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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TUCSON DIVISION

WILDEARTH GUARDIANS and NEW MEXICO WILDERNESS ALLIANCE, Plaintiffs, vs. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	No. 13-392-DCB **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

I. Introduction

Plaintiffs WildEarth Guardians ("Guardians") and New Mexico Wilderness Alliance ("NMWA") are conservation organizations whose members have an interest in the continued survival of the Mexican gray wolf, and in the success of the Mexican gray wolf reintroduction program. Second Amended Complaint ("SAC") at ¶¶ 32, 33. These interests are injured by a non-enforcement policy of Defendant United State Department of Justice ("DOJ") – known as the "McKittrick Policy"[1] – which Guardians and NMWA allege threatens the success of the reintroduction program. SAC at ¶ 96.

In *United States v. McKittrick*, 142 F.3d 1170, 1176-77 (9th Cir. 2008), the Ninth Circuit assessed congressional intent behind the criminal enforcement provision of the Endangered Species Act ("ESA"). The Ninth Circuit specifically rejected the defendant's argument that to establish criminal liability for illegal killing of a protected species, the government must prove that the defendant knew the biological identity of the animal that he killed. *Id.* Instead, the Ninth Circuit held that to establish criminal liability for illegally killing a protected species, the government need only prove that the defendant "knew he was shooting an animal, and that the animal turned out to be a protected [species]." *Id.* at 1177. The Ninth Circuit has explained that its *McKittrick* decision hinged on the facts that "the plain intent of Congress in enacting [the ESA] was to halt and reverse the trend towards species extinction, *whatever the cost*," and that criminal violations of the ESA are only misdemeanor offenses. *United States v. Lynch*, 233 F.3d 1139, 1144-45 (9th Cir. 2000) (emphasis in original).

DOJ's McKittrick Policy rejects the Ninth Circuit's *McKittrick* decision, and declares a DOJ policy of enforcing the ESA's criminal prohibition of illegal killing in circumstances that are far narrower than intended by Congress – that is, only when DOJ can prove that a defendant

[1] DOJ contends that the McKittrick Policy is its "legal position." Regardless of how denominated, the Policy is a final agency action, and all DOJ prosecutors are required to adhere to and to implement the Policy. Exhibit 1. It is, therefore, judicially reviewable since it is the "consummation of the agency's decision-making process" and has "legal consequences." 5 U.S.C. § 704, *Bennett v. Spear*, 117 S.Ct. 1154, 1168 (1997).

knew the biological identity of the animal that he killed. SAC at ¶¶ 20-22, 69, 89, 90, 96. The McKittrick Policy is an *ultra vires* policy that disregards congressional intent, and that constitutes DOJ's abdication of its duty to exercise the *full scope* of the prosecutorial discretion intended by Congress.[2] SAC at ¶¶ 22, 23, 27, 97.

In connection with Mexican gray wolves, on-going application of the McKittrick Policy has resulted in an extraordinary number of illegal killings of Mexican gray wolves at a level that threatens the success of the reintroduction program. SAC at ¶¶ 20, 25, 75, 89-96. In 2010, the United States Fish and Wildlife Service ("FWS") determined that the illegal shooting of Mexican gray wolves is one of the primary threats hindering the biological progress of the population and the recovery program. SAC at ¶ 94. The official position of the Arizona Department of Game and Fish is that a change to the McKittrick Policy "is necessary to reduce illegal killing (shooting) of endangered Mexican wolves and other species." SAC at ¶¶ 83, 84.

In this action brought pursuant to the Administrative Procedures Act ("APA") and the ESA, Guardians and NMWA seek to vindicate their protectible interests in wolf conservation and recovery. Specifically, Guardians and NMWA seek an Order from this Court declaring that the on-going application of the McKittrick Policy in connection with the illegal killings of Mexican gray wolves is illegal, and enjoining further application of the Policy. Such an Order will redress the serious and demonstrable injury caused by the continuing application of the McKittrick Policy, and will thereby redress Guardians' and NMWA's grievance in this matter.

In its Motion to Dismiss, Defendant DOJ argues (1) that Guardians and NMWA have failed to state a claim for relief under both the APA and the ESA, (2) that Guardians and NMWA lack standing to maintain this action, and (3) that the applicable statute of limitations bars prosecution of this action at this time. As set out below, Defendant DOJ is wrong on every

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[2] Anomalously, DOJ's McKittrick Policy results in a situation where migratory birds receive more protection under federal criminal statutes than threatened and endangered species. *United States v. Zak*, 486 F.Supp.2d 208, 214 (D. Mass. 2007) (cataloguing decisions holding that proof of a defendant's knowledge of biological identity is not required to prosecute illegal shooting under the Migratory Bird Treaty Act), *see also* Exhibit 2 ("under this policy a hen mallard is afforded more protection than any of the animals listed as endangered").

count. Defendant DOJ's adoption of an *ultra vires* policy which is directly at odds with congressional intent is decidedly *not* the sort of "*single-shot* non-enforcement decision" decision that is presumptively non-reviewable under the APA. *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994) (emphasis in original). Furthermore, Guardians and NMWA initiated this action to protect their cognizable interests promptly after they "discovered the true state of affairs," and therefore within the applicable limitations period. *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991). For these reasons, Defendant DOJ's Motion to Dismiss must be denied, and this case should be allowed to proceed to a full and final adjudication on the merits.

II. Factual background

In a historic collaborative effort, the State of Arizona, the Arizona counties of Graham, Greenlee, and Navajo, the White Mountain Apache Tribe, and three federal agencies are cooperating to save the Mexican gray wolf from extinction. The keystone of this bold and ambitious inter-governmental effort is the wolf reintroduction program which is intended to establish a viable and self-sustaining Mexican gray wolf population in Arizona and New Mexico.

The last surviving Mexican gray wolf known to be living in the wild in the United States was killed in Arizona in 1970. SAC at ¶ 2. While the species was nearly extinct at that time, there is renewed hope that the iconic gray wolf will be restored into its natural habitat in the wilds of the southwestern United States. Under the auspices of the ESA, the inter-governmental recovery team seeks to halt and to reverse what was once the Mexican gray wolf's drift towards inevitable extinction through implementation of a reintroduction program. As originally conceived, the goal of the reintroduction program was to establish a population of at least 100 wolves in the species' historic range in Arizona and New Mexico. SAC at ¶ 5. More recently, the United States Fish and Wildlife Service ("FWS") has determined that the wild population must be larger than 100 individuals in order to assure the species' recovery in the wild. *Id.*

Unfortunately, the progress of the inter-governmental wolf reintroduction program has been far slower than originally anticipated. SAC at ¶¶ 11-14, 93. The FWS states that it had expected that the initial goal of 100 wolves in the wildlands of Arizona and New Mexico would

be achieved by 2006. SAC at ¶ 93. To date, this goal has still not been met. *Id.* According to the American Society of Mammologists, the Mexican gray wolf remains "one of the most endangered mammals in North America and its recovery seems to have stalled. SAC at ¶ 14.

The problems which have hobbled the reintroduction program's ultimate success have been studied in depth, and it is clear that illegal shooting of Mexican gray wolves is the most important factor impairing the program's effort to "bring back" the Mexican gray wolf from the brink of near-certain extinction. SAC at ¶ 13. Since releases of captive-bred wolves into the wild began in 1998, at least 55 reintroduced Mexican gray wolves have been illegally killed in violation of the ESA's prohibition on "take." SAC at ¶ 10. These illegal killings represent more than half of *all* known mortality of Mexican gray wolves in the wild and, according to the FWS's 2010 "Mexican Wolf Conservation Assessment," "is the single greatest source of wolf mortality in the reintroduced population." SAC at ¶¶ 10, 13. Just this year, the FWS stated that the illegal killing of wolves is "hindering the growth and fitness of the population." SAC at ¶ 13.

Even at the time that the reintroduction program was being planned, wildlife officials understood that some opponents of the heroic conservation effort might seek to derail the program by illegally killing Mexican gray wolves. The FWS sought to deal with this issue preemptively by announcing in the Federal Register notice approving the reintroduction program that the illegal killing of Mexican gray wolves is a violation of the ESA, would result in "vigorous enforcement," and "would subject the offenders to severe penalties." SAC at ¶ 17. To ensure that success of the reintroduction program is not stymied by illegal killings of Mexican gray wolves that are justified by the killer's professed "ignorance" as to the identity of a killed wolf, the FWS specifically stated that shooting a reintroduced wolf upon the belief that the target animal was a coyote or some other look-alike and non-protected species does not constitute a defense to criminal liability under the ESA. SAC at ¶¶ 18, 19. In this connection, the final rule approving the reintroduction program states that "[h]unters (and others) who might shoot a wolf are responsible to identify their targets before shooting" and that "[t]aking a wolf by shooting will not be considered unavoidable, accidental, or unintentional take" that is immune from criminal prosecution under the ESA. *Id.* The FWS's promise of "vigorous enforcement" was

reasonable in light of the fact that Congress specifically amended the ESA's criminal provision in 1978 to clarify that ESA criminal violations are "a general rather than a specific intent crime." 1978 U.S.C.C.A.N. 9453, 9476, and in light of the Ninth Circuit's *McKittrick* decision. Yet, the anticipated "vigorous enforcement" has not taken place since (as explained below) DOJ's *ultra vires* McKittrick Policy makes illegal wolf killings virtually unenforceable crimes.

Guardians and NMWA allege in their Second Amended Complaint that the McKittrick Policy has been the subject of severe criticism by federal and state wildlife officials. SAC at ¶¶ 77-80, 83-84. In a memorandum to the Department of the Interior Solicitor, the Director of the FWS states that the McKittrick Policy "has precluded criminal prosecution in direct taking (shooting) cases throughout the country" and "[i]n many ways . . . rendered the species protection provisions in Section 9 of the ESA unenforceable." SAC at ¶ 77, Exhibit 3. The Director requests the Solicitor to "take all steps necessary to remedy this situation" and warned that "[f]ailure to successfully resolve this problem will result in little to no protection for this Nation's most critically endangered species." *Id.* A series of more recent internal memoranda written for the use of high level officials at the Department of the Interior state that "[a]fter more than two years of working under the Justice Department policy, the [FWS] concluded that the new jury instructions have rendered ESA prohibitions on taking endangered species virtually unenforceable, precluding criminal prosecutions in shooting cases throughout the country" and that the "'McKittrick Policy' has made it more difficult to pursue Federal charges in cases involving the killing of endangered and threatened animals, increasing the vulnerability of species to unlawful take and potentially undermining species recovery efforts." Exhibit 4.

Similarly, the Arizona Department of Game and Fish states that Arizona is advocating for a change in the [McKittrick] Policy to make it more feasible to seek criminal prosecutions," which change "is necessary to reduce the killing (shooting) of endangered Mexican wolves and other endangered species." SAC at ¶¶ 83, 84, Exhibit 5. Even DOJ admits that the McKittrick Policy creates a "hole" in ESA criminal enforcement that is inconsistent with "the Ninth Circuit's interpretation of the necessary elements found in *McKittrick"*:

The true "hole" created by the current interpretation of the *mens rea* requirement

> occurs . . . when an unidentified animal is killed and left laying. Those perpetrators can and do escape any criminal punishment under the ESA when, for instance, they take an endangered species in violation of 16 U.S.C. Section 1538(a)(1)(B)."

SAC at ¶ 82, Exhibit 6.

The gist of this lawsuit is simple and straightforward. Guardians and NMWA allege that DOJ's adoption and on-going application of the McKittrick Policy undermines the historic inter-governmental effort to save the Mexican gray wolf from extinction. Guardians and NMWA allege that the "McKittrick Policy has the practical effect of removing the threat of criminal prosecution for would-be wolf killers who are opposed to the reintroduction of the Mexican gray wolf" and that "[t]he loss of this deterrent leads to high levels of illegal shootings, and to a corresponding threat to the success of the Mexican gray wolf reintroduction program." SAC at ¶ 96. If proved on the merits, these allegations are sufficient to establish that the McKittrick Policy, as it is applied to the Mexican gray wolf, constitutes a violation of the APA and the ESA.

III. Standard of review

Under Rule 12(b)(6), a court must consider whether a complaint alleges "sufficient facts . . . to support a cognizable legal theory." *Shroyer v. New Cingular Wireless Services*, 622 F.3d 1035, 1041 (9th Cir. 2010). The court "must accept all material allegations in the complaint as true, and construe them in the light most favorable to the non-moving party." *Chubb Custom Ins. Co. v. Space Sys.*, 710 F.3d 946, 956 (9th Cir. 2013). On a motion regarding statute of limitations, "a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995).

Rule 12(b)(1) permits a defendant to bring a motion to dismiss asserting a lack of subject matter jurisdiction. When defendants bring a "facial attack" on subject matter jurisdiction, "all factual allegations" in a plaintiff's complaint "are taken as true and all reasonable inferences are drawn in [plaintiff's] favor." *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013).

IV. The Second Amended Complaint states a viable claim under the APA

Guardians and NMWA readily acknowledge that DOJ's individual and discrete non-

enforcement decisions are *not* subject to judicial review. 5 U.S.C. § 701(a)(2). However, this case does not involve individual non-enforcement decisions. Rather, this case targets a non-enforcement *policy* which is so extreme as to amount to an abdication of DOJ's statutory duty to prosecute illegal killings of Mexican gray wolves. SAC at ¶¶ 23, 27, 97, 101. A long line of authority – ignored by DOJ – stands clearly for the proposition that such non-enforcement policies fall outside the presumption of non-reviewability, and are subject to judicial review. The APA claim in this lawsuit clearly falls within the exception to the non-reviewability presumption.

The leading Supreme Court case on this issue is *Heckler v. Chaney*, 105 S.Ct. 1649, 1656 n. 4 (1985), where the Supreme Court noted that an agency non-enforcement policy "that is so extreme as to amount to an abdication of its statutory responsibilities" may be subject to judicial review under the APA.[3]

The most instructive case on the distinction between a non-reviewable individual enforcement decision and a reviewable enforcement (or non-enforcement) policy is *Crowley Caribbean Transport*, where the D.C. Circuit provided a well-reasoned analysis as to why non-enforcement policies – unlike individual enforcement decisions – are amenable to judicial review. In that decision, the D.C. Circuit first noted that it had held – on at least two prior occasions – "that an agency's statement of a *general enforcement policy* may be reviewable for legal sufficiency where the agency has expressed the policy as a formal regulation after the full rulemaking process . . . or has otherwise articulated it in some form of universal policy statement." 37 F.3d at 676 (emphasis in original), *citing Edison Electric Institute v. EPA*, 996 F.2d 326 (D.C. Cir. 1993), and *National Wildlife Federation v. EPA*, 980 F.2d 765 (D.C. Cir. 1992). The D.C. Circuit then went on to explain the legal distinction between the two sorts of legal challenges:

> There are ample reasons for distinguishing the two situations. By definition, expressions of broad enforcement policies are abstracted from the particular

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[3] Without any support in the decision whatsoever, DOJ erroneously suggests that the *Heckler* decision distinguishes between civil and criminal enforcement policies. In fact, the Supreme Court states that its *Heckler* decision addresses "an agency's decision not to prosecute or enforce, *whether through civil or criminal process*." 105 S.Ct. at 1655 (emphasis added).

> combinations of facts the agency would encounter in individual enforcement proceedings. As general statements, they are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion. Second, an agency's pronouncement of a broad policy against enforcement poses special risks that it "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," *Chaney,* 470 U.S. at 833 n. 4, 105 S.Ct. at 1656 n. 4 (internal quotation marks omitted), a situation in which the normal presumption of non-reviewability may be inappropriate. Finally, an agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to forego enforcement tend to be cursory, ad hoc, or post hoc.

37 F.3d at 677. Furthermore, judicial review of a non-enforcement policy does not implicate the same concerns as judicial review of an individual non-enforcement decision, as set out in *Heckler*: "whether a violation has occurred, . . . whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency enough resources to undertake the action at all." *National Wildlife Federation*, 980 F.2d at 772-73, *quoting Heckler*, 470 U.S. at 831, *see also Chiang v. Kempthorne*, 503 F.Supp.2d 343, 351 (D.D.C. 2007), *quoting Heckler*, 470 U.S. at 831 (non-enforcement policies are judicially reviewable because they are unlike "[i]ndividual agency decisions not to enforce a statute [which] 'involve a complicated balancing of a number of factors'"), *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) ("an agency's adoption of a general enforcement policy is subject to review"), *Center for Auto Safety, Inc. v. National Highway Traffic Safety Administration*, 342 F.Supp.2d 1, 12-13 (D.D.C. 2004) (the *Heckler* presumption of non-reviewability applies only to "single-shot non-enforcement" decisions).

Finally, the cases cited by DOJ in support of its argument on this issue are distinguishable from this case and support the notion that Guardians' and NMWA's APA claim is justiciable. First, *In re Aiken County* "does not involve [an agency] decision not to prosecute violations of federal law," and is therefore distinguishable from this case. 725 F.3d 255, 266 (D.C. Cir. 2013). Therefore, any discussion in that case concerning the reviewability of non-enforcement policies is dicta, if the decision even addresses this issue which is far from clear. Furthermore, even if

there is dicta in *In re Aiken* that does address the reviewability of a non-enforcement policy, that dicta cannot be reconciled with the many decisions of the D.C. Circuit which hold that non-enforcement policies *are* amenable to judicial review. Second, *State of California v. United States*, 104 F.3d 1086 (9th Cir. 1997), actually supports Guardians' and NMWA's position in this matter as the Ninth Circuit recognized the exception to the presumption of non-reviewability which applies to judicial challenges of *ultra vires* agency non-enforcement policies. The claim in *State of California* foundered because in that case, unlike in the case now before the Court, the Ninth Circuit determined that "the allegations asserted in the instant Complaint do not rise to a level that would indicate such an abdication." *Id.* at 1094. In this case, of course, Guardians and NMWA have very specifically alleged that such an abdication *has* occurred in connection with DOJ's non-enforcement policy.

For all of the above reasons, Guardians and NMWA have stated a viable APA claim.

V. The Second Amended Complaint states a viable claim under the ESA Section 7(a)(2)

In the Second Amended Complaint, Guardians and NMWA allege that "DOJ's adoption and on-going implementation on the McKittrick Policy are agency actions which trigger Section 7 substantive and procedural duties." SAC at ¶ 13, *see also* ¶ 99 ("[a]doption and on-going application of DOJ's McKittrick Policy constitute 'actions' which may adversely effect the Mexican wolf within the contemplation of ESA Section 7"). Thus, DOJ's argument that the ESA claim in this lawsuit is not justiciable because it seeks to compel a Section 7(a)(2) consultation on agency *inaction* is a red herring that is easily disposed of. The actual focus of the ESA Section 7(a)(2) claim is DOJ's illegal failure to consult with the FWS as to the impacts of affirmative DOJ *actions* which imperil the success of the Mexican gray wolf reintroduction program: adoption and on-going application of the McKittrick Policy.

There is little doubt that DOJ's adoption and on-going application of the McKittrick Policy – the affirmative action that gives rise to this lawsuit – is the type of agency "action" that falls within the scope of the ESA's consultation requirements, as set out in Section 7(a)(2). By its own terms, that statute provides that it applies to "*any* action authorized, funded, or carried out by a [federal] agency." 16 U.S.C. § 1536(a)(2) (emphasis added). On the basis of this

expansive and open-ended statutory provision, the Ninth Circuit has held time and time again that "[t]here is 'little doubt' that Congress intended agency action to have a broad definition in the ESA" and has "followed the Supreme Court's lead by interpreting its plain meaning 'in conformance with Congress's clear intent.'" *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc) *quoting Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994), *see also Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 974 (9th Cir. 2003) (the term "agency action" is "broadly defined"), *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998) (same). An agency action is subject to Section 7(a)(2)'s consultation requirements so long as it is "carried out" by the agency and the agency "ha[s] some discretion to influence or change the activity for the benefit of a protected species." *Karuk Tribe*, 681 F.3d at 1021. DOJ's adoption and on-going application of the McKittrick Policy easily passes both of these tests: DOJ clearly adopted and "carries out" the Policy, and DOJ clearly has the authority to modify the Policy to resuscitate Congress's clear intent with respect to ESA criminal enforcement.

The FWS regulations implementing Section 7(a)(2) reflect Congress's intentionally broad sweep. Those regulations define "action" as "*all* activities or programs of any kind authorized, funded, or carried out" by a federal agency, including by way of example actions that "directly or *indirectly* caus[e] modifications to the land, water, or air." 50 C.F.R. § 402.02 (emphasis added). The Federal Register notice accompanying the regulations expressly clarifies that a federal "action" falls within the scope of Section 7(a)(2) when adverse wildlife impacts may occur either as a result of (1) the agency action itself *or* (2) the indirect and induced actions of others:

> "Indirect effects are those that are caused by the action and are later in time but are still reasonably certain to occur. They include the effects on listed species . . . of future activities that are induced by the action subject to consultation and that occur after that action is completed. In *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), the Court of Appeals for the Fifth Circuit found that "indirect effects" which can be expected to result must be considered under Section 7 of the Act. In that case, the court enjoined completion of a highway because the Department of Transportation failed to consider the effects to the endangered sandhill crane from future private development that would result from construction of the highway. The Service will consider the effects to listed species from such future activities that are reasonably certain to occur under the analysis of "indirect effects." The Service's approach will be consistent with *National Wildlife Federation v. Coleman*, and the Service declines to narrow the

scope of its review (as requested by one commenter) in light of existing case law. 51 Fed.Reg. 19926, 19932 (June 3, 1986).[4]

Thus, in the *National Wildlife Federation* case discussed in the above quoted Federal Register notice, the court held that the Section 7(a)(2) consultation regarding impacts to the sandhill crane was required to consider not only the federal agency action (a highway), but also "the indirect effects of the highway on the crane [associated with] the residential and commercial development that can be expected to result from the construction of the highway. 529 F.2d at 373. A similar decision was recently issued by Ninth Circuit Judge Wallace Tashima in a case in the District of Arizona: *Center for Biological Diversity v. Salazar*, 804 F.Supp.2d 987 (D.Ariz. 2011). In that case, which concerned a Section 7(a)(2) consultation regarding on-going and future operations at Fort Huachuca, the court specifically held that the wholly private development and growth that is induced by federal operations at the facility – but which would be carried out by private third parties – was part and parcel of the "action" subject to the consultation requirement.

Here, Guardians and NMWA allege (and have already provided evidence to the effect) that DOJ's adoption and on-going application of the McKittrick Policy "render[s] the species protection provisions in Section 9 of the ESA unenforceable," "preclud[es] criminal prosecutions in shooting cases throughout the country," and "leads to high levels of illegal shootings, and to a corresponding threat to the success of the Mexican gray wolf reintroduction program." SAC at ¶¶ 77, 96, Exhibits 3, 4, 5. Under the statute, regulations, and prevailing case law regarding the broad sweep of agency action that falls within the scope of Section 7(a)(2), these allegations are sufficient to state a claim for relief under the ESA.

As for DOJ's fall-back argument that the consultation would be meaningless, this is of course absurd. Despite DOJ's argument to the contrary, FWS officials have expressed a keen

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[4] "Reasonably certain to occur," as used in connection with standing analysis, "does not mean that there is a guarantee that an action will occur." 51 Fed.Reg. at 19933. Rather, it means just "more than a mere possibility." *Id.*

interest in the McKittrick Policy. As stated above, FWS employees state that, in their "expert opinion," the Policy has made the ESA's prohibition on illegal killing of protected species "unenforceable" and Arizona wildlife officials state that a change in the Policy "is necessary to reduce the killing (shooting) of endangered Mexican wolves and other endangered species." Exhibits 3, 4, 5. Certainly, there *is* "something" for wildlife officials to evaluate with respect to the Policy, and that evaluation has already lead those official to conclude that the Policy must be changed if the Mexican gray wolf reintroduction program is to succeed.

VI. Guardians and NMWA have standing to maintain this action

To defeat a standing dismissal motion, plaintiffs may rely on "general factual allegations" of the essential elements of standing – injury in fact, causation, and redressability – "for on a motion to dismiss we presume[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2137 (1992).

As noted at the outset of this memorandum brief, Guardians and New Mexico NMWA have alleged that their members have an interest in the continued survival of the Mexican gray wolf, and in the success of the on-going Mexican gray wolf reintroduction program. SAC at ¶¶ 32, 33. Further, Guardians and NMWA allege that the "McKittrick Policy has the practical effect of removing the threat of criminal prosecution for would-be wolf killers who are opposed to the reintroduction of the Mexican gray wolf" and that "[t]he loss of this deterrent leads to high levels of illegal shootings, and to a corresponding threat to the success of the Mexican gray wolf reintroduction program." SAC at ¶ 96. These standing allegations regarding Guardians' and NMWA's cognizable interests and injury to those interests are sufficient to overcome a motion to dismiss. *See for example Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) (plaintiffs allege sufficient "injury in fact" when they seek "avoidance of harm to listed species"), *Environmental Protection Information Center v. The Simpson Timber Co.*, 255 F.3d 1073, 1079 (9th Cir. 2001) ("a non-profit organization that seeks to protect threatened species" has a "direct interest" in compliance with the ESA, and therefore standing pursuant to the APA and the ESA citizen's suit provision), *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.2d 1141, 1147 (9th Cir. 2000) ("[t]he 'injury in fact' requirement in

environmental cases is satisfied if an individual adequately shows that she has an aesthetic interest in a particular place, or animal, or plant species and that that interest is impaired by defendant's conduct").

DOJ is simply incorrect when it argues that the "injury in fact" analysis in this case is controlled by the Supreme Court's decision in *Linda R.S. v. Richard D.*, 93 S.Ct. 1146 (1973), as that case is readily distinguishable. *Linda R.S.* was a case in which the plaintiff sought, *inter alia*, to compel the state of Texas to prosecute the father of her child under a criminal statute for failure to pay child support. The Supreme Court found that "if [plaintiff] were granted the requested relief, it would result only in the jailing of the child's father" and that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 1149. The Supreme Court further found that even if the child's father were prosecuted and jailed, such punishment would not vindicate the plaintiff's interest in the payment of child support. *Id.* By contrast, in this case Guardians and NMWA do not (and, admittedly, could not) allege that their cognizable interest in Mexican gray wolf conservation is injured by any specific non-prosecution decision of DOJ. Rather, Guardians and NMWA allege (and provide evidentiary support for the fact) that it is the adoption and on-going application of a broad and *ultra vires* non-enforcement policy – untethered to any specific enforcement decision – that results in their injury. To apply the reasoning of *Crowley Caribbean*, *Linda R.S.* was a case in which an "individual enforcement decision" was at issue and, accordingly, the plaintiff had an insufficient interest in the matter and prosecutorial discretion was appropriate. In this case, on the other hand, an *ultra vires* "broadly applicable enforcement policy" that threatens the success of the Mexican gray wolf reintroduction program is at issue. This is a critical distinction.

DOJ goes on to argue that Guardians and NMWA have not adequately alleged causation for purposes of standing. Again, DOJ is incorrect. The gist of DOJ's argument is that it is the illegal killing of Mexican gray wolves that causes Guardians' and NMWA's injury, and not the adoption and on-going application of the McKittrick Policy. As previously noted, federal and state wildlife officials have explained that DOJ's McKittrick Policy *itself* endangers the success of the Mexican gray wolf reintroduction program because it renders illegal killings of protected

species "virtually unenforceable." SAC at ¶ 77, 83, 84, 96, Exhibits 3, 4, 5.

In circumstances like this, standing is not defeated merely because the intervening act of a third party must occur before an individual Mexican gray wolf dies is killed. "[I]t is by no means impossible to establish causation and redressability where plaintiffs' injury stems from government regulation of a third party." *Center for Auto Safety*, 342 F.Supp.2d at 9, *citing Lujan*, 112 S.Ct. at 2137. As the D.C. Circuit explains in *Wilderness Society v. Griles*, 824 F.2d 4, 17 (D.C. Cir. 1987), the important factor in causation analysis is the role that the government action (in this case adoption and on-going application of the McKittrick Policy) has in influencing the third party behavior which causes the ultimate injury:

> [C]ausation questions concern the directness of the link between the defendant's challenged action and the alleged injury, and focus on the incentive structure to which the intervening third party, who directly causes the injury, is responding. If the third party's conduct is sufficiently dependent upon the incentives provided by the defendant's action, then the resultant injury will be fairly traceable to that action and a court order binding the defendant will likely cure the plaintiff's harm.

The *Griles* decision goes on to hold that the causation prong of the standing inquiry is satisfied if a plaintiff alleges that injury-causing third party action is "the natural consequence" of the challenged government action. *Id.* at 18. Here, Guardians and NMWA have alleged precisely this type of causation: that a "natural consequence" of DOJ's adoption and on-going application of the McKittrick Policy is an elevated level of illegal wolf killings because the practical effect of the Policy is to immunize from prosecution most cases of illegal killings. *See also Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 440-41 (D.C. Cir. 1998) ("a plaintiff satisfies the causation prong of constitutional standing by establishing that the challenged agency rule permitted the activity that allegedly injured her, when that activity would allegedly have been illegal otherwise").[5]

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[5] The case of *Cary v. Hall*, 2006 WL 6198320 (N.D. Cal. 2006), is instructive on this point. In that case, there was a mis-match between the standing affiant's cognizable interests in the conservation of *wild-born* animal species and the government action at issue in the lawsuit which permitted the hunting of *captive-born* individuals of those same species. In light of the fact that the affiant's interest and the allegedly injurious action were not aligned, the court found

Guardians' and NMWA's allegations regarding redressability are likewise sufficient at the pleading stage, as they allege that federal and state wildlife officials have taken the position that a change in the McKittrick Policy would enable DOJ to prosecute cases of illegal wolf killings without the impediment posed by the specific intent requirement imposed by the Policy. Exhibits 3, 4, 5. Those wildlife officials believe that the number of illegal wolf killings would fall if DOJ were to begin prosecuting illegal wolf killings as general intent crimes, as intended by Congress.[6] This expected reduction in the level of illegal wolf killings would redress Guardians' and NMWA's injury and promote and protect their interests in wolf conservation and the success of the inter-governmental Mexican gray wolf reintroduction program.

VII. This action was timely filed and is not barred by the statute of limitations

Both the APA claim and the ESA claim are timely under the circumstances, and particularly in light of the near-record level of illegal wolf killings in 2013. SAC at ¶¶ 10, 92. The statute of limitations issue in this case is governed by the Ninth Circuit's decision in *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir.). That case arose from the government's allegedly illegal classification of a parcel of land as a wilderness study area

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that causation was not established. *Id.* at *5-6. However, the court went on to hold that if the challenged government action had permitted the hunting of wild-born animals, causation would have been established: "causation would not be implausible if the [challenged action] allowed the importation into the United States of trophies of the three antelope species taken in the wild . . . [as] it would be fair to recognize a causal connection between legalizing their importation (which would otherwise be illegal) and [the affiant's] injury." *Id.* at 6. In this case, Guardians and NMWA specifically allege that DOJ's McKittrick Policy results in an elevated level of illegal killing of Mexican gray wolves. This is exactly the type of link that the *Cary* decision finds does establish causation for standing purposes.

[6] DOJ suggests that it *is* prosecuting criminal violations of the ESA, but this claim is immaterial for purposes of this motion to dismiss. First, Guardians and NMWA need not prove its allegations of injury, causation, and redressability at this stage of these proceedings. Second, and more importantly, DOJ's evidence does not rebut the core allegations in the Second Amended Complaint which is that – as a result of the McKittrick Policy – DOJ is not prosecuting the *illegal killing* of *Mexican gray wolves*. Even a DOJ employee has found that the McKittrick Policy creates a "hole" in the ESA's criminal enforcement scheme for illegal take, so DOJ's evidence as to the prosecution of *"non-take" offenses* (such as possession offenses) in connection with *other species* is simply irrelevant to the claims in this case. Exhibit 6.

("WSA") which had occurred more than six years prior to commencement of the lawsuit and, therefore, outside the limitations period provided in 28 U.S.C. § 2401(a). Nonetheless, the Ninth Circuit held that the action was not time barred because the plaintiff alleged that the government's classification decision was *ultra vires:*

> Other circuits have concluded that an agency regulation or other action of continuing application may be challenged after a limitations period has expired if the ground for challenge is that the issuing agency acted in excess of its statutory authority.
>
> . . . .
>
> Such challenges, by their nature, will often require a more "interested" person than generally will be found in the public at large. For example, assuming that [plaintiff's] challenge [to the classification decision] is merited, no one was likely to have discovered that the BLM's 1979 designation of this particular WSA was beyond the agency's authority until someone actually took an interest in that particular piece of property, which only happened when [plaintiff] staked its mining claims. *The government should not be permitted to avoid all challenges to its actions, even if ultra vires, simply because the agency took the action long before anyone discovered the true state of affairs*.

946 F.2d at 714-15 (emphasis added), *see also North County Community Alliance, Inc. v. Salazar*, 573 F.3d 738, 741-44 (9th Cir. 2009) (applying the *Wind River* exception to plaintiff's claims since plaintiff commenced its lawsuit as soon as it learned that a 14 year old federal action threatened to cause legally cognizable injury), *Artichoke Joe's California Grand Casino v. Norton*, 278 F.Supp.2d 1174, 1183 (E.D. Cal. 2003).

In this case, the attached declarations explain that Guardians and NMWA did not "discover the true state of affairs" – that the McKittrick Policy leads to elevated levels of illegal killings of Mexican gray wolves and threatens to derail the success of the reintroduction program – until 2012. Exhibit 7 at ¶¶ 7-12, Exhibit 8 at ¶ 5. Up until that time, wildlife advocates intimately involved with the Mexican gray wolf reintroduction program knew that there was a high level of illegal killings, but were entirely unaware of the McKittrick Policy and of wildlife officials' conclusion that the Policy leads to illegal killings, makes the prohibition on illegal killings unenforceable, and threatens the success of the reintroduction program.[7]

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[7] An article on "Environmental Crimes" in the July 2011 edition of the U.S. Attorney's Bulletin confirms that the McKittrick Policy is obscure and not widely known. That

DOJ may argue that the *Wind River* exception applies only (1) when an agency applies a regulation to a plaintiff in an enforcement proceeding or (2) when a party petitions an agency to amend a regulation. However, the exception is not so limited. For example, in *Center for Biological Diversity v. Salazar*, an environmental group challenged FWS's 2008 authorization that allowed oil and gas companies to take polar bears, arguing "the Service relied on an impermissible regulatory definition" promulgated in 1983. 695 F.3d 893, 902 (9th Cir. 2012). The court rejected the statute of limitation defense, citing *Wind River* and holding that the claim was not time barred despite the fact that the organization was not the subject of an enforcement proceeding and had not petitioned to rescind the challenged regulation, but instead simply challenged an agency action and the underlying regulation causing harm. *Id.* at 904, *citing Natural Resources. Defense Council v. Evans*, 364 F. Supp. 2d 1083, 1099 (N.D. Cal. 2003).[8]

Furthermore, Guardians' and NMWA's ESA claim is not time barred for a second and independent reason: the claim that DOJ illegally failed to consult with the FWS as to the impacts of the McKittrick Policy on Mexican gray wolves is not a "complain[t] about what the agency has done but rather about what the agency has yet to do." *Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 2007 WL 4117978 at *5 (D. Ore. 2007), *quoting Wilderness Society v. Norton*, 434 F.3d 584, 588 (D.C. Cir. 2006). Each day that a federal agency fails to perform an on-going duty required by statute "constitutes a single, discrete violation of the statute." *Id.* at *6, *Wilderness Society*, 434 F.3d at 589 (six year statute of limitations does not apply to chronic failures to undertake legal obligations). This is particularly true in connection with alleged violations of the ESA, as that statute "gives the public a large role in the enforcement of the statute [that] counsels against a mechanical application of the statute of limitations." *Id.* at *5.

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article states that "[p]rosecutors need to be aware" of the policy, and notes that the Policy is inconsistent with "the available case law." Exhibit 7 at p. 49.

[8] Numerous other cases hold that a regulation is "applied" to a party for statute of limitations purposes when the party is adversely affected by the agency action. *See for example Forestkeeper v. Tidwell*, 847 F. Supp. 2d 1217, 1236 (E.D. Cal. 2012) (statute of limitations did not accrue until challenged regulations "were applied to [environmental] plaintiffs" through agency logging projects).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Plaintiffs' Opposition to Defendant's Motion to Dismiss was served on all counsel of record in this case through the Court's ECF system on October 14, 2014.

/s/ Steven Sugarman
Steven Sugarman