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UNITED STATES DISTRICT COURT

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DISTRICT OF ARIZONA

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Defenders of Wildlife, et al,

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CV 08-280 TUC DCB

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Plaintiffs,

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v.

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United States Fish and Wildlife et al.,

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Defendants.

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WildEarth Guardians, et al.,

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CV 08-820 PHX DCB

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Plaintiffs,

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v.

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ORDER

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United States Fish and Wildlife et al.,

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Defendants.

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The Plaintiff WildEarth Guardians (Guardians) filed a Motion for Summary Judgment, which is fully briefed. On May 23, 2011, the Court heard oral argument and took the motion under advisement.

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The Court finds that USFS has complied with ESA, section 7(a)(1), requirements to act, in consultation with and with the assistance of USFWS, to utilize its authorities in furtherance of the ESA by carrying out programs for the conservation of the Mexican

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1 gray wolf. The Court denies Guardians’ Motion for Summary Judgment and enters
2 Judgment for USFS.

3 **Overview: Procedural Posture of the Case**

4 In 1982, the United States Fish and Wildlife Service (USFWS) issued the
5 Mexican Wolf Recovery Plan. In 1998 USFWS issued a final rule, pursuant to section
6 10(j) of the Endangered Species Act (ESA), to reintroduce an experimental population of
7 Mexican wolves into the Blue Range Wolf Recovery Area (BRWRA). USFWS oversaw
8 the recovery plan and reintroduction program for the species without complaint until 2003
9 when it entered into a Memorandum of Understanding (MOU) with a number of federal,
10 state, local, and tribal entities, including Defendant USFS, to create the Adaptive
11 Management Oversight Committee (AMOC). On April 30, 2005, the AMOC issued a
12 document entitled the Mexican Wolf Blue Range Reintroduction Project Adaptive
13 Management Oversight Committee Standard Operating Procedure 13 (SOP 13), which
14 was challenged by Plaintiffs, Guardians and Defenders of Wildlife (Defenders), in these
15 consolidated cases. In addition to suing USFWS, Guardians also sued the USFS for
16 failing to confer with USFWS to carry out a program to conserve the Mexican gray wolf.

17 On December 3, 2009, a Consent Decree was entered between Defenders and the
18 USFWS. The USFWS filed a Motion to Dismiss Guardians’ claim against it, which the
19 Court granted over Guardians’ objection. The Court found the Consent Decree “‘in short,
20 . . . provides all of the relief that Guardians seek – the Service is no longer making
21 decisions pursuant to SOP 13.’” (Order (Doc. 78) at 3 (quoting USFWS Motion to
22 Dismiss (Doc. 71) at 5)). The AMOC agencies, including USFS, are no longer using
23 SOP 13. *Id.*

24 The sole remaining claim in the case is between Guardians and the USFS.
25 According to Guardians, there are two issues. First, Guardians ask the Court to decide
26 what ESA, section 7(a)(1) requires of the USFS: 1) whether section 7(a)(1) requires the
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1 USFS to develop and implement its own agency-specific conservation program for the
2 wolf, and if not– then whether section 7(a)(1) requires the USFS to execute USFWS’s
3 wolf programs in a manner that significantly furthers the wolf’s conservation. Either
4 way, USFS is in violation of ESA. (Guardians Reply (Doc. 82) at 1.)

5 Specifically, Guardians complain that the Mexican gray wolf is a critically
6 endangered subspecies of wolf driven to the edge of extinction because the federal
7 government acts on behalf of domestic livestock operators rather than the wolf. Since
8 1998, when USFWS reintroduced the wolf by releasing 98 wolves into the BRWRA,
9 government agencies, including USFS, have paradoxically removed 70 wolves for
10 preying on livestock and reduced wolf population numbers to 42, with only two breeding
11 pairs in the wild, which is below USFWS’s original projections for recovery. (Guardians
12 MSJ (Doc. 79-2) at 2.)

13 “Despite the fact that conflicts with livestock permitted by the Forest Service to
14 graze the BRWRA are the primary factor driving wolf removals, the Forest Service has
15 not fundamentally altered its role in obstructing wolf recovery and has never consulted
16 with USFWS to develop and implement its own conservation program for the wolf or
17 otherwise utilize its authorities in furtherance of wolf conservation.” *Id.*

18 Guardians argue that it is not enough that USFWS and the agencies participating
19 in AMOC, including USFS, no longer make decisions pursuant to SOP 13. The USFS is
20 the primary land manager of the BRWRA and must be compelled to examine how
21 conflicts with its livestock permitting program are derailing the wolf’s recovery, then
22 formulate and implement a plan¹ for reducing those consequences. Guardians charge that

24 ¹Guardians use the terms plan and program interchangeably, but ESA section 7(a)(1)
25 requires agencies like USFS to utilize their authorities in furtherance of the ESA by carrying
26 out programs for the conservation of endangered and threatened species. 16 U.S.C.A. §
27 1536(a)(1) (West 2011). Whereas, USFWS is charged with developing recovery plans for
28 endangered and threatened species, 16 U.S.C.A. § 1533(f) (West 2011).

1 “the Forest Service’s failure to consult with USFWS in order to develop and implement a
2 conservation program for the Mexican gray wolf is a direct violation of ESA 7(a)(1) and
3 APA 706(1).” *Id.*

4 Even if not required to adopt its own agency-specific conservation program for
5 the wolf, USFS’s failure to utilize its authorities in furtherance of Mexican Wolf recovery
6 is a direct violation of its nondiscretionary duty to conserve the species “set forth at ESA
7 § 7(a)(1), and constitutes agency action unlawfully withheld or unreasonably delayed
8 within the meaning of the APA § 706(1).” *Id.* at 1.

9 STANDARD OF REVIEW

10 “The APA does not create subject matter jurisdiction, but it does provide a
11 generic cause of action for people aggrieved by agency action,” (Order (Doc. 30) at 2
12 (citing *Califano v. Sanders*, 430 U.S. 99, 107 (1977)), where no other statute provides a
13 private right of action, *id.* at 35 (citing *Coos County Board of County Com’rs v.*
14 *Kemphorne*, 531 F.3d 792, 810 (9th Cir. 2008)), *see also* 5 U.S.C.A. § 702 (West 2011)
15 (providing cause of action for “[a] person suffering legal wrong because of agency action,
16 or adversely affected or aggrieved by agency action within the meaning of a relevant
17 statute”). “The reviewing court shall – [] compel agency action unlawfully withheld or
18 unreasonably delayed.” 5 U.S.C.A. § 706(1) (West 2011). Guardians do not allege a
19 cause of action under § 706(2), which provides: a reviewing court “shall – hold unlawful
20 and set aside agency action, findings, and conclusions found to be – arbitrary, capricious,
21 an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.A. §
22 706(2)(A)-(C) (West 2011).

23 Guardians ask the Court, pursuant to § 706(1), to compel USFS to consult with
24 USFWS to develop a USFS-agency specific program for the conservation of the Mexican
25 gray wolf and to carry out a program for the conservation of the Mexican gray wolf. Both
26 duties are nondiscretionary, but involve some discretion on the part of the agency. In
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1 such circumstances, courts have found the claim is properly brought under the APA,
2 which imposes on agencies a general duty of timeliness in carrying out a required action.
3 *See e.g., In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. 2004)
4 (finding obligation to conclude a matter within a reasonable time under the APA), *but see*
5 *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (finding actions against regulated agencies
6 proceed under ESA’s citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), but subsection A
7 conflicts with subsection C, therefore, failure to act claims against the Secretary are
8 limited to being brought pursuant to the APA); *Sierra Club v. Glickman*, 156 F.3d 606,
9 616-617 (5th Cir. 1998) (citizen suit may be brought against regulated government agency
10 to enforce affirmative requirements of section 7(a)(1)), *Rio Grande Silvery Minnow v.*
11 *Bureau of Reclamation*, 601 F.3d 1096, 1106 (10th Cir. 2010) (finding a plaintiff may
12 utilize ESA’s citizen suit provision, 16 U.S.C. § 1540(a)(1)(A), to challenge agency
13 failure to undertake consultation in the first instance).²

14 “ESA does not contain a standard of review so, generally, the courts apply the
15 standard of review under the Administrative Procedures Act (APA),” (Order (Doc. 58) at
16 3 (denying Motion to Compel)), which is a highly deferential standard of review, *Norton*
17 *v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 64, 66 (2004). “Plaintiffs
18 must show that the ‘agency failed to take a *discrete* agency action that it is *required to*
19 *take.*” *Id.* at 55, 62-64. Here, Guardians allege USFS failed to consult, a procedural
20 requirement under section 7(a)(1), and substantively violated the section by failing to
21 conserve the Mexican gray wolf.

24 ²Under ESA’s citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), the Court may enjoin
25 “any person, including any governmental instrumentality or agency . . . , who is alleged to
26 be in violation of any provision of [ESA].” *See* (Guardians’ Motion to Compel (Doc. 42) at
27 4 (describing Second Claim of Relief against USFS as brought pursuant to 16 U.S.C. §
1540(a)(1)(A)).

1 Guardians suggest a two prong approach: “[F]irst, whether the Forest Service has
2 undertaken a conservation program for the wolf, and second whether the Forest Service
3 has consulted with USFWS regarding such a program.” (Guardians MSJ (Doc. 79-2) at
4 12.) This approach originated with the Court in the context of Guardians’ Motion to
5 Compel discovery beyond the administrative record when USFS argued it had acted in
6 compliance with section 7(a)(1), both procedurally and substantively, because:
7 “[C]onsultation with USFWS has been continuous to carry out two ‘primary
8 conservation programs’ for the Mexican gray wolf: 1) the Mexican wolf recovery plan
9 and 2) the Mexican wolf ESA § 10(j) reintroduction rule. . . .’ Plaintiff argue[d] that both
10 of these are USFWS programs. The USFS submit[ed] that the ESA ‘does *not* require
11 federal agencies to independently develop programs to conserve endangered and
12 threatened species. . . . [Instead], [t]he Forest Service and other federal agencies routinely
13 meet their section 7(a)(1) obligations by carrying out programs developed by USFWS in
14 its expert capacity as a wildlife management agency.’” (Order (Doc. 78) at 4 (citing
15 (Notice of filing Administrative Record (Notice AR) (Doc. 65), Exhibit: Cover letter at 1-
16 2)).

17 The Court reasoned, if ESA section 7(a)(1) requires USFS to develop its own
18 agency-specific conservation program, then its adoption of USFWS’s programs will be
19 insufficient as a matter of law, and the Court will compel USFS to immediately confer
20 and consult with USFWS to develop and implement a USFS agency-specific conservation
21 program for the Mexican gray wolf. *Id.* at 5.

22 Guardians’ Motion for Summary Judgment and USFS’s Response continue in
23 this same vein. USFS argues that section 7(a)(1) does not require USFS to develop its
24 own, separate, independent, wolf conservation program. (USFS Response (Doc. 80) at
25 8-12.) “Should the Court decline to adopt an agency-specific reading of § 7(a)(1) and
26 instead decide that the Forest Service’s support of USFWS’s conservation programs are
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1 enough to facially satisfy the ESA, [then] Guardians argue that the Forest Service is *still*
2 in violation of § 7(a)(1), as the Forest Service’s “support” has not actually furthered the
3 wolf’s conservation.” (Guardians Reply (Doc. 82) at 7) (emphasis in original).

4 Under the APA, section 706(1), the Court must determine whether there has been
5 more than an insignificant undertaking by an agency to conserve an endangered species,
6 amounting to total inaction. *Id.* (citing *Pyramid Lake Paiute Tribe of Indians v. United*
7 *States*, 898 F.2d 1410, 1418-19 (9th Cir. 1990)).

8 **ESA: SECTION 7(a)(1)³**

9 ESA charges: “The Secretary [USFWS]⁴ shall review other programs
10 administered by [USFWS] and utilize such programs in furtherance of
11 the purposes of [ESA]. *All Federal agencies shall, in consultation with*
12 *and with the assistance of the [USFWS], utilize their authorities in*
13 *furtherance of the purposes of [ESA] by carrying out programs for the*
14 *conservation of endangered species*

15 16 U.S.C.A. § 1536(a)(1) (West 2011) (emphasis added). The USFS is a federal action
16 agency governed by the second clause.

17 An endangered species is “any species which is in danger of extinction
18 throughout all or a significant portion of its range.” 16 U.S.C.A. § 1532(6) (West 2011).
19 The ESA defines conservation as, “to use and the use of all methods and procedures
20 which are necessary to bring an endangered species or threatened species to the point at

21 ³Under section 7(a)(2), an agency must, in consultation with USFWS, ensure that “any
22 action authorized, funded, or carried out by such agency” is not likely to jeopardize the
23 continued existence of any endangered or threatened species or result in the destruction or
24 adverse modification of the designated critical habitat or species. Consultation pursuant to
25 subsection 2 is conducted pursuant to formal and informal procedures, 16 U.S.C. 1536(b),
26 which do not apply to consultation conducted under subsection 1. (Order (Doc. 58) at 7-8.)
27 It is undisputed that USFS has engaged in consultation with USFWS, pursuant to section
28 7(a)(2) in respect to its grazing permits.

⁴The Secretary of Interior delegates responsibility for administering the ESA to the
USFWS.

1 which the measures pursuant to this chapter are no longer necessary.” 16 U.S.C.A. §
2 1532(3) (West 2011).

3 In this case, the USFWS listed the Mexican wolf in the BRWRA as a
4 nonessential experimental population, subject to release under section 10(j) of the ESA.

5 Section 10(j) was added to ESA in 1982 to address federal agencies’
6 frustration over political opposition to reintroduction efforts being taken
7 under ESA provisions that protect a species once it is listed as
8 endangered or threatened. Specifically, ESA requires the Secretary of
9 the Department of Interior to develop and implement recovery plans for
10 the conservation and survival of listed species unless he finds that such a
11 plan will not promote the conservation of a species. 16 U.S.C. § 1533(f).
12 ESA authorizes the Secretary to “live” trap and transplant (reintroduce)
13 rare species, if necessary, to bring an endangered or threatened species to
14 the point at which protection under ESA is no longer necessary. 16
15 U.S.C. § 1536(a)(1); 16 U.S.C. § 1532(3). Section 10(j) mitigated
16 perceived conflicts with human activity from reintroduction of
17 endangered or threatened species by clarifying and limiting ESA
18 responsibilities incumbent with experimental host experimental
19 populations like the Mexican wolf. *See Wyoming Farm Bureau*
20 *Federation et al., v. Babbitt*, 199 F.3d1224, 1231-1233 (discussing wolf
21 reintroduction program, ESA, and 10(j) provisions).

22 Under section 10(j) an “experimental” population is any population
23 authorized by the Secretary for release as an endangered species or a
24 threatened species outside the current range of that species, 16 U.S.C. §
25 1539(j)(2)(A), . . . “Before authorizing release of any [such] population . .
26 . . , the Secretary shall by regulation identify the population and
27 determine, on the basis of the best available information, whether or not
28 such population is essential to the continued existence of an endangered
species or a threatened species.” 16 U.S.C. § 1539(j)(B). *An*
experimental population shall be treated as a threatened species, 16
U.S.C. § 1539(j)(C), and if not essential, the species shall be treated as a
species proposed to be listed. By statute critical habitat need not be
designated, 16 U.S.C. § 1539(j)(C)(ii), and “[b]y regulation, the
Secretary can identify experimental populations, determine whether such
populations are essential or nonessential, and, consistent with that
determination, provide control mechanisms (*i.e.*, controlled takings)
where the Act would not otherwise permit the exercise of such control
measures against listed species.” *Wyoming Farm Bureau Federation*, 199
F.3d at 1233.

(Order (Doc. 30) at 5-6) (emphasis added).

Congress created a statutory scheme for the Secretary, in this case USFWS, to
promulgate special rules to identify each experimental population and provide a vehicle
for the development of special regulations for each experimental population that will

1 reverse necessarily follows if the Court finds that the duty to conserve can be satisfied by
2 carrying out the conservation program developed by the USFWS, then USFS has
3 procedurally satisfied the duty to consult.

4 The administrative record supports this conclusion. The USFS worked with
5 USFWS to reintroduce the Mexican wolf to carry out the Mexican Wolf Recovery Plan.
6 The objectives of the Wolf Recovery Plan were to maintain a captive population and to
7 re-establish a viable, self-sustaining wild population of Mexican wolves. (USFWS First
8 Supplemental Administrative Record (USFWS 1st Supp. AR), Ex. 16: Five Year Review
9 at TC-2.)

10 From the beginning, USFS participated in the reintroduction process, such as
11 locating release pens, public information, and area management after reintroduction.
12 (USFS AR, Exs. 1, 13, 33, 38, 39, 85, 95, 101, 102, 105, 148, 167, 168, 354.) From the
13 inception of the reintroduction program in 1982 through 2008, USFS was an active
14 participant by putting boots on the ground for the reintroduction of the wolf, *id.*, exs. 34,
15 59, and cooperating in the interagency management of the wolf reintroduction program,
16 *id.*, exs. 63, 160, and at all times served alongside USFWS as a member of the various
17 interagency management teams designed to further the conservation and recovery of the
18 Mexican wolf, *id.*, exs. 51, 53, 68, 75, 160, 171, 174, 272, 336, 378.

19 As summarized by Guardians at oral argument, USFS's involvement related to
20 land management for release pen locations and wolf releases, and USFS's membership
21 and participation in the interagency wolf management organization, AMOC.

22 Guardians admit that there is no Ninth Circuit precedent expressly supporting its
23 interpretation of ESA section 7(a)(1), as requiring an action agency, like USFS, to
24 independently develop and implement its own agency-specific conservation program, but
25 according to Guardians, "the Fifth Circuit has squarely held that the specific conservation
26 obligations of ESA § 7(a)(1) are not only species-specific, but agency-specific as well."
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1 (Guardians MSJ (Doc. 79-2) at 6 (citing *Sierra Club v. Glickman*, 156 F.3d 606, 618 (5th
2 Cir. 1998) (finding ESA § 7(a)(1) required USDA to develop its own conservation
3 program for threatened and endangered species dependant on the Edwards aquifer)).
4 “The Ninth Circuit Court of Appeals assumed without comment in *Pyramid Lake* that
5 Section 7(a)(1) requires non-Interior agencies to develop their own conservation
6 programs.” *Id.* at 7 (citing *Pyramid Lake Tribe v. United States Department of the Navy*,
7 898 F.2d 1410, 1416 (9th Cir. 1990).

8 Guardians overstate the law. In *Pyramid*, the Pyramid Lake Paiute Tribe (the
9 Tribe) challenged the Navy’s practice of outleasing acreage with water rights to local
10 farmers because it depleted the water in Pyramid Lake, which was primary habitat for
11 Cui-ui fish, an endangered species. In *Pyramid*, the USFWS had developed a Cui-ui
12 Restoration Program aimed at increasing the water level of the lake. *Pyramid*, 898 F.2d
13 at 1413

14 The Tribe argued the Navy violated section 7(a)(2) because it failed to ensure
15 that its actions were not likely to jeopardize the continued existence of the listed species.
16 The court found that the Navy met its procedural obligation to consult with USFWS
17 regarding the outlease program and could rely on the USFWS biological opinion (BO)
18 that the outlease program would not jeopardize the Cui-ui because the Tribe failed to
19 show the BO was arbitrary or capricious. *Id.* at 1415

20 The court also considered the Navy’s obligations under section 7(a)(1). The
21 court rejected the Navy’s argument that section 7(a)(1) only required it to “*develop*
22 programs that will operate to conserve listed species, . . . in a manner consistent with the
23 accomplishment of the agencies’ primary goals.” *Id.* at 1417. It rejected the Tribe’s
24 argument that an agency must adopt the least burdensome alternative because “it would
25 work to divest an agency of virtually all discretion in deciding how to fulfill its duty to
26 conserve,” *id.* at 1418, and further found that the alternative proposed by the Tribe was an

1 insignificant conservation measure, which in the context of ESA is “oxymoronic” to the
2 very definition of conservation, *id.* at 1419.

3 The court held that action agencies hold equal responsibility with USFWS to
4 utilize their authorities in furtherance of the ESA by carrying out programs for the
5 conservation of endangered species. *Id.* at 1417 n. 15. Discussing the seminal ESA case
6 *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (*TVA*), the court noted that *TVA* was
7 premised on section 7(a)(2), not 7(a)(1), and in *TVA* it was indisputable that the
8 challenged agency action would result in total destruction of the endangered species
9 habitat whereas the outlease program had been determined not likely to jeopardize the
10 Cui-*ui.* *Id.* at 1418. The court found the Navy’s outlease program did not substantively
11 violate ESA section 7’s conservation requirement.

12 The Fifth Circuit case, *Glickman*, involved an action against the United States
13 Department of Agriculture (USDA) for violating section 7(a)(1) of the ESA by failing to
14 consult with USFWS and failing to utilize its authorities to carry out programs for the
15 conservation of Edwards-aquifer-dependent species. In *Glickman*, the court rejected the
16 USDA’s argument that it had complied with the requirements of 7(a)(1) because
17 Edwards-aquifer dependant species had experienced incidental benefits from USDA
18 programs designed and carried out for other purposes. *Glickman*, 156 F.3d at 618. This
19 finding was necessary for standing: section 7(a)(1) provided redressibility because it was
20 designed to protect a threatened concrete interest, not just a generalized duty to confer
21 and develop programs for the benefit of endangered species. *Id.* at 615. “Congress
22 intended to impose an affirmative duty on each federal agency to conserve each of the
23 species listed pursuant to § 1533.” *Id.* at 616. The court refused to allow the USDA to
24 read out of existence ESA’s requirement that the agency have a substantive conservation
25 program for the species to be carried out in consultation with USFWS. The USDA did
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1 not dispute that it had never fulfilled any obligations under 7(a)(1) with respect to
2 Edwards-aquifer dependant species. *Id.* at 618.

3 Neither *Pyramid* nor *Glickman* support Guardians’ position that section 7(a)(1)
4 requires USFS to develop its own independent agency-specific conservation program for
5 the Mexican wolf. The Court finds that under *Pyramid* and *Glickman*, the USFS has
6 responsibility, equal to that of the USFWS, to use its authorities in furtherance of the
7 conservation of the Mexican gray wolf and has an affirmative duty to carry out a program
8 for the conservation of the Mexican gray wolf. In other words, USFS must carry out a
9 substantive conservation program for the Mexican gray wolf. This coincides with the
10 express language of the statute, which is clear and unambiguous. The statute requires
11 agencies, such as USFS, “in consultation with and with the assistance of the [USFWS], to
12 utilize their authorities in furtherance of the purposes of [ESA] by carrying out programs
13 for the conservation of endangered species and threatened species. . . .” 16 U.S.C.A. §
14 1536(a)(1) (West 2011).

15 In *Chevron*, the Supreme Court instructs the courts to conduct statutory review in
16 two steps: “First, always, is the question whether Congress has directly spoken to the
17 precise question at issue. If the intent of Congress is clear, that is the end of the matter;
18 for the court, as well as the agency, must give effect to the unambiguously expressed
19 intent of Congress. If, however, the court determines Congress has not directly spoken to
20 the precise question at issue, the court does not simply impose its own construction on the
21 statute, as would be necessary in the absence of an administrative interpretation. Rather, if
22 the statute is silent or ambiguous with respect to the specific issue, the question for the
23 court is whether the agency's answer is based on a permissible construction of the
24 statute.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,
25 842-43(1984).

1 Guardians argue that while the statute “at first blush” appears to be “a
2 generalized duty to confer and develop programs for the benefit of endangered species –”
3 (Reply at 5 (quoting *Glickman*, 156 F.3d at 615)), “. . . when the ESA is read as a whole,”
4 it is clear the statute requires an “agency-specific approach,” *id.* at 6. The Court does not
5 agree.

6 The Court, reading ESA as a whole, finds that section 10(j) provided for USFWS
7 to designate the Mexican gray wolf in the BRWRA as a nonessential experimental
8 population.⁶ The Court must consider that the purpose of section 10(j) was to mitigate
9 “perceived conflicts with human activity from reintroduction of endangered or threatened
10 species by clarifying and limiting ESA responsibilities incumbent with experimental
11 populations in the hope of encouraging private parties to host experimental populations
12 like the Mexican wolf.” (Order (Doc. 30) at 6 (citing *Wyoming Farm Bureau Federation*
13 *et al.*, v. *Babbitt*, 199 F.3d 1224, 1231-1233 (discussing wolf reintroduction program,
14 ESA, and 10(j) provisions)). The Mexican gray wolf in the BRWRA, designated as a
15 nonessential experimental population (ENE), is treated as a species proposed to be listed;
16 it is purposefully not afforded the same protections as otherwise listed endangered and
17 threatened species.⁷

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20 ⁶The gray wolf in the majority of the United States is listed as endangered and
21 threatened, except it is listed as experimental nonessential in the BRWRA and Wyoming.
22 50 C.F.R. § 17.11.

23 ⁷This distinguishes the Mexican gray wolf in the BRWRA from the programs and
24 protections afforded other species Guardians suggest as comparisons, such as the Canadian
25 lynx and the grizzly bear in Yellowstone National Forest. (Guardians’ Motion to Compel
26 (Doc. 63) at 7-10.) The lynx is designated “threatened.” 50 C.F.R. § 17.11. The grizzly bear
27 is listed as “threatened,” except in Idaho and Montana where it is designated experimental
28 nonessential. *Id.* However, treatment of experimental nonessential species as “proposed to
be listed” and the corresponding reduced protections do not apply to such species residing
within the National Park System. 50 C.F.R. 17.83(a).

1 Guardians agree that “this fact is a critical one in this case, which makes the
2 USFS’s compliance with ESA § 7(a)(1) all the more crucial. This is because the ENE
3 designation *eviscerates* the otherwise protective value of ESA § 7(a)(2) consultations by
4 turning what would be meaningful biological assessments or opinions into “not likely to
5 jeopardize” rubberstamps of the USFS’s grazing permits.” (Guardians Reply (Doc. 82) at
6 9 (citing MSJ (Doc. 79-1), SOF ¶ 14) (emphasis added). “Unlike ESA §§ 4(a)(3)(A)
7 (critical habitat designation), 7(a)(2) (interagency consultation), and 9(a)(1)(B) (take
8 prohibition), ESA § 7(a)(1) *is not affected* by the ENE designation. (citation omitted);
9 [r]ather, § 7(a)(1) stays intact with full force and effect, and should in this instance be
10 providing some conservation value for the wolf.” *Id.* n. 17; *see also* (Guardians MSJ
11 (Doc. 79-2) at 13.) The Court agrees, but considering ESA as a whole, the Court finds
12 that section 7(a)(1) cannot require an action agency to carry out programs for the
13 conservation of the Mexican wolf that would *eviscerate* the section 10(j) ENE listing.

14 Guardians’ position that USFS must develop its own Mexican gray wolf
15 conservation program and may not simply implement a program developed by USFWS
16 puts form over substance and is not supported by either *Pyramid* or *Glickman*, or the
17 statute, either section 7(a)(1) or ESA as a whole. The Court finds that Congress has
18 “directly spoken to the precise question at issue” here and requires agencies, like USFS,
19 “to carry out programs for the conservation of endangered species and threatened
20 species,” such as the Mexican gray wolf, and to do so “in consultation with and with
21 assistance from USFWS.” 16 U.S.C. § 1536(a)(1). Congress requires nothing more and
22 nothing less.

23 Even if the Court concluded that Congress had not answered the question
24 expressly in the statute and turned to the second step outlined in *Chevron*, the Court
25 would find that USFWS’s interpretation of ESA, section 7(a)(1), is a permissible one.
26 According to USFWS, “the Act does not mandate particular actions to be taken by
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1 Federal agencies to implement 7(a)(1).” 51 FR at 19934. USFWS recommends
2 particular actions, which the federal agencies are free to implement or not. The agency’s
3 interpretation of the ESA is entitled to deference. *Pyramid*, 898 F.2d at 1418, *Chevron*,
4 467 U.S. at 844. The USFWS’s interpretation of the statute makes sense because it would
5 be a waste of resources to require action agencies to “do over” conservation programs
6 developed by USFWS, the lead expert in the conservation of endangered and threatened
7 species. *Cf.*, *San Francisco Baykeeper v. U.S. Army Corps of Engineers*, 219 F.Supp.2d
8 1001, 1012 (N.D.Cal.,2002) (finding NEPA regulations requiring preparation of
9 Environmental Assessment (EA) allows for acceptable work done by permit applicant; it
10 need not be redone, but must be verified by the agency); *Seattle Audubon Soc. v. Lyons*,
11 871 F.Supp. 1291, 1318 (W.D.Wash.,1994) (same applies to agency requirement to
12 prepare Environmental Impact Statement (EIS)); *Life of the Land v. Brinegar*, 485 F.2d
13 460, 467 (9th Cir. 1973) (same).

14 This does not mean USFS can simply “rubberstamp” a conservation program
15 developed by USFWS. The USFS is independently responsible for the sufficiency of the
16 USFWS programs it adopts as its own. *See e.g.*, *Florida Key Deer v. Paulison*, 522 F.3d
17 1133, 1144 (11th Cir. 2008) (applying section 7 to Federal Emergency Management
18 Agency (FEMA) flood insurance program). The Eleventh Circuit found section 7 placed
19 an affirmative conservation duty on FEMA to conserve the endangered Florida Key deer.
20 *Id.* at 1138. Once FEMA consulted with USFWS regarding the impact of its flood
21 insurance program on the deer, the USFWS recommended “reasonable and prudent
22 alternatives” (RPAs), which included USFWS review of new building permits being
23 issued in Monroe County and “conservation recommendations” for an incentive program
24 to reduce premiums in counties that adopted comprehensive, county-wide habitat
25 conservation plans. FEMA did both. *Id.* at 1139-40. The former satisfied section 7(a)(2)

1 and the latter addressed 7(a)(1). Environmentalists challenged both measures. The
2 Eleventh Circuit followed the reasoning of the Ninth Circuit as explained in *Pyramid*.

3 As to section 7(a)(2), the court held that if USFWS’s proposed RPA
4 recommendations were arbitrary and capricious then reliance on them by the action
5 agency is “like-wise” arbitrary and capricious. *Id.* at 1145. The analysis required by
6 *Pyramid* is whether a challenging party can point to “new” information that USFWS did
7 not take into account– which challenges the USFWS’s recommendations. *Id.* at 1144
8 (citing *Pyramid*, 898 F.2d at 1415). As to section 7(a)(1), FEMA complied with
9 USFWS’s conservation recommendation for an incentive program, but after nine years it
10 had failed to produce even one county-wide habitat conservation plan. The incentive
11 program was undisputably a complete failure. *Id.* at 1145. The court found that “the
12 Ninth Circuit has given substance to the baseline requirement of section 7(a)(1) that
13 federal agencies actually carry out conservation programs.” *Id.* at 1146. In other words,
14 the Ninth Circuit has set a floor for substantively evaluating section 7(a)(1), which is:
15 “total inaction is not allowed.” *Id.*

16 At a minimum, agencies “must in fact carry out a program to conserve, and not
17 an ‘insignificant’ measure that does not, or is not reasonably likely to, conserve
18 endangered or threatened species.” *Id.* The court had “no trouble concluding that
19 FEMA’s program to conserve amounted to the total inaction that other courts have
20 condemned.” *Id.* at 1147. The program [] had *no* effect whatsoever despite its long
21 tenure, and it [was] therefore not a program to conserve.” *Id.* (emphasis in original).

22 Therefore, even though the Court has rejected Guardians’ argument that section
23 7(a)(1) requires agency-specific development of a conservation program, it must address
24 Guardians’ argument “that the USFS is *still* in violation of section 7(a)(1), as the Forest
25 Service’s ‘support’ has not actually furthered the wolf’s conservation.” (Guardians’
26 Reply at 7) (emphasis in original).

1 **2. Whether the USFS’s Support of USFWS’s Mexican Wolf Program has**
2 **Hindered the Conservation of the Subspecies.**

3 Under ESA, action agencies have substantial discretion in determining how best
4 to fulfill their section 7(a)(1) obligations. ““While compliance is not committed to agency
5 discretion, it is clearly beyond [a] court’s authority to order that any specific conservation
6 measure be undertaken.”” (USFS Response at 6 (quoting *DOW v. United States Dep’t of*
7 *Interior*, 354 F. Supp. 2d 1156, 1174 (Or. 2005)), *see also*, *Pyramid Lake*, 898 F.2d at
8 1418, *DOW v. Babbitt*, 130 F. Supp. 2d 121, 135 (D.C. 2001); *Coalition for Sustainable*
9 *Resources v. USFS*, 48 F. Supp. 2d 1303, 1315-16 (Wyo. 1999), *aff’d in part, vacated in*
10 *part on other grounds*, 259 F.3d 1244 (10th Cir. 2001), *Hawksbill Sea Turtle v. FEMA*, 11
11 F. Supp. 2d 529, 542-43 (V.I. 1998), *remanded on other grounds*, 215 F.3d 1314 (3rd Cir.
12 2000); *Strahan v. Linnon*, 967 F. Supp. 581, 596 (Mass. 1997), *aff’d* 187 F. 3d 623 (1st
13 Cir. 1998), *Center for Marine Conservation v. Brown*, 917 F. Supp. 1128, 1150 (Tex.
14 1996), *DOW v. EPA*, 688 F. Supp. 1334, 1352 (Minn. 1988), *aff’d in part rev’d in part on*
15 *other grounds*, 882 F.2d 1294 (8th Cir. 1989).

16 In this failure to act case, the question is whether the actions undertaken by the
17 USFS are so insignificant as to qualify as total inaction. Where there is total inaction, the
18 courts have “no trouble” finding a violation of section 7(a)(1) because the agency has
19 “impermissibly ‘read out of existence’ [its] substantive requirement to use the agency’s
20 authorities by carrying out programs for the conservation of endangered and threatened
21 species.” *DOW v. Flowers*, 2003 WL 22143271 at *2 (Arizona, August 18, 2003).

22 Guardians allege that the USFS had “for more than a century permitted domestic
23 livestock grazing on federal lands, [which] was instrumental in driving the Mexican wolf
24 to extinction in the wild.” (Guardians MSJ (Doc. 79-1), SOF ¶ 2.) The USFWS began
25 active conservation of the Mexican gray wolf when it trapped the last known remaining
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1 wild wolves (four males and one pregnant female). *Id.* ¶ 5. It issued the Wolf Recovery
2 Plan in 1982. *Id.* ¶ 6.

3 “FWS believed it needed the management flexibility of ESA § 10(j) in order to
4 successfully recover the Mexican wolf to the Apache and Gila National Forests
5 [BRWRA], where domestic livestock are ‘omnipresent’ by virtue of the Forest Service’s
6 ongoing grazing program.” *Id.* ¶ 10 (citing AR, Ex. 128 at Bates Stamp (BS) 002354;
7 Complaint ¶ 30; Answer ¶ 30 (admission that livestock graze the “vast majority” of the
8 BRWRA); AR, Ex. 128 at BS 002354 (interactions between wolves and cattle on the
9 BRWRA are “unavoidable”)).

10 The USFWS expressly incorporated into the Special Rule⁸ for the Mexican gray
11 wolf that it was an ENE and included provisions for dealing with conflicts between its
12 reintroduced wolves and the USFS’s permitted livestock. *Id.* (citing 50 C.F.R. § 17.84(k),
13 AR 54 at BS 001733). “Specifically, the Special Rule, adopted at 50 C.F.R. §
14 17.84(k)(3)(ix), authorizes USFWS to lawfully “take” depredating⁹ wolves from the ENE
15 population in a manner consistent with a FWS approved management plan, special
16 management measure, or valid FWS issued permit.” *Id.* ¶ 11.

17 From 1998 to 2002, USFWS was the lead organization, with interagency
18 cooperation and participation by other agencies, such as USFS, as member entities in the
19 1998 Mexican Wolf Interagency Management Plan (IMP), which provided for an
20 Interagency Management Advisory Group (IMAG). The USFS’s role on IMAG was to
21 provide information on wolf locations to grazing permittees, maintain public relations
22 with newspapers, and approve proposed locations for site-specific USFWS actions, such
23 as wolf release locations. The USFS also began including wolf analysis in its section
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25 ⁸The Special Rule codifies the Final Rule for the Establishment of a Nonessential
26 Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico.

27 ⁹USFWS is authorized to kill wolves that kill livestock.

1 7(a)(2) biological assessments for proposed grazing permits, but the ENE listing for
2 Mexican wolves on the BRWRA meant that “no proposed agency action” would ever
3 lead to a jeopardy determination for the entire species. Therefore, there was essentially a
4 blanket “not likely to jeopardize the continued existence of the wolf” biological
5 assessment, pursuant to section 7(a)(2) consultation required under ESA, for every USFS
6 grazing permit. *Id.* ¶ 14. During this time the wolf population grew. *Id.* ¶ 15.

7 Guardians allege that USFS expressed a desire for more wolf removals and more
8 influence over project management, primarily to protect its livestock grazing permit
9 program. *Id.* ¶ 15. In 2003, USFWS caved to pressure, replacing IMAG with AMOC,
10 and turning leadership of the program over to USFS and other agencies. *Id.* ¶ 16.
11 AMOC generated several SOPs, including SOP 13, which replaced the IMP and was the
12 subject of the parties’ claims in this case against USFWS. Under the direction of AMOC
13 and pursuant to SOP13, wolf populations declined due to high rates of removal in large
14 part in response to depredation incidents between wolves and livestock. *Id.* ¶ 17-19.

15 “Since 2003, the wolf recovery program has been operating essentially as a
16 ‘put and take’ program, whereby FWS ‘puts’ wolves out on the landscape and then
17 ‘takes’ them off again to accommodate the Forest Service’s permitted grazing. Instead of
18 working proactively on a program to avoid, or at least mitigate, wolf-livestock conflicts
19 on the BRWRA, the Forest Service has worked only reactively to increase wolf removals
20 through its position on the AMOC. The Forest Service has acknowledged through the
21 AMOC that this ‘aggressive removal rate of wolves by management due to
22 depredation...[is] hindering population growth.’” *Id.* ¶20 (quoting AR, Ex. 378 at BS
23 006177). “Still, the Forest Service has taken no affirmative steps to work with FWS to
24 address the root of the problem with the wolf recovery project – namely that those
25 agencies in charge of the project have for years consistently prioritized the uninterrupted
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1 implementation of the Forest Service’s domestic livestock grazing program over the
2 mandate for Mexican gray wolf conservation.” *Id.* ¶ 20.

3 Guardians do not challenge the sufficiency of USFWS’s conservation program
4 from its inception to 2002, but instead complain that during this time USFS’s
5 contributions did not add anything to wolf conservation and its lobbying for increased
6 removals was disadvantageous to wolf conservation. *Id.* ¶ 24-27. “Between 1998 and
7 December 2007, wolf-livestock conflict was the leading cause of management removal of
8 wolves . . . At the end of 2007, the lead agencies acknowledged that the aggressive
9 removal rate of wolves by management due to depredation, nuisance, and boundary issues
10 was hindering population growth, although they also reiterated the importance of
11 demonstrating a high level of responsiveness to conflicts.” *Id.* ¶ 28 (quoting AR, Ex. 378
12 at BS 006177).

13 Guardians’ focus on 2003 reflects the creation of AMOC when USFS and others
14 took over as cooperating Lead Agency members responsible for Mexican wolf
15 management in place of USFWS. *Id.* ¶ 28. The AMOC continued to govern the Mexican
16 wolf program pursuant to SOP 13 until November 2009, when USFWS agreed to
17 discontinue it. *Id.* ¶ 29 (citing Consent Decree (Doc. 62)). While the USFWS has
18 disavowed SOP 13, Guardians allege that AMOC continues to protect the USFS’s grazing
19 permittees. *Id.* ¶ 30-31.

20 Guardians specifically charge that “the Forest Service [has failed to] reform[] the
21 way in which it operates its livestock grazing program, mandate[] proactive mitigation
22 measures on those grazing allotments within the BRWRA, close[] any such grazing
23 allotments to livestock, alter[] its support of a punitive, reactive approach to dealing with
24 wolf-livestock conflicts, or consult[] with FWS as to how it might do any of these things
25 or otherwise utilize its authorities in furtherance of Mexican gray wolf conservation.” *Id.*
26 ¶ 32.

1 Guardians Statement of Facts supports USFS’s assertion that “consultation with
2 USFWS has been continuous to carry out two ‘primary conservation programs’ for the
3 Mexican gray wolf: 1) the Mexican wolf recovery plan and 2) the Mexican wolf ESA §
4 10(j) reintroduction rule. . . .” *Supra* at 6 (citations omitted). Both programs were
5 developed by USFWS, the agency within the Department of Interior authorized by law to
6 protect and manage the fish, wildlife, and native plant resources of the United States. *See*
7 16 U.S.C. § 1533(f) (charging the Secretary with developing and implementing recovery
8 plans for the conservation and survival of endangered and threatened species). There is a
9 strong presumption in favor of upholding decisions by the USFWS in view of its
10 expertise in the area of wildlife conservation and management. *Carlton v. Babbitt*, 900
11 F.Supp. 526, 530 (D.D.C.1995), *see also San Francisco Baykeeper*, 219 F. Supp. 2d at
12 1026 (finding Corp of Engineers could rely on FWS finding of no jeopardy when carrying
13 out its 7(a)(1) duty to conserve listed species).

14 The conservation program developed by USFWS was premised on the Mexican
15 wolf being designated an experimental nonessential (ENE) species and required
16 interagency cooperation and considerable management flexibility to reduce potential
17 conflicts between wolves and the activities of governmental agencies, livestock operators,
18 hunters, and others. The ENE designation, interagency-cooperative wolf management,
19 and management flexibility were essential because USFWS was planning on
20 reintroducing the wolf in the “middle of an area fairly densely populated with livestock.”
21 (Amicus New Mexico Cattle Growers Assoc (Amicus) Objection at 2-3.) From the
22 beginning, the plan was to allow grazing to continue and to remove depredating wolves.
23 The Mexican Wolf Recovery Plan, the FEIS, and the Final Rule for Reintroduction of the
24 Mexican Wolf all support this assertion.

25 Except for SOP 13, Guardians did not challenge the USFWS’s recovery plan or
26 reintroduction program. Guardians only alleged, “FWS’s adoption and continued
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1 that Forest personnel and affected livestock permittees, work with the wolf Field Team to
2 arrive at a solution.” *Id.*, Exs. 5-12:USFWS consultation letters of concurrence.

3 The administrative record in this case reflects that this is not a case like *Pyramid*
4 where the agency has taken no action whatsoever, and a reviewing court should have no
5 problem in finding total inaction and issuing an order to “compel agency action
6 unlawfully withheld or unreasonably delayed.” 5 U.S.C.A. § 706(1). The Court has a
7 problem finding total inaction where USFS has undertaken measures to carry out the
8 unchallenged wolf conservation program developed by USFWS, which allows for
9 livestock grazing on the BRWRA, and has undertaken measures to carry out the grazing
10 permit program in full compliance with section 7(a)(2).

11 CONCLUSION

12 Guardians frame its case as a failure to act claim, but Guardians really argue that
13 USFS’s actions have failed to conserve the wolf. In other words, USFS has acted
14 arbitrarily, capriciously, abused its discretion or otherwise not acted in accordance with
15 law. 5 U.S.C. § 706(2)(A). Such a claim requires final agency action for review under
16 the APA, 5 U.S.C. § 704, and the ESA requires a discrete agency action, enforceable
17 under ESA’s citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), *SUWA*, 542 U.S. at 66.

18 Guardians’ Statement of Facts makes it clear that discrete decisions challenged in
19 this case were in large part not made by USFS. Specifically, USFWS made the ENE
20 designation for the Mexican gray wolf from which flow many of the consequences
21 challenged by Guardians, including the “not likely to jeopardize” biological assessments
22 necessary for USFS to continue issuing grazing permits. Guardians did not challenge the
23 ENE designation. Guardians did not challenge the USFWS’s Mexican Wolf Recovery
24 Plan, the FEIS, or the Final Rule for the Reintroduction of the Mexican Gray Wolf, all of
25 which were developed around the ENE designation and provided for continued livestock
26 grazing on USFS land and taking of wolves for depredation of livestock. Guardians

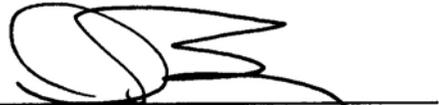
1 admit conservation was carried out successfully while USFWS was in charge of the very
2 program it now asserts is “insignificant.” Guardians has not proved USFS has failed
3 totally to act to conserve the Mexican gray wolf.

4 **Accordingly,**

5 **IT IS ORDERED** that the Motion for Summary Judgment (Doc. 79-2) is
6 DENIED.

7 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter Judgment
8 for Defendant.

9 DATED this 13th day of June, 2011.

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13 David C. Bury
14 United States District Judge
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