ENDANGERED SPECIES ACT, SECTION 10(J): SPECIAL RULES TO REESTABLISH THE MEXICAN WOLF TO ITS HISTORIC RANGE IN THE AMERICAN SOUTHWEST.

BY
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Only the mountain has lived long enough to listen objectively to the howl of the wolf.
Aldo Leopold

Federal government efforts to restore endangered wolves to the wild are among the most romantic and divisive topics in wildlife conservation.[1] Wildlife enthusiasts generally favor restoration efforts, viewing wolves as a symbol of nature and wilderness. Residents of the reintroduction areas, however, fear the wolves will damage wild game herds and kill livestock.[2]

In order to ease local residents' concerns regarding reintroduction efforts, Congress added section 10(j)[3] to the Endangered Species Act (ESA).[4] Section 10(j) allows reintroduced "experimental populations" of endangered species to be managed as if they were only threatened.[5] Critics of section 10(j) contend that endangered wildlife, including wolves, should receive full endangered species protections—even when released under experimental conditions.[6] Proponents of section 10(j), on the other hand, believe that local support of reintroduction efforts is a key element for long-term viability of reintroduced populations.[7]

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[1] *See generally,* MiMi S. Wolok, *Experimenting with Experimental Populations*, 26 ENVTL. L. REP. 10,018 (1996).
[2] Aurelio Rojas, *Return of the Native,* S.F. CHRON., Nov. 23, 1997, at 4 (quoting rancher who has lost over 60 sheep killed by wolves in Idaho).
[3] 16 U.S.C. § 1539(j) (1994).
[4] 16 U.S.C. §§ 1531-1544 (1994).
[5] 16 U.S.C. § 1539 (j)(2)(C).
[6] *See* Rojas, *supra* note 2.
[7] *See, e.g.*, Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico, 63 Fed. Reg. 1752, 1755 (1998) (to be codified at 50 C.F.R. pt. 17) (hereinafter "Recovery Plan").

This Article explores the conflict between the ESA's statutory mandate to promote endangered species' recovery[8] and the reality of local concern—and opposition—which accompanies reintroduction efforts. In particular, this paper will discuss a practical application of section 10(j) by examining a recent plan to reintroduce Mexican wolves to the American Southwest.[9] On balance, the results of this examination indicate that section 10(j) management flexibility for reintroduced populations is good for wolf conservation.

I. SECTION 10(J): EXPERIMENTAL POPULATIONS

Congress declared its policy of conserving animal and plant species threatened with extinction by passing the ESA in 1973.[10] Part of the ESA's conservation strategy includes restoring endangered species to their historic ranges.[11] For innocuous creatures such as the whooping crane, reintroductions are typically non-controversial.[12] Restoring predators such as Mexican wolves, however, presents serious political and economic problems.[13]

In order to ease local concerns over species reintroduction, Congress amended the ESA in 1982 by adding section 10(j).[14] Section 10(j) allows the U.S. Fish and Wildlife Service (FWS)—the agency in charge of reintroductions—to designate reintroduced animal populations as "nonessential" and "experimental."[15]

"Experimental" designation increases FWS's management flexibility.[16] "Nonessential" designation indicates that the loss of the experimental popula-

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[8] *See* 16 U.S.C. § 1531(c) (stating that it is policy of Congress that all federal agencies "conserve" endangered and threatened species); 16 U.S.C. 1532(3) (defining "conserve" to mean use of all means necessary to bring listed species beyond point where coverage by ESA is necessary).

[9] *See* Recovery Plan, *supra* note 7.

[10] 16 U.S.C. § 1531(c).

[11] *See* 16 U.S.C. § 1532(5) (defining "critical habitat" to include areas not currently occupied by listed species); 16 U.S.C. 1532(3) (defining "conserve" to include habitat acquisition, live trapping and transplantation).

[12] *See generally* Wolok, *supra* note 1 (noting controversy over wolf reintroduction, but none for whooping crane).

[13] *See* recovery plan, *supra* note 7, at 1752.

[14] 16 U.S.C. § 1539(j).

[15] *Id.*

[16] 16 U.S.C. § 1539 (j)(2)(A) (allowing Secretary of Interior to authorize release of "experimental populations" of endangered species outside of their current range, if such release will further conservation of species).

tion will not threaten the continued existence of the species.[17] When taken in combination, these designations effectively "downlist" relocated animals and their offspring from full endangered species status to "proposed for listing" status.[18] The FWS can then promulgate rules tailored to the needs of the particular reintroduction plan. Section 10(j) thus provides management flexibility not otherwise permitted under full endangered species protection.

Most of this added flexibility in rule making is applied to circumventing section 9 of the ESA and its prohibitions against "taking" endangered species.[19] The ESA defines "take" as actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect..." endangered species.[20] Under section 9 "take" is a broad concept, covering everything from intentionally shooting animals to unintentionally affecting animal behavior by modifying habitat.[21] Persons caught violating section 9 face stiff civil and criminal penalties.[22]

II. PROBLEMS WITH WOLF REINTRODUCTION

Mexican wolves *(Canis lupus baileyi)* are a true subspecies of the gray wolf *(Canis lupus)*.[23] The Mexican wolf is smaller than the gray wolf, weighing 50 to 90 pounds compared to the 80 to 130 pound gray wolf.[24] Mexican wolves are thought to have once numbered in the thousands in Mexico and the American Southwest prior to westward American expansion.[25] However, partly due to its reputation as a livestock killer, the Mexican wolf became the target of eradication efforts subsidized by federal and state governments.[26] As a result, the Mexican wolf is now among the rarest of wolves, with only 148 wolves living in captivity.[27]

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[17] 16 U.S.C. § 1539(j)(2)(B).
[18] 16 U.S.C. § 1539(j)(2)(C)(i).
[19] 16 U.S.C. § 1538(a)(1)(B).
[20] 16 U.S.C. § 1538(a)(1)(D).
[21] *See, e.g.*, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).
[22] *See* 16 U.S.C. § 1540.
[23] *See* Recovery Plan, *supra* note 7, at 1752.
[24] *Id.*
[25] *Id.*
[26] *Id.* Other reasons for wolf eradication included commercial hunting and trapping. Wolves were killed under the theory that elimination of predators would enhance wild game populations and prevent attacks on humans. *Id.*
[27] *Id.* at 1753.

Wolf reintroduction is problematic primarily because wolf predation threatens livestock.[28] Mexican wolves have one of the worst reputations as livestock killers.[29] As one commentator notes, Mexican wolves "sometimes make dreadful havoc among the cattle, frequently killing and devouring even mules and horses."[30] Despite the Mexican wolf recovery plan's extensive control measures, the FWS still projects up to thirty-four head of cattle will be lost each year to Mexican wolf depredation.[31]

Containment of experimental wolf populations may also prove to be difficult. Because wolves travel great distances, it is difficult to contain them to public lands—where their impact on private landowners can be minimized.[32] In one instance, wolves released in Denali National Park dispersed up to 250 miles beyond the park's boundaries.[33]

Like the well-publicized Yellowstone wolf reintroduction, the Mexican wolf recovery plan has encountered significant opposition.[34] State, tribal and private parties opposed the Mexican wolf recovery plan, fearing that the ESA might prevent them from protecting their livestock from the reintroduced wolves.[35] State Fish and Game departments voiced concern over potential impacts on game populations.[36] Some local counties even went so far as passing ordinances forbidding wolf reintroduction.[37]

Paradoxically, even some environmentalists oppose wolf reintroduction. In one lawsuit—brought in part by the Audubon Society—a federal district court

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[28] *See* Brian N. Beisher, Comment, *Are ranchers legitimately trying to save their hides or are they just crying wolf—what issues must be resolved before wolf reintroduction to Yellowstone National Park proceeds?* 29 LAND & WATER L. REV. 417 (1993).

[29] *See* Recovery Plan, *supra* note 7, at 1752.

[30] Reintroduction of the Mexican Wolf within its Historic Range in the Southwestern United States, Final Environmental Impact Statement, 1-5 (Nov. 1996) (herinafter "Mexican wolf FEIS").

[31] *Id.* at 4-4.

[32] *See* Recovery Plan, *supra* note 7, at 1754.

[33] L. David Mech, *Denali Park Wolf Studies: Implications for Yellowstone*, 56th Trans N.A. Wildl. & Nat. Res. Conf., 1991, at 87.

[34] *See* Recovery Plan, *supra* note 7, at 1755 (stating that management flexibility offered by section 10(j)'s experimental population designation is essential to gaining local support for Mexican wolf reintroduction); Beisher, *supra* note 28, at 417 (noting rancher opposition to Yellowstone wolf reintroduction).

[35] *See* Mexican wolf FEIS, *supra* note 30, at 5-48 (stating the Mescalero Apache Tribe's opposition to Mexican wolf reintroduction); *Id.* at 5-44 (stating the New Mexico Department of Fish and Game's opposition to Mexican wolf reintroduction).

[36] *See* Mexican wolf FEIS, *supra* note 30, at 5-44.

[37] *See* Recovery Plan, *supra* note 7, at 1762. FWS invoked the Supremacy Clause of the U.S. Constitution to preempt county ordinances which conflicted with the federal reintroduction plan. *Id.*

recently invalidated the Yellowstone/Central Idaho gray wolf reintroduction program.[38] The Court ruled that the program violated section 10(j)(1), which requires that experimental populations be kept separate from naturally occurring populations of endangered species.[39] In particular, naturally occurring gray wolves had been observed in the Yellowstone/Central Idaho plan's geographical area.[40]

Fortunately, this type of complication should not affect the Mexican wolf recovery program: no naturally occurring populations of Mexican wolves exist in the wild.[41]

III. SECTION 10(J) APPLIED TO THE MEXICAN WOLF RECOVERY PLAN

On April 3, 1997, the Department of the Interior issued the Mexican wolf recovery plan, reintroducing Mexican wolves into Arizona and New Mexico.[42] Under the recovery plan, the FWS selects captive wolves and releases them into a 5000 square mile area in the Apache and Gila National Forests.[43] The goal of the plan is to establish 100 wolves in the wild by the year 2005.[44]

To secure local cooperation in restoring Mexican wolves to the wild, the FWS promulgated experimental population rules designed to mitigate adverse effects of the recovery plan.[45] The recovery plan relaxes section 9 take restrictions by allowing private parties to harass, and even kill wolves under certain conditions.[46] For instance, the recovery plan's rules allow people to scare away wolves found within 500 yards of livestock, people and buildings.[47] To scare the wolves away, people may approach within twenty feet to fire guns or throw things in the proximity but not in the direction of wolves.[48] In addition, the plan allows livestock owners to kill wolves caught in the act of attacking livestock, provided the killing is reported to the FWS immediately.[49] The plan also states

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[38] *See* Wyoming Farm Bureau Fed'n v. Babbitt, 987 F. Supp. 1349 (D. Wyo. 1997) (naming Audubon Society as co-plaintiff).
[39] 16 U.S.C. § 1539(j)(1).
[40] Wyoming Farm Bureau Fed'n, 987 F. Supp. at 1375.
[41] *See* Recovery Plan, *supra* note 7, at 1763.
[42] *See id.* at 1753.
[43] *Id.*
[44] *Id.*
[45] *See id.* at 1754.
[46] *See id.* at 1763.
[47] *Id.*
[48] *Id.*
[49] *Id.*

that "unavoidable" or "unintentional" takings will not be considered a violation of the law.[50]

However, according to a recent Supreme Court ruling, direct force against endangered species—such as shooting—is not the only way to run afoul of section 9's take prohibitions.[51] Landowners might still be liable for indirectly taking endangered species by altering private land where the animals live. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court invalidated regulations allowing logging where the falling trees could harm endangered spotted owls.[52] Thus, section 9 may prohibit private land owners from using their land in ways that adversely affect endangered species.[53]

Notwithstanding the Court's ruling in *Sweet Home*, the Mexican wolf recovery plan invokes section 10(j)'s "experimental population" status in order to allow habitat modification on private and tribal lands.[54] According to the FWS, the recovery plan's easing of take restrictions provides beneficial flexibility. Others feel that the recovery plan doesn't adequately protect reintroduced wolves from harm by humans.[55]

IV. Can Relaxing Legal Protections Actually Promote Conservation?

Critics of section 10(j)'s downlisting process argue that it erodes legal protection for endangered species, and that it violates the underlying conservation mandate of the ESA.[56] As a practical matter, however, the FWS feels that section 10(j)'s flexible management provisions are essential to securing local cooperation necessary for the recovery plan's success.[57] This management flexibility helps prevent intentional, illegal wolf killings that would otherwise hinder wolf recovery efforts.[58] Thus, relaxing strict endangered species protections in this manner actually promotes conservation goals in the case of wolf reintroduction.[59]

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[50] *Id.*

[51] Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

[52] *Id.*

[53] *Id.*

[54] *See* Recovery Plan, *supra* note 7, at 1753.

[55] *See generally id.* at 1758-60 (presenting public criticism regarding the recovery plan's rules allowing take); *also see* Mexican wolf FEIS, *supra* note 30, at 5-86.

[56] *See id.*

[57] *See* Recovery Plan, *supra* note 7, at 1755.

[58] *Id.*

[59] *Id.*

The FWS is convinced that illegal killings will harm recovery efforts unless it crafts management practices that protect local interests from the adverse effects of reintroduction.[60] Furthermore, even if political and legal opposition to reintroduction is surmounted, the ESA's severe penalties for the taking of endangered species tend to create a backlash in which local landowners kill endangered species and simply keep silent.[61] This phenomenon is so common that it even has a nickname: "shoot, shovel and shut-up."[62]

Increased enforcement efforts will not substitute for the local support which section 10(j) encourages. For example, despite the disappearance of several wolves during the course of the Yellowstone/Central Idaho reintroduction program, only one person was ever convicted for illegally shooting a wolf.[63] The West is simply too vast to effectively patrol in order to prevent such illegal killings.[64] If local residents view reintroduced wolves as destructive agents of a distant and unresponsive federal government, foreclosing management options will ultimately be counterproductive to wolf recovery.

It would be preferring symbolism over substance to insist that released Mexican wolves retain full endangered species status if the practical result of such demands harms reintroduction efforts. Inflexible management practices result in illegal killings that, in turn, threaten the success of the entire reintroduction program. Because conservation is politics as well as biology,[65] section 10(j) is a necessary and useful tool for predator reintroduction efforts. As disagreeable as it may seem to allow local residents to intentionally harm, and even kill endangered wolves under limited, enumerated circumstances, the alternative—loss of local support and clandestine killings—could unravel Mexican wolf reintroduction efforts altogether.

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[60] *Id.* at 1754.

[61] Robert Nelson, *Shoot, Shovel and Shut-up*, FORBES, Dec. 4, 1995, at 82.

[62] *Id.*

[63] Mexican wolf FEIS, *supra* note 30, at j-1.

[64] The inability to effectively enforce section 9's take prohibitions is the underlying premise for FWS' conclusion that providing full protection to experimental populations of Mexican wolves will result in illegal killings which, in turn, would harm recovery efforts.

[65] *See generally* Recovery Plan, *supra* note 7, at 1753. Even though the Mexican wolf recovery plan is generally based on FWS studies of Mexican wolf biology, the rule-making process included public comments from approximately 18,000 people.