress has consistently stated that the Department of the Interior should, to the maximum extent practicable, honor the States' authority to manage and regulate in this area traditionally occupied by the States. Compelling the Service to comply with state permit requirements governing wildlife releases, except in the unusual cases where that authority directly impedes the Secretary's ability to comply with the ESA, preserves States' authority in this area.

In addition to protecting state wildlife management programs and plans, the regulation also helps preserve a cooperative relationship between the Service and state wildlife agencies that is the cornerstone of threatened and endangered species recovery. States play a vital role in recovery, lending critical resources, staff, expertise, and generally supplying "boots on the ground" in recovery efforts. But because the ESA authorizes the Service to override some state directives in this area, conflicts can arise when state plans are not congruent with federal plans.

This case provides the Court with the opportunity to ensure that the Service's invocation of the "statutory responsibility" exception to the

requirements in 43 C.F.R. § 24.4(i)(5) remains limited to situations where state permit requirements prevent fulfillment of obligations imposed on the Secretary by the ESA. In the broader picture, doing so will strengthen the States' authority to maintain the integrity of their own wildlife management plans and will also help solidify the cooperative relationships on which endangered species recovery depends.

Affirming the preliminary injunction also protects New Mexico's specific interest in avoiding the irreparable harm posed by unpermitted wolf releases into the state and preserves the district court's ability to render a meaningful decision on the merits.

State-federal cooperation does not always come easily. When conflicts develop, reaching agreement can take time, and the commitment of both parties to work through disagreements. But in the Amici States' experience, moving forward unilaterally puts species recovery and other state interests at risk. Protecting the authority of state wildlife agencies to enforce permit requirements governing release of wildlife helps ensure that the best conservation and recovery practices–which cannot take place without the participation and buy-in

of the state wildlife agencies–continue to be implemented. The Service runs the risk of jeopardizing these successes and generating unnecessary conflict and ill will when it bypasses state permit requirements that it has agreed, through federal regulation, to abide by.

BACKGROUND

A. The Endangered Species Act

Congress enacted the Endangered Species Act in 1973 to provide for the conservation, restoration, and recovery of species of fish, wildlife, and plants threatened with extinction. 16 U.S.C. §§ 1531(b), 1532(3). The Act authorizes the Secretary of the Interior (Secretary)[2] to list species of fish, wildlife, or plants as endangered or threatened. Upon listing, a species receives certain protections under the ESA, and federal agencies assume duties to conserve and protect the species. 16 U.S.C. §§ 1531 – 1540. The ESA also directs the Secretary to develop and implement recovery plans to bring listed species to the point that they no longer require the protections of the ESA. *Id.* at 1533(f). The

[2] The Act delegates authority to both the Secretaries of Interior and Commerce. The National Marine Fisheries Service, located in the Commerce Department, has authority over marine species. For purposes of this brief, "Secretary" refers to the Secretary of the Interior.

Secretary has delegated authority for administering the ESA to the Service.

B. Experimental Populations under ESA Section 10(j)

In 1982, Congress added section 10(j) to the ESA, providing for the creation of "experimental populations," a new tool in the Service's toolbox of conservation actions to aid in recovery. *Id.* at § 1539(j). An experimental population is a geographically-described unit that is isolated from other existing populations of the species. Under Section 10(j), the Service can introduce individuals of a listed species outside the species' current range, in an effort to establish new populations and expand the range of the species. 16 U.S.C. § 1539(j)(1). Experimental populations are treated as "threatened" species in many but not all respects under the provisions of the Act.

Before authorizing the release of individual animals, the Service must adopt a regulation identifying the experimental population and determining whether it is "essential to the continued existence" of the species. *Id.* at § 1539(j)(2)(B). The resulting species-specific regulation, referred to as a "10(j) rule," describes in detail the purpose of the

population, the area in which it is to be located, and the terms governing management of the population. 50 C.F.R. § 17.81.

The Service can designate an experimental population as "essential" or "nonessential." An experimental population is considered "essential" if extirpation of the experimental population would "appreciably reduce the likelihood of the survival of the species in the wild." 50 C.F.R. § 17.80. For all other cases, the experimental population is considered non-essential; in other words, the Service has determined that loss of the experimental population would not appreciably reduce the species' chances of survival in the wild.

ARGUMENT

A. Cooperation between the federal government and the States is essential to successful conservation of listed species

1. States have traditional authority and expertise in the area of wildlife management

Management of wildlife is a traditional state function. *E.g., Geer v. Connecticut*, 161 U.S. 519, 528 (1896) (explaining that the power to manage and protect wildlife lies with the States, except as restrained by constitutional grants of authority to the federal government). The States possess authority over fish and wildlife within their borders,

including those found on federal lands. 43 C.F.R. § 24.3(a); *see also Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) (holding that States have broad trustee and police powers over wild animals on federal lands within their borders unless Congress explicitly declares otherwise); *Wyoming v. United States*, 279 F.3d 1214, 1231 (10th Cir. 2002) (noting that state jurisdiction over wildlife management remains concurrent with federal authority).

Notwithstanding federal authority granted under the Property, Commerce, and Supremacy Clauses, federal policy recognizes that "effective stewardship of fish and wildlife requires the cooperation of the several States and the Federal Government." 43 C.F.R. § 24.1(b). Congress recognized the importance of this principle when it passed the Act in 1973: "[c]learly any effort on the part of the Federal government to encourage restoration of threatened or endangered species would fail without the assistance of the State agencies." 93 Cong. Reg. 359 (July 24, 1973). The Tenth Circuit has similarly recognized that "wildlife management policies affecting the interests of multiple sovereigns demand a high degree of inter-governmental cooperation." *Wyoming v. US*, 279 F.3d at 1218.

States and state wildlife agencies have a particularly keen interest in cooperation when the Service proposes to introduce a new population of a listed species into their state. Recognizing the potential impacts of federally protected species on land use, property rights, and water rights, Colorado law, for example, prohibits state or local government participation in the reintroduction of listed or candidate species until the General Assembly adopts a bill providing for and regulating the reintroduction process. Colo. Rev. Stat. § 33-2-105.5 (2016). Similarly, Utah statutes and regulations specifically prohibit release of wildlife, including endangered or threatened species, without state permits. Utah Code Ann. §§ 23-13-5 and 23-13-14 (LexisNexis through the 2016 3rd Special Session); Utah Admin. Code §§ 657-3-8 and 657-3-9 (Lexis Advance through September 1, 2016). Utah's wildlife management agency, the Division of Wildlife Resources, is further required by statute to develop plans, gather public input, and ultimately obtain approval from its policy board before transplanting big game, turkeys, wolves, or sensitive species. Utah Code Ann. § 23-14-21 (LexisNexis through the 2016 3rd Special Session). Acknowledging this type of sensitivity, FWS regulations require that a 10(j) rule

embody, to the maximum extent practicable, an agreement between the Service and the affected States, and where relevant, private landowners. 50 C.F.R. § 17.81(d).

Thus, the establishment of 10(j) populations, like other management activities geared towards recovery, typically involves close cooperation and negotiation between a state wildlife agency and the Service. A 10(j) rule creating a nonessential experimental population of the wood bison, located in Alaska, for example, was the product of a multi-year cooperative effort between the Alaska Department of Game and Fish and the Service. *See* Establishment of a Nonessential Experimental Population of Wood Bison in Alaska, 79 Fed. Reg. 26,175 (May 7, 2014).[3] Indeed, under the terms of the 10(j) rule, the Alaska Department of Game and Fish assumed primary responsibility for leading and implementing the wood bison reintroduction effort. *Id.* Other 10(j) populations, such as the California Condor and the black-footed ferret, have also been introduced only after agreement was

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[3] *See also* U.S. Fish & Wildlife Service, "Questions and Answers" on wood bison reintroduction at https://www.fws.gov/alaska/fisheries/endangered/pdf/wood_bison/wood_bison_q_a.pdf.

reached between the Service and the relevant states. *See* Establishment of a Nonessential Experimental Population of California Condors in Northern Arizona, 61 Fed. Reg. 54,044 (Oct. 16, 1996); Establishment of a Nonessential Experimental Population of Black-Footed Ferrets in Northwestern Colorado and Northeastern Utah, 63 Fed. Reg. 52,824 (Oct. 1, 1998). In all these examples, the Service had completed a recovery plan prior to introduction and release of the experimental population, providing the state agencies an opportunity to see the specific links between the long-term species recovery plan and the experimental population, and to take those plans into account in their own wildlife management plans.

2. <u>The States play a vital role in species recovery</u>

Most of the ESA's protections for listed species involve prohibitions on various activities, with penalties for violations. *See, e.g.,* 16 U.S.C. § 1538. These prohibitions protect the species from further decline. But recovery of a species requires positive, proactive steps to identify geographically specific threats to the species, determine how to reduce the threats, recover and protect habitat, monitor the status of

the species, and adjust recovery activities in response to changing conditions.

The ESA requires the Secretary, with a limited exception, to prepare a recovery plan for all listed species. *Id.* at § 1533(f). Once the recovery plan is completed, however, successful implementation of the plan requires the cooperation of state wildlife agencies, other federal agencies, and local landowners. Because the Service often lacks funding and staff resources to independently carry out recovery plans, state participation has become indispensable to successful recovery efforts. The Service formally recognized this in its recently-adopted Policy Regarding the Role of State Agencies in ESA Activities:

> State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act.

Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 81 Fed. Reg. 8663 (Feb. 22, 2016).

State participation in recovery programs can include cooperating or taking the lead on introducing a 10(j) population. With the active leadership or participation of state wildlife agencies, nonessential experimental populations have been introduced for many species in addition to the aforementioned wood bison, black-footed ferret, and California condor. *See* 50 C.F.R. §§ 17.84 (vertebrates), 17.85 (invertebrates).

After introduction of a 10(j) population, state wildlife agencies remain active participants. For black-footed ferrets, for example, state wildlife agencies in Colorado, Montana, Wyoming, Arizona, Texas, Utah, and South Dakota have been experimenting with the use of an oral vaccine to combat sylvatic plague, one of the principal threats to successful ferret recovery.[4] For the California condor, both the Arizona Game and Fish Department and the Utah Division of Wildlife Resources have introduced effective programs to reduce condor poisoning from eating carrion containing lead-based ammunition.[5]

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[4] *See* http://www.hcn.org/blogs/goat/states-test-prairie-dog-plague-vaccine.

[5] *See* https://www.fws.gov/cno/es/calcondor/PDF_files/3rd-5YR-Review-Final%20.pdf

State wildlife agencies also facilitate and participate in multi-state partnerships with the Service, often aimed at recovering multiple species while still allowing for economic activity to continue.[6] Partners of the Upper Colorado River Endangered Fish Recovery Program, including Colorado, Utah, and Wyoming, for example, have collaborated with the Service for almost two decades on the recovery of four species of endangered fish in the Upper Colorado River and its tributaries, while also protecting new and existing water uses in the basin. The States contribute substantial resources to the program, either through direct payments or through staff and expertise on program projects.[7] A similar program involving Nebraska, Wyoming, and Colorado exists for recovery of four endangered species in the Platte River Basin (the whooping crane, least tern, piping plover, and pallid sturgeon).[8]

Recovery efforts depend heavily on other programs of state wildlife agencies as well. Most States charge their fish and game

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[6] *See, e.g.,* Upper Colorado River Endangered Fish Recovery Program, http://www.coloradoriverrecovery.org/.
[7] *See* 2015-2016 Highlights Report at 22 (available at http://www.coloradoriverrecovery.org/general-information/general-publications/briefingbook/2016-Briefing_book.pdf).
[8] *See* https://www.platteriverprogram.org/Pages/Default.aspx.

departments generally with the conservation of wildlife and the habitat on which it depends. Many States also have specific programs and funding mechanisms aimed at nongame and endangered wildlife.[9] These agencies expend tremendous resources on conservation and recovery projects for species of concern, both before and after listing. The Service relies heavily on state wildlife agencies' data collection, research, monitoring, habitat acquisition and management, captive breeding programs (including fish hatcheries), and other activities without which recovery plans could never succeed.

States also take the lead in convening multiple jurisdictions to reach cross-boundary management agreements for pre-listing conservation activities.[10] These efforts have facilitated management and conservation programs that kept species from needing ESA protections in the first place, as was the case with the Rio Grande cutthroat trout, arctic grayling, and dunes sagebrush lizard, among

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[9] A few of the many examples include Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Indiana, Montana, New Jersey, North Carolina, and Oregon.

[10] *See e.g.,* "Conservation Agreement for Rio Grande Cutthroat Trout in the States of Colorado and New Mexico," available at *https://cpw.state.co.us/Documents/Research/Aquatic/pdf/ConservationAgreementRioGrandeCutthroatTrout.pdf*.

others. *See* 12-Month Finding on a Petition to List Rio Grande Cutthroat Trout as an Endangered or Threatened Species, 79 Fed. Reg. 59,140 (Oct. 1, 2014), Revised 12-Month Finding on a Petition to List the Upper Missouri River Distinct Population Segment of Arctic Grayling as an Endangered or Threatened Species, Part II, 79 Fed. Reg. 49,384 (Aug. 20, 2014), Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872 (June 19, 2012).

B. Federal law and policy require the federal government to cooperate with the States in management of listed species

1. Both the ESA and the Department of Interior's own regulations mandate cooperation with the States

Any activity undertaken by the Service under the authority of the ESA must involve outreach to and cooperation with the States. Indeed, Congress devoted an entire section of the ESA to "Cooperation with the States." 16 U.S.C. § 1535 (commonly referred to as section 6). Section 6 commands the Secretary to cooperate "to the maximum extent practicable" with the States. *Id.* at § 1535(a). To aid in species recovery, Section 6 also encourages management agreements and cooperative agreements between the Service and the States, and

provides a funding source to assist with States' conservation efforts. *Id.* at §§ 1535(b)-(d).

The federal commitment to state-federal cooperation is also formalized in Department of Interior regulations at 43 C.F.R. Part 24, "Fish and Wildlife Policy: State-Federal Relationships." This Part is intended to further "the manifest Congressional policy of Federal-State cooperation that pervades federal law in the area of fish and wildlife conservation." 43 C.F.R. § 24.2(b). The regulations "reaffirm the basic role of the States in fish and resident wildlife management, especially where States have primary authority and responsibility," and note that state jurisdiction remains concurrent with federal authority, even with respect to management of endangered and threatened species. *Id.* at §§ 24.2., 24.3.

Part 24 stresses what Congress recognized in Section 6 of the ESA: that "[e]ffective stewardship of fish and wildlife requires the cooperation of the several States and the Federal Government." *Id.* at § 24.1(b). Accordingly, it aims to "to strengthen and support, to the maximum legal extent possible, the missions of the States and the Department of the Interior to conserve and manage effectively the

nation's fish and wildlife." *Id*. at § 24.1(c). Subsection 24.4(i)(5), mandating compliance with state permit requirements, should be read in light of the rest of the regulations in this area, prioritizing cooperation with the States and deferring to their primary authority over wildlife. *Id*. at § 24.4(i)(5).

2. Federal cooperation with States requires deference to the States' primary authority over wildlife

By mandating that Department of Interior agencies cooperate with the States, Part 24 protects State interests and the States' primary authority over wildlife against unnecessary federal intrusion that might otherwise threaten harm to a State's game, nongame, or domestic livestock industries. Section (i)(5)'s rule regarding state permit requirements achieves this in part by requiring Department of Interior agencies to defer to State policies or regulations in this area.

Over a decade ago, this Court adjudicated another dispute between the Service and a State over wildlife management. *Wyoming v. U.S.*, 279 F.3d 1214 (challenging the Service's refusal to allow the State to vaccinate elk on a national wildlife refuge in order to protect other game and domestic livestock). That case, which also referenced 43 C.F.R. Part 24, is commonly cited for its findings about federal

sovereignty over wildlife on federal lands. But an equally important part of the opinion addressed the challenge faced when dual sovereigns facing a congressional mandate to cooperate with each other have a fundamental policy disagreement.

The *Wyoming* court recognized that when federal and State interests conflict in an area where both have jurisdiction, simply determining ultimate sovereignty (*e.g.*, over wildlife on federal lands) would not yield a satisfactory solution. "Simplicity ends when we are faced with a situation where the program, or lack thereof, by one sovereign allegedly impairs the meaningful accomplishment of another sovereign's responsibilities." *Id.* at 1241. But in the elk vaccination case, as well as here, a congressional mandate to cooperate with the States materially restricts a federal agency's discretion to take actions that threaten a State's own plans and programs. *Id.* at 1242. Reaching a cooperative solution that serves both the federal and the States' interests may be within reach; but it requires the Service to recognize that Congress and Part 24 have restricted its discretion to act unilaterally. *Id.*

C. The Service is obligated by its own regulations to comply with states' permit requirements

1. 43 C.F.R. § 24.4(i)(5)(i) requires compliance with state permitting rules

Even leaving aside the importance of cooperation in recovery efforts, the Service's regulations require compliance with New Mexico's permitting rules. At the hearing on the preliminary injunction, the district court observed that the Service's interpretation of § 24.4(i)(5) would mean that any time a State disapproves of a wolf release, the Secretary could ignore the State's objection by invoking her "statutory responsibilities" and effectively transforming the requirements of § 24.4(i)(5) into a "paper tiger." Addendum to New Mex. Resp. Br. at 262. In other words, under the Service's interpretation, any time a state and the Service disagree over release of wildlife as part of a recovery program, "what the state has to say about it is of no consequence …" *Id*. The district court properly rejected this interpretation, and agreed with New Mexico that the Service must abide by the state permit requirements.

2. Agencies must comply with their own regulations

"It is by now axiomatic that agencies must comply with their own regulations while they remain in effect." *Memorial, Inc. v. Harris*, 655

F.2d 905, 910-11 n.14 (9th Cir. 1980); *United States v. Coleman*, 478 F.2d 1371, 1374 (9th Cir. 1973) (noting the "general principle that an agency is to be held to the terms of its regulations"). This principle applies even where an agency has adopted regulations that go beyond what the law might otherwise require. *Wilderness Soc. v. Tyrrel*, 701 F. Supp. 1473, 1481 – 82 (E.D. Cal. 1988) (citing *Ruangswang v. INS*, 591 F.2d 39, 46 n.12 (9th Cir. 1978)) (explaining that federal agencies must abide by their own regulations, even where the regulations are more generous than required by law).

Thus, under 43 C.F.R. § 24.4(i)(5)(i), the Service must comply with state permitting requirements before reintroducing wildlife into a State for the purposes of recovery, with one narrow exception: if compliance with the State's requirements would prevent the Secretary from carrying out her statutory responsibilities, she is excused from compliance. *Id*. The district court properly considered whether compliance with New Mexico's permit conditions prevents the Secretary from carrying out her statutory responsibilities under the ESA, and reasonably found that it does not, because as explained below, the

Secretary has no statutory responsibility to use an experimental population as a tool for recovery.

3. Nonessential experimental populations under Section 10(j) of the ESA are a discretionary recovery tool

As this Court has observed, "Congress purposefully designed Section 10(j) to provide the Secretary flexibility and discretion in managing the reintroduction of [listed] species." *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1233 (10th Cir. 2000). This discretion is central to Congress's purpose in allowing the creation of experimental populations. The Act does not require the use of experimental populations as part of recovery of listed species, and many species' recovery plans do not make use of an experimental population. *See, e.g.*, *Sierra Club v. Martin*, 992 F. Supp. 1448, 1475 (N.D. Ga. 1998) (noting that the existing recovery plan does not recommend an experimental population, although "it may be beneficial to designate one [in the future]").

Indeed, nowhere in the Act does Congress prescribe how species should be recovered, nor could it. Species recovery is driven by facts on the ground: habitat conditions, current geographic range, status of the existing population, threats to the species, and many other factors.

Establishing non-essential experimental populations is a discretionary action that may be used as part of species management and recovery, but need not be. 16 U.S.C. § 1539(j)(2)(A). Likewise, other important conservation tools made possible by Section 10 such as enhancement of survival permits, habitat conservation plans, and safe harbor agreements, are also used at the Secretary's discretion. 16 U.S.C. § 1539(a); 50 C.F.R. §§ 17.22, 17.32. The Secretary's statutory responsibilities require conservation and recovery of species, but do not impose specific duties to use any particular tool to achieve that end.

4. Requiring the Service to supplement its application with further information does not amount to a "veto" by New Mexico

Nor does New Mexico's denial of the Service's permit application preclude the survival of the 10(j) population. Contrary to Federal Defendants' characterization, New Mexico has not attempted to "veto" the releases of wolves, nor do New Mexico's permit requirements "oblige Interior to abandon its plans for releasing wolves on federal land." Fed. Aplts' Open. Br. at 31. Intervenor-Defendants also assert incorrectly that the district court's ruling "strips FWS of its statutory authority to reintroduce species if a state refuses to issue permits, thereby granting

individual states veto power over reintroductions of federally-protected species." Int-Def. Open. Br. at 14.

Placing conditions on a permit is a legitimate prerogative of the issuing jurisdiction, so long as the conditions "advance some legitimate police-power purpose" related to the permit. *Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825, 827 (1987). Here, there is no question as to New Mexico's legitimate authority to regulate and manage wildlife within its borders. And, rather, than vetoing the permit, or forcing Interior to "abandon its plans" to augment the 10(j) population, New Mexico placed a condition on issuance of the permit that advanced its interest in managing both game and nongame wildlife. Specifically, the State made a reasonable request that the Service provide a federal species management plan for Mexican wolves before a permit could issue.

This is a critical distinction. New Mexico's denial of the permit did not permanently veto the wolf releases. Rather, the Director of New Mexico's Department of Game and Fish, supported on appeal by the New Mexico Game Commission, rejected the Service's permit application on the ground that the Service did not prepare or submit a

federal species management plan along with the permit application, and hence the Director was unable to determine whether the proposed releases would conflict with state conservation management efforts. Aplt's App. at 61-62, 65. But the Director and the Commission left the door open to approve the permits if FWS provided the requisite species management plan.

And such a plan is well underway. Under the terms of a stipulated settlement agreement, the Service agreed to complete a final recovery plan for the Mexican wolf by November 30, 2017. *State of Ariz. v. Sally Jewell*, No. 4:15-cv-00245-JGZ, Doc. No. 49 (D. Ariz.), Order entering settlement agreement (entered Oct. 19, 2016). Moreover, preparation of the recovery plan is being carried out in accordance with ESA requirements that the process include input and participation by the potentially impacted States, New Mexico, Arizona, Colorado, and Utah. Aplt's App. at 122-23.[11] Waiting until the recovery plan is complete would facilitate New Mexico's review of the permit application, advance state-federal cooperation in the wolf release

[11] In the event the Service wants to move ahead more quickly, nothing precludes the agency from preparing a separate species management plan to submit to New Mexico along with a permit application.

program, and give the Department of Game and Fish the ability to incorporate information about the wolf population into its game and nongame management plans. It would also help the Department of Game and Fish explain to the public how the State's wildlife management plans could accommodate the wolf releases. Effective communication with the public can be indispensable in addressing hostility to the experimental wolf population that could otherwise compromise the success of the reintroduction program.

5. Even the total loss of a nonessential experimental population does not prevent the Secretary from carrying out her statutory responsibilities under the ESA

Even if a delay in further releases of wolves somehow led to an "extinction vortex" for the experimental population, as Federal Defendants darkly suggest, Fed. Aplts' Open. Br. at 9, the entire loss of a *nonessential* experimental population does not prevent the Secretary from carrying out her statutory responsibility to conserve Mexican wolves.

The Service has unambiguously declared that the 10(j) Mexican wolves are a nonessential population. First, the initial 1998 10(j) rule announced the experimental population was not essential: "The Service

finds that even if the entire experimental population died, this would not appreciably reduce the prospects for future survival of the [species] in the wild. That is, the captive population could produce more surplus wolves and future reintroductions still would be feasible if the reasons for the initial failure were understood." Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico, 63 Fed. Reg. 1752, 1754 (Jan. 12, 1998).

Subsequently, in 2015 when it revised the 10(j) rule, the Service left the "nonessential" designation in place: "The Service has previously determined that this experimental population of Mexican wolves was nonessential in the 1998 Final Rule … [and] does not intend to change the nonessential experimental designation to essential experimental, threatened, or endangered." Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512, 2557 (Jan. 15, 2015).

As a consequence, by the Service's own determination, loss of the entire experimental population would not threaten the species. The captive breeding program would continue to provide a source of wolves to increase the genetic diversity of the wild population. Using a

nonessential 10(j) population may be an important element of recovering the species, but temporarily delaying releases in New Mexico cannot by definition make recovery impossible, even if it were to result in the total loss of the experimental population. Accordingly, delaying the release pending FWS compliance with New Mexico's permit requirements cannot be construed to impede the Secretary's ability to carry out her statutory responsibilities.

Thus, New Mexico's request to review a federal species management plan before it would issue a permit was not a "veto" of the wolf releases, was consistent with 43 C.F.R. § 24.4(i)(5)(i), and does not prevent the Secretary from carrying out any statutory responsibilities.

D. The district court's preliminary injunction was necessary and appropriate

1. Invasion of a State's regulatory authority constitutes irreparable harm that cannot be compensated after the fact

States suffer irreparable harm when enforcement of their regulatory schemes is undercut by the federal government. The district court properly found that New Mexico would suffer irreparable harm if the Service continued its planned releases of Mexican wolves without first securing state permits. This harm stems in part from interference

with a state regulatory scheme designed to protect public health and safety and to manage wildlife for the health of wildlife and to the benefit of the State.

The irreparable harm factor requires a party seeking preliminary relief to demonstrate "that irreparable injury is likely in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To satisfy the irreparable harm requirement, a movant must demonstrate "a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003).

Courts have recognized that a threat to a State's sovereign authority constitutes irreparable harm that cannot be compensated after the fact by monetary damages. When a group of states recently sought to enjoin a federal rule purporting to regulate the practice of hydraulic fracturing (fracking), the court found that the federal rule infringed on authority Congress had left to the States, and as a result of the infringement the States would be irreparably harmed "the moment the Fracking Rule [went] into effect." *Wyoming v. United States Dep't of*

the Interior, 136 F. Supp. 3d 1317, 1346-47 (D. Wyo. 2015), *preliminary injunction vacated as moot*, 2016 U.S. App. LEXIS 13210.

In that case, the States and the Ute Tribe argued that Congress had clearly intended to locate authority to regulate fracking with the States and Tribes. As a result, many States had adopted regulations addressing hydraulic fracturing. *Id.* at 1346.

The court found that the interference with States' sovereign interests was irreparable:

> Because the Fracking Rule places the States' and Tribe's "sovereign interests and public policies at stake," the harm these Petitioners stand to suffer is "irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits."

Id. at 1347 (quoting *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001)). *See also Int'l Snowmobile Mfrs. Ass'n v. Norton,* 304 F. Supp. 2d 1278, 1287 (D. Wyo. 2004) (granting preliminary injunction when National Park Service regulation infringed on Wyoming's sovereignty by impairing its ability to manage its trails program and fish populations). Similarly, the Fifth Circuit has held that when a State is prevented from carrying out its laws, the State "necessarily suffers the irreparable harm of denying the public interest in the

enforcement of its laws." *Planned Parenthood of Greater Texas Surgical Health Serv's. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013), *aff'd*, 134 S. Ct. 506 (2013).

Federal Defendants argue that New Mexico's sovereignty has not been harmed in this case because the Service's activities to conserve listed species are not subject to state control, and States have no authority to "overrule duly promulgated federal law." Fed. Aplts' Open. Br. at 27. That assertion may be true in some circumstances, but not where the Department of the Interior has chosen, in "duly promulgated federal law," to defer to state authority exercised via state permit requirements for the introduction and release of wildlife. 43 C.F.R. § 24.4(i)(5)(i). Federal Defendants' argument fails here because the district court did not hold that States have sovereign authority to override federal law; it held that Interior's own regulation "curtails their power and requires them to release wolves in compliance with state permit requirements." Aplt's App. at 162.

2. The preliminary injunction preserves the district court's ability to render a meaningful decision on the merits

Finally, the district court reasonably recognized the potential for ongoing irreparable harm to New Mexico, and enjoined further wolf releases to ensure that, if New Mexico were to prevail on the merits, it would not be a hollow victory.

The primary goal of a preliminary injunction is to preserve the pre-trial status quo. *RoDa Drilling Co. v. Siegal*, 552 F.2d 1203, 1208 (10th Cir. 2009). "In issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits." *Tri-State Generation & Transmission Assn. v. Shoshone River Power, Inc.,* 805 F.2d 351, 355 (10th Cir. 1986) (citing *Compact Van Equipment Co. v. Leggett & Platt, Inc.*, 566 F.2d 952, 954 (5th Cir. 1978)). Allowing the Service to continue releasing Mexican wolves into New Mexico without complying with the State's permit requirements would permanently alter the status quo for wildlife in the State. Once the wolves are on the landscape, breeding and roaming as intended, a meaningful decision on the merits would no longer be possible for the State.

CONCLUSION

The district court properly recognized that allowing the Service to sidestep the state permit requirements under these circumstances would render the requirement in § 24.4(i)(5) toothless. It also properly recognized that New Mexico would suffer irreparable harm if the Service were permitted to continue releasing wolves into the wild during the pendency of this litigation. In addition, allowing the Service to proceed without state permits would damage the cooperative relationship necessary to achieve successful recovery not just for this species, but for species throughout our States. Accordingly, the Amici States urge this Court to affirm the preliminary injunction.

Dated this 4th day of November, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,062 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook.

DATED: Nov. 4, 2016

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify with respect for the foregoing:

1. All privacy redactions have been made pursuant to 10th Cir. R. 25.5;

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DATED: Nov. 4, 2016

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CERTIFICATE OF SERVICE

I hereby certify on November 4, 2016, I electronically filed the foregoing **Brief of the States of Colorado, Alabama, Alaska, Arkansas, Arizona, Idaho, Kansas, Michigan, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, South Dakota, Texas, Utah, Wisconsin, and Wyoming as Amici Curiae in Support of Plaintiff-Appellee New Mexico Department of Game and Fish and in Support of the Decision of the District Court** using the court's CM/ECF system which will send notifications of such filing to all counsel of record.

DATED: Nov. 4, 2016

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