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UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ARIZONA

WILDEARTH GUARDIANS AND NEW MEXICO WILDERNESS ALLIANCE, Plaintiffs, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant, and NEW MEXICO CATTLE GROWERS' ASSOCIATION; NEW MEXICO FEDERAL LANDS COUNCIL; and NEW MEXICO FARM AND LIVESTOCK BUREAU, Defendant-Intervenors, and SAFARI CLUB INTERNATIONAL, Defendant-Intervenor.	Case No. 4:13-cv-00392-DCB **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Department of Justice ("DOJ") has broad authority over criminal prosecutions. That authority includes the discretion to pursue prosecutions in a manner that DOJ believes is consistent with Supreme Court case law. Here, DOJ decided to forgo pursuing a jury instruction (the "*McKittrick* instruction") in cases brought under the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(b)(1), after concluding that the instruction conflicts with Supreme Court case law relating to the meaning of "knowingly" in Section 1540(b)(1). DOJ's decision falls squarely within its broad prosecutorial discretion and is not subject to judicial review. Far from abdicating its duties, DOJ promptly prepared an alternative instruction to facilitate ESA prosecutions while remaining consistent with Supreme Court precedent. DOJ has also continued to successfully prosecute ESA violations nationwide, including in cases involving the Mexican gray wolf at issue here. While Plaintiffs feel the number of prosecutions is inadequate, perceived inadequate enforcement is not a reviewable abdication of duty.

Plaintiffs also lack Article III standing. Their injuries are not fairly traceable to DOJ's decision to stop requesting the *McKittrick* instruction because they are caused by illegal third-party actions. Plaintiffs' injuries are also not redressable because a ruling in Plaintiffs' favor would not alter the Supreme Court case law on which DOJ's decision is based. Nor would it cause DOJ to resume requesting the *McKittrick* instruction.

Plaintiffs' claims are also barred by the six-year statute of limitations, 28 U.S.C. § 2401(a), because DOJ made the challenged decision more than 14 years before the complaint was filed, and Plaintiffs have not shown that equitable tolling applies.

Finally, even if Plaintiffs' claims are justiciable, they fail on the merits. DOJ's decision to stop requesting the *McKittrick* instruction was a reasonable exercise of discretion, not an arbitrary abdication of duty in violation of the Administrative Procedure Act ("APA"). At a minimum, the *McKittrick* instruction in serious tension with the Supreme Court's "long-standing rule" that a "knowing" violation requires knowledge of the facts that constitute the offense. *United States v. Crowder*, 656 F.3d

870, 874 (9th Cir. 2011) (collecting Supreme Court cases). Because the Supreme Court would likely adhere to its long-standing rule when interpreting Section 1540(b)(1), DOJ's decision to forgo pursuing the *McKittrick* instruction was reasonable.

Plaintiffs' ESA claim also lacks merit because DOJ's decision did not trigger a duty under ESA Section 7(a)(2) to consult on Mexican wolves. Mexican wolves are considered threatened – and subject to Section 7(a)(2) – only when they occupy a national park or wildlife refuge. Because Mexican wolves did not occupy any national park or refuge when DOJ made its decision, and because DOJ's decision is not an affirmative agency action within the meaning of Section 7(a)(2) in any event, the duty to consult does not apply. Accordingly, summary judgment should be entered for DOJ.

BACKGROUND

A. The Endangered Species Act

The ESA provides for the listing of species as threatened or endangered and the designation of their critical habitat. 16 U.S.C. § 1533. The Secretaries of Commerce and the Interior share responsibility for implementing the ESA. *See id*. § 1532(15). The Secretary of the Interior administers the statute with respect to the endangered Mexican gray wolf at issue in this case and discharges his responsibility through the U.S. Fish and Wildlife Service ("FWS"). *See* 50 C.F.R. §§ 17.11, 402.01(b).

1. The Section 9 take prohibition

ESA Section 9 makes it unlawful for any person to "take" a member of an endangered species. 16 U.S.C. § 1538(a)(1)(B)-(C). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id*. § 1532(19). FWS may issue regulations under ESA Section 4 extending the "take" prohibition to a threatened species. *Id*. § 1533(d).

2. Section 11's enforcement provisions

ESA Section 11(b)(1) provides for criminal fines and imprisonment for "knowing[]" violations of the Act. 16 U.S.C. § 1540(b)(1). Any person who "knowingly" takes an endangered species "shall, upon conviction, be fined not more than

$50,000 or imprisoned for not more than one year, or both." *Id*. Because the offense is a Class A misdemeanor, 18 U.S.C. § 3559(a)(6), the maximum fine for an individual is actually $100,000. *Id*. § 3571(b)(5). Any person who "knowingly violates" a regulation extending the take prohibition to a threatened species "shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than six months, or both," 16 U.S.C. § 1540(b)(1), which is a Class B misdemeanor, 18 U.S.C. § 3559(a)(7).

ESA Section 11(a) also authorizes the assessment of civil monetary penalties for "knowing[]" violations. 16 U.S.C. § 1540(a)(1). Any person who "otherwise violates" the take prohibition (or any regulation extending the prohibition to a threatened species) may be assessed a civil penalty of up to $500 per violation, *id*., which, pursuant to the Federal Civil Penalties Inflation Adjustment Act of l990, has increased to $1,270 per violation. 50 C.F.R. § 11.33(c); 82 Fed. Reg. 6307, 6308 (Jan. 19, 2017).

3. Section 7(a)(2)'s consultation requirement

Section 7(a)(2) directs each federal agency to insure, in consultation with (in this case) FWS, that "any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of" a listed species, or destroy or adversely modify its designated critical habitat. 16 U.S.C. § 1536(a)(2). If the agency proposing action determines that its action "may affect" listed species or designated critical habitat, it must pursue formal or informal consultation. 50 C.F.R. §§ 402.14(a), 402.13(a). If formal consultation is required, FWS prepares its biological opinion on whether the action is likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. *Id*. § 402.14(g)(4), (h).

4. Section 10(j) provisions governing the Mexican wolf

Mexican wolves in the United States are designated a nonessential experimental population under ESA Section 10(j), 16 U.S.C. § 1539(j). *See* 63 Fed. Reg. 1752 (Jan. 12, 1998); 80 Fed. Reg. 2512 (Jan. 16, 2015). Members of a nonessential experimental population are treated as threatened – and subject to Section 7(a)(2) – only when they occur "in an area within the National Wildlife Refuge System or the National Park

System." 16 U.S.C. § 1539(j)(2)(C)(i); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 699-700 (10th Cir. 2009).

FWS has issued a rule prohibiting the take of Mexican wolves except in limited circumstances. 50 C.F.R. § 17.84(k)(5), (7). Both the rule and preamble indicate that shooting a Mexican wolf, whether intentionally or unintentionally, is a prohibited take. *Id*. § 17.84(k)(7)(viii); 80 Fed. Reg. at 2527-28, 2534, 2535, 2558. However, the rule and preamble do not address which shootings are subject to criminal penalties and which are subject to civil or administrative penalties. *Id*.; *see also* 63 Fed. Reg. at 1758, 1759, 1763, 1772. Instead, FWS states in the preamble that "[e]ach incident of take will be investigated and determinations regarding those investigations will be made on a case-by-case basis. Nothing in this rule predetermines the outcome of an investigation into the take of a Mexican wolf." 80 Fed. Reg. at 2534.

B. Factual Background

DOJ's decision to stop requesting the *McKittrick* instruction arose out of the prosecution of Chad McKittrick for (among other violations) knowingly shooting a threatened gray wolf in violation of then-applicable regulations. *See United States v. McKittrick*, 142 F.3d 1170, 1172 (9th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999); Administrative Record ("AR") 120-121. At trial, McKittrick testified that he thought the wolf was a wild dog when he shot it. AR 122. Over McKittrick's objection (and at the government's behest), the court instructed the jury that the government was not required to prove that McKittrick knew the animal was a wolf, or a threatened species, when he pulled the trigger. The government was only required to prove that McKittrick knowingly shot an animal, which turned out to be a wolf. *Id*. at 122-23. McKittrick was subsequently convicted of illegally taking the wolf and related violations. *Id.* at 123.

The Ninth Circuit affirmed McKittrick's conviction, including the district court's use of the *mens rea* jury instruction described above. 142 F.3d at 1176-78. McKittrick petitioned the Supreme Court for *certiorari*, claiming in part that the *mens rea* instruction

eviscerated the meaning of "knowingly" in 16 U.S.C. § 1540(b)(1), and conflicted with Supreme Court case law. AR 17-21, 129.

In the course of preparing its response, DOJ determined that the challenged *mens rea* jury instruction did not adequately explicate the meaning of "knowingly" in Section 1540(b)(1), in light of Supreme Court case law. *See* AR 129-31; Pls.' Ex. 1 (ECF No. 88-1) at 2, Ex. 2 (ECF No. 88-2) at 49; AR 129-31. Accordingly, in its November 1998 response, DOJ argued that McKittrick's challenge to the jury instruction did not warrant Supreme Court review because, in pertinent part:

> the issue is not likely to recur. Although we defended this [*mens rea* jury] instruction in the court of appeals and that court approved it, … , the Department of Justice does not intend in the future to request the use of this instruction, because it does not adequately explicate the meaning of the term "knowingly" in Section 1540(b)(1). In the context of an analogous public welfare misdemeanor offense involving the violation of a regulation, this Court has held that a "knowing" violation of the regulation occurs if the defendant either knew the essential facts or "willfully neglected" to exercise its duty under the Regulation to inquire into the relevant facts. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952); *cf. Staples v. United States*, 511 U.S. 600, 616-619, 620 (1994) (addressing knowledge requirement in serious statutory felony offense). In our view, the term "knowingly" in Section 1540(b) has a similar scope.

AR 129-131 (footnotes omitted). On January 11, 1999, the Supreme Court denied McKittrick's petition for *certiorari*. 525 U.S. 1072.

On February 12, 1999, DOJ issued a memorandum (the "*McKittrick* Memorandum") informing all DOJ attorneys of the position the government had taken in the Supreme Court and instructing them "not to request, and to object to, the use of the knowledge instruction at issue in *McKittrick*." AR 148-150. The memorandum also instructed prosecutors to contact DOJ's Environment and Natural Resources Division for an approved alternative *mens rea* jury instruction. AR 150.

DOJ's approved alternative instruction was developed in connection with a prosecution of the take of a Mexican wolf. AR 151-155. The instruction requires the government to prove beyond a reasonable doubt that "the defendant did knowingly take … a wolf." AR 151. The government need not prove that the defendant knew the wolf

was a *Mexican* wolf (because there are no other, non-listed subspecies of wolves in Mexican wolf habitat), the wolf's legal status as a listed species, or that his conduct was illegal. *Id*. at 152-53. DOJ's instruction also allows the government to satisfy the knowledge requirement through any direct or circumstantial evidence, and it permits the jury to infer that the defendant acted knowingly if it "finds that the defendant knew that the animal he took looked like a wolf." *Id*. at 152. DOJ's instruction also allows the jury to infer that the defendant acted knowingly based on a finding of deliberate ignorance, *i.e.*, that "the defendant was aware of [a] high probability that the animal taken was a wolf and that the defendant deliberately avoided learning the truth. The element of knowledge may be inferred if the defendant deliberatively closed his or her eyes to what would have otherwise been obvious to him or her." *Id*.

Since the issuance of the *McKittrick* Memorandum, DOJ has continued to successfully prosecute ESA violations involving a range of species, including Mexican and other gray wolves. Defs.' Controverting Stmt. of Facts ("DCSF") ¶¶ 11, 17, 24, 31.

STANDARDS OF REVIEW

A. Jurisdiction

Although the Court denied DOJ's motion to dismiss for lack of jurisdiction, the motion was "limited to Plaintiffs' claims as pled," ECF No. 82 at 1, and was based on the allegations in the complaint and judicially-noticeable facts and documents. "[T]he standards governing motions to dismiss and motions for summary judgment are entirely different." *Rich v. BAC Home Loans Servicing LP*, No. CV-11-00511-PHX-DLR, 2014 WL 7671615, at *4 (D. Ariz. Oct. 9, 2014). At summary judgment, "the plaintiff can no longer rest on … 'mere allegations', but must 'set forth' by affidavit or other evidence 'specific facts'" establishing standing and other jurisdictional prerequisites. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs bear the burden of establishing subject matter jurisdiction by a preponderance of admissible evidence. *Data Disc, Inc. v. Sys. Tech. Assocs.,* 557 F.2d 1280, 1289 (9th Cir. 1977).

B. Merits

The merits of Plaintiffs' claims are reviewed under the APA, which authorizes courts to set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this deferential standard, "[a]gency action is presumed to be valid and must be upheld if a reasonable basis exists for the agency decision." *Peck v. Thomas*, 697 F.3d 767, 772 (9th Cir. 2012). Judicial review is generally limited to the administrative record, *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1017 (9th Cir. 2012), the Court does not sit as a fact-finder, and summary judgment is the appropriate mechanism for deciding the legal question of whether the administrative record permitted the agency to make the decision it did. *Id.*; *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985).

ARGUMENT

I. The *McKittrick* Memorandum is an unreviewable exercise of DOJ's discretion to pursue criminal prosecutions in accordance with Supreme Court case law.

Subject only to constitutional constraints, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citations omitted); *Wayte v. United States*, 470 U.S. 598, 607 (1985). "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." *United States v. Olson*, 504 F.2d 1222, 1225 (9th Cir. 1974) (citation omitted); *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 976 (9th Cir. 2000) (*en banc*).

DOJ's control over criminal prosecutions includes the authority to decide not to pursue charges based on a view of the law that DOJ believes would not survive Supreme Court review. "[A] common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction. That is surely an eminently 'reviewable' proposition, in the sense that courts are well qualified to consider the point; yet it is entirely clear that the refusal to prosecute

cannot be the subject of judicial review." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). Although the courts decide the meaning of a criminal statute in particular cases presented for decision, DOJ has "very specific responsibility to determine for itself what [a criminal] statute means, in order to decide when to prosecute." *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).

DOJ decided to stop requesting the *McKittrick* instruction after concluding that it conflicts with Supreme Court case law relating to the meaning of "knowingly" in Section 1540(b)(1). AR 129-131; Pls.' Ex. 1 at 2, Ex. 2 at 49; *infra* at 19-28. Litigation risk posed by Supreme Court case law is certainly a legitimate reason for not pursuing criminal prosecutions under a particular legal theory; it would be an unwise and potentially unfair exercise of discretion for DOJ to subject citizens to prosecution based on a legal theory that the Supreme Court is likely to reject. Whether DOJ has properly assessed the litigation risk is not subject to judicial review. *See ICC*, 482 U.S. at 283. Even if this Court were to disagree with DOJ's assessment, the Court could not order DOJ to resume requesting the *McKittrick* instruction. "A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them." *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992). And, of course, there are no "constitutional and statutory limits" that preclude DOJ from considering Supreme Court case law in deciding when to prosecute. Plaintiffs' Brief (ECF No. 87) ("Br.") at 2-3 (quoting *dicta* in *Nader v. Saxbe*, 497 F.2d 676, 679 (D.C. Cir. 1974)).

Nor has Congress mandated that DOJ devote its limited resources to prosecuting citizens who take listed species by mistake. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, §§ 201-219, 129 Stat. 2242, 2296-2315 (2015).[1] Where, as here, Congress appropriates a lump sum without restricting how the funds are spent, an agency's allocation of the funds is committed to its discretion. "After all, the very point

[1] *Cf. id.* at 2529 (dictating that FWS "shall" use certain level of funds to implement provisions of ESA Section 4 and limiting amount of funds that may be spent on designating critical habitat for listed species).

of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

DOJ's decision to stop requesting the *McKittrick* instruction is also not a reviewable "abdication" of duty. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court reiterated that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id*. at 831. However, the Court left open the possibility of judicial review where an agency has "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Id*. at 833 n.4. Plaintiffs' claim that the *McKittrick* Memorandum is such a policy fails for three reasons.

First, the *Heckler* exception does not apply in the criminal context because, apart from constitutional constraints not implicated here, DOJ's discretion in deciding when to prosecute is "absolute." *Nixon*, 418 U.S. at 693; *Wayte*, 470 U.S. at 607. *Heckler* involved a challenge to FDA's refusal to take regulatory enforcement action against drug manufacturers for alleged violations of the Federal Food, Drug, and Cosmetic Act. As a result, the Court had no occasion to consider the potential bounds of DOJ's criminal enforcement discretion. The Court also recognized that civil and criminal enforcement decisions are distinct. Although an agency's refusal to institute civil enforcement proceedings "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict," the decision whether to bring criminal charges "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Heckler*, 470 U.S. at 832 (quoting U.S. Const., Art. II, § 3). Accordingly, while it has "occasionally been posited that the President's power not to initiate a civil enforcement action may not be entirely absolute (unlike with respect to criminal prosecution) and thus might yield if Congress expressly mandates civil enforcement

actions in certain circumstances," *In re Aiken Cty.*, 725 F.3d 255, 264-65 n.9 (D.C. Cir. 2013), that possibility does not apply in the criminal context.

Second, even if the *Heckler* exception applied in the criminal context in general, it does not apply here because the *McKittrick* Memorandum is not a "general policy" of non-enforcement. *Heckler*, 470 U.S. at 833 n.4. It simply instructs prosecutors not to request a particular jury instruction that would likely fail Supreme Court review. AR 148-150; *infra* at 19-28. Far from "abdicating" its responsibilities, DOJ promptly prepared an alternative instruction to facilitate take prosecutions while remaining consistent with Supreme Court precedent. AR 151-155. DOJ's alternative instruction allows the government to prove the defendant knew the identity of the animal he was targeting based on any admissible direct or circumstantial evidence, including the factors noted in Plaintiffs' brief. *Id*.; Br. at 7, 27. DOJ's instruction also allows the jury to infer that the defendant acted knowingly if it finds that she knew the animal she was targeting looked like a wolf, or that she acted with deliberate ignorance. AR 151-155. The notion that DOJ's approach amounts to a general policy of non-enforcement is baseless.

Plaintiffs thus are left arguing that the practical effect of DOJ's approach amounts to an abdication of its ESA enforcement responsibilities. However, the narrow *Heckler* exception requires an express, general policy of non-enforcement. 470 U.S. at 833 n.4. *Heckler* does not suggest that complaints about the practical effect of a more limited enforcement decision can make that decision reviewable. *See id*.

Regardless, Plaintiffs' rhetoric about the supposed impact of DOJ's approach lacks factual support. It is based on speculative opinion testimony with no reliable basis, unauthenticated documents containing hearsay, and dire predictions from a former FWS director who left the agency 16 years ago. *See* DCSF ¶¶ 15-52; *infra* at 34-39. Contrary to those predictions, DOJ and FWS have continued to successfully prosecute unlawful takes involving a variety of species. DCSF ¶¶ 11, 17, 24, 31, 43. Even when there is no direct or circumstantial evidence indicating that the defendant knew the identity of the animal at the time of the take, DOJ has satisfied the knowledge requirement when the

defendant subsequently takes possession of the animal and correctly identifies it at that time. Pls.' Ex. 1 at 2; *see* 16 U.S.C. § 1538(a)(1)(D).

Plaintiffs' lawsuit thus boils down to the claim that DOJ is not adequately enforcing the ESA because DOJ is not also prosecuting citizens for unlawful take where: (a) the citizen maintains that he or she killed a listed species by accident; (b) the government has no direct or circumstantial evidence from which a jury could properly conclude that the citizen acted knowingly or with deliberate ignorance; and (c) the citizen did not take possession of the listed animal and correctly identify it at that time. Supreme Court case law strongly suggests that the Court would not sustain a conviction on those facts for "knowingly" taking a listed species. *See infra* at 19-28. Regardless, Plaintiffs' complaints about perceived inadequate enforcement of a single subsection of ESA Section 9 do not amount to a viable "abdication" claim. "Real or perceived inadequate enforcement … does not constitute a reviewable abdication of duty." *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *California v. United States*, 104 F.3d 1086, 1094 (9th Cir. 1997) (allegations that DOJ failed to adequately fulfill obligation to enforce immigration laws "do not rise to a level that would indicate … an abdication"). Because the *McKittrick* Memorandum is an unreviewable exercise of DOJ's authority to pursue criminal prosecutions in a manner that it likely to result in sustainable convictions, DOJ is entitled to summary judgment as a matter of law.

II. Plaintiffs lack Article III standing.

"Article III's 'case' or 'controversy' provision creates an irreducible constitutional minimum of standing for all … plaintiffs." *M-S-R Pub. Power Agency v. Bonneville Power Admin.*, 297 F.3d 833, 843 (9th Cir. 2002). Standing requires a showing "that (1) the plaintiff suffered an injury in fact, *i.e.*, one that is sufficiently 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical,' (2) the injury is 'fairly traceable' to the challenged conduct, and (3) the injury is 'likely' to be 'redressed by a favorable decision.'" *Bates v. United Parcel Serv.*, 511 F.3d 974, 985 (9th Cir. 2007) (quoting *Defs. of Wildlife*, 504 U.S. at 560-61). A plaintiff must establish standing

"with the manner and degree of evidence required at the successive stages of the litigation." *Defs. of Wildlife*, 504 U.S. at 561. At summary judgment, a plaintiff "must set forth by affidavit or other evidence specific facts" establishing standing. *Id*. DOJ can prevail sby pointing out that there is an absence of admissible evidence establishing each element of standing. *In re Brazier Forest Prods.*, 921 F.2d 221, 223 (9th Cir. 1990). That is precisely the situation here.[2]

A. Plaintiffs have failed to establish causation.

At least one of Plaintiffs' declarants avers an interest in observing Mexican wolves in habitat he intends to continue visiting in the future. ECF No. 87-8 ¶¶ 16-22. That is a cognizable interest for standing purposes. *See Defs. of Wildlife*, 504 U.S. at 562-64. To establish causation, the declarants aver that the *McKittrick* Memorandum harms their recreational and aesthetic interests in observing Mexican wolves because it "eviscerates the deterrent effect of the ESA's criminal enforcement provision," and "the loss of this deterrent effect has led to elevated levels of illegal mortality." *E.g.*, ECF No. 87-8 ¶¶ 25, 28. Those statements are inadmissible because they are not based on the declarants' personal knowledge. *See infra* at 34-35. But even if the statements were admissible, Plaintiffs' causation theory fails as a matter of law.

DOJ's decision to stop requesting the *McKittrick* instruction does not authorize anyone to kill Mexican wolves. Shooting a wolf, intentionally or otherwise, is illegal under FWS regulations, regardless of DOJ's position on proper jury instructions. 80 Fed. Reg. at 2562; 50 C.F.R. § 17.84(k)(5), (k)(7)(viii)(a); *see United States v. Canori*, 737 F.3d 181, 184-85 (2d Cir. 2013) (despite DOJ policy against prosecuting marijuana offenses, "[m]arijuana remains illegal under federal law … That the [DOJ] has chosen to prioritize certain types of prosecutions unequivocally does not mean that some types of

[2] To ensure the issue is preserved for potential appeal, DOJ reiterates that Plaintiffs cannot establish standing as a matter of law under the general rule that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Leeke v. Timmerman*, 454 U.S. 83, 86-87 (1981); *Ariz. Dream Act Coal. v. Brewer*, ----F.3d---, No. 15-15307, 2017 WL 461503, at *18 (9th Cir. Feb. 2, 2017).

marijuana use are now legal").[3] Nor does DOJ's decision coerce anyone into killing wolves. *Cf. Bennett*, 520 U.S. at 169 (causation established where agency decision had a "powerful coercive effect" on third-party actions that injured the plaintiffs). "[W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Heckler*, 470 U.S. at 832.

Because the *McKittrick* Memorandum does not authorize wolf killings or coerce anyone into killing wolves, the illegal killing of wolves by third parties is not fairly traceable to the Memorandum. If an individual accidentally kills a wolf, the *McKittrick* Memorandum is not implicated; the Memorandum could only be a causative factor if the shooter is aware of DOJ's position and knowingly shoots a wolf because he believes he will get away with it due to DOJ's position. But knowingly shooting a wolf is a criminal act for which the shooter bears sole responsibility, and that illegal act breaks any purported causal link between the *McKittrick* Memorandum and the killing:

> [T]he causal connection between the defendants' [actions] and the plaintiffs' alleged injuries is broken by the intervening criminal acts of the third-part[ies] … A crime is an independent action. Indeed, our entire concept of criminal punishment is predicated on the idea that individuals are accountable for their own actions.

Alston v. Advanced Brands & Importing Co., 494 F.3d 562, 565 (6th Cir. 2007); *see Arpaio v. Obama*, 797 F.3d 11, 20 (D.C. Cir. 2015) (allegation that challenged policies would encourage foreign citizens to enter United States unlawfully did not establish causation because "the decisions of such individuals to enter the United States unlawfully lack any legitimate causal connection to the challenged policies").

The Ninth Circuit has made clear that the causation element of standing is satisfied only if the plaintiff's injury is caused by the agency's alleged misconduct, "and not the

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[3] Because shooting a Mexican wolf is illegal regardless of the *McKittrick* Memorandum, the Memorandum has no legal consequences. As a result, even if the Memorandum did not involve a matter committed to DOJ's discretion, it would not be a "final agency action" reviewable under the APA. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

result of misconduct of some third party not before the court." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013) (emphasis added). Whether done knowingly, recklessly, or negligently, killing a wolf is an illegal act that DOJ has not authorized – *i.e.*, it is "misconduct of some third party not before the court." *Id.*; *see* 50 C.F.R. § 17.84(k)(7)(viii)(a). Therefore, Plaintiffs' injuries caused by the illegal shooting of Mexican wolves are not fairly traceable to the *McKittrick* Memorandum.

B. Plaintiffs have not established redressability.

Plaintiffs have also failed to demonstrate that it is "likely, as opposed to merely speculative, that the[ir] injur[ies] will be redressed by a favorable decision." *Defs. of Wildlife*, 504 U.S. at 561 (citation and internal quotation marks omitted). Plaintiffs assert that an order setting aside the *McKittrick* Memorandum will cause DOJ to bring more criminal prosecutions, which will lead to a decrease in wolf killings. Br. at 36-37. Plaintiffs' assertions are not merely speculative, they are incorrect.

The *McKittrick* Memorandum exists because of the Supreme Court's "long-standing rule" that "knowingly" in a criminal statute requires proof of knowledge of the facts that constitute the offense. *Crowder*, 656 F.3d at 874. An order setting aside the Memorandum would not change the long-standing rule. And because the *McKittrick* instruction conflicts with the rule, *infra* at 19-28, there is no likelihood DOJ will resume requesting it, regardless of the outcome of this case. DOJ believes it is inappropriate to subject citizens to criminal prosecution based on a legal theory the Supreme Court is almost certain to reject, even if a lower court has endorsed (or might endorse) the theory.

Although Plaintiffs wisely do not seek such relief, it is also clear that the Court cannot order DOJ to prosecute citizens under a particular legal theory, request a particular jury instruction, or ignore Supreme Court case law in deciding when to prosecute. *See supra* at 7-8. Accordingly, there is no likelihood that Plaintiffs' injuries would be redressed by a favorable decision in this case. Because Plaintiffs lack Article III standing, DOJ is entitled to summary judgment as a matter of law.

III. Plaintiffs' claims are barred by the statute of limitations.

Contrary to Plaintiffs' assertions, Br. at 37-38, the Court's ruling on defendant's motion to dismiss at the pleading stage did not "fully and finally resolve" whether Plaintiffs' claims are barred by the statute of limitations, 28 U.S.C. § 2401(a). DOJ brought a facial motion to dismiss limited to the allegations in the complaint and judicially noticeable facts. *See* Defs.' Mot. to Dismiss (ECF No. 24) at 3 n.1, 5-6, 10-13. In ruling on a facial motion to dismiss, the Court does not resolve factual disputes, *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004), and the Court may consider matters subject to judicial notice without converting the motion into a summary judgment motion. *See, e.g., CopyTele, Inc. v. E Ink Holdings*, 962 F. Supp. 2d 1130, 1135-36 (N.D. Cal. 2013).

In ruling on the motion, the Court did not state that it was treating DOJ's motion as one for summary judgment or give "[a]ll parties" the required "reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). Nor did the Court enter partial summary judgment on DOJ's statute of limitations defense of any other issue. Plaintiffs' assertion that *they* unilaterally converted DOJ's motion into a motion for summary judgment because *they* "went far beyond the pleadings" and submitted "substantial evidentiary materials," Br. at 38, is not supported by any authority. Accordingly, the Court's ruling on DOJ's facial motion to dismiss did not finally resolve the applicability of the statute of limitations or any other issue.

Section 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). The Ninth Circuit recently clarified that APA and ESA claims first accrue on the date of the allegedly unlawful agency action – in this case, on February 12, 1999, when DOJ issued the *McKittrick* Memorandum. AR 148-150; *see Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1049, 1050 (9th Cir. 2016) ("APA claims must be brought within six years of the agency action that is challenged… Our cases on this topic determine the timeliness of APA challenges according to when

the applicable agency action was taken"); *Ctr. for Biological Diversity v. EPA*, -- F.3d --, No. 14-16977, 2017 WL 460659, at *7-9 (9th Cir. Feb. 2, 2017) (applying 2401(a) and dismissing ESA failure-to-consult challenge to EPA actions taken more than six years before the complaint was filed). Notice in the Federal Register is not required to start the limitations period. *See id.* at *7-9, *12 (dismissing time-barred challenges to EPA actions that were not subject to notice-and-comment); *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, Civ. No. 04-3096 PA, 2007 WL 1072112, at *6 (D. Or. Apr. 3, 2007) (challenge to ESA biological opinion, notice of which is not publicized, was time barred when brought more than six years after opinion was issued).

Although Plaintiffs also purport to challenge DOJ's "ongoing implementation" of the *McKittrick* Memorandum, Br. at 1, DOJ's decision to stop requesting the *McKittrick* instruction was fully "implemented" when DOJ issued the Memorandum telling its prosecutors to stop requesting the instruction. AR 148-150. While a prosecutor might consider the *McKittrick* Memorandum in deciding whether to pursue a particular case, Plaintiffs disavow "challeng[ing] – or seek[ing] judicial review of – any particular enforcement decision." *Id*. Consequently, this case does not involve a timely challenge to a specific application of the *McKittrick* Memorandum. *Cf. Cal. Sea Urchin Comm'n*, 828 F.3d at 1049 ("Although Plaintiffs cannot now challenge the 1987 Final Rule, they can challenge its application in the 2012 program termination as exceeding the agency's statutory authority"). Because the only purported action challenged here was taken on February 12, 1999, Plaintiffs' claims first accrued on that date. *See Ctr. for Biological Diversity*, 2017 WL460659, at *11 (rejecting claim that EPA's alleged failure to consult gave rise to an "ongoing violation" and holding that "an ESA claim accrues only when an agency takes discretionary, affirmative action"). Because Plaintiffs did not file suit until May 30, 2013, over 14 years later, their suit is time barred.

Equitable tolling is unavailable because Section 2401(a) is jurisdictional. *See Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008). Even if equitable tolling were

available, Plaintiffs have not demonstrated that it applies. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Courts "have typically extended equitable [tolling] relief only sparingly … where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked… into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 590 (9th Cir. 1998). Neither scenario applies here.

Plaintiffs' entire lawsuit is based on the notion that there is widespread knowledge of the *McKittrick* Memorandum among unethical hunters and others who have been shooting wolves for years because they believe they will escape prosecution as a result of DOJ's position. Plaintiffs cannot have it both ways. They cannot claim for standing purposes that the *McKittrick* Memorandum is causing their injuries because everyone knows about it and has been shooting wolves because of it – and then turn around and argue for statute of limitations purposes that they could not have learned of DOJ's position and filed suit until over 14 years after the Memorandum was issued.

Beyond the basic inconsistency in Plaintiffs' position, no extraordinary circumstances prevented them from timely filing suit. DOJ's position has been no secret. FWS discussed it in its annual law enforcement reports published in 1999, 2000, 2001, and 2002. Chavez Decl., Ex. A at 9, 18, 27, 33. Also in 2002, another environmental group raised many of the same issues concerning DOJ's position that Plaintiffs belatedly repeat here. ECF No. 29-2. Far from attempting to conceal its position, DOJ sent a response explaining it. *Id*. Plaintiffs present no evidence (because there is none) that DOJ has ever refused to discuss its position or produce the *McKittrick* Memorandum in response to any formal or informal request. In 2003, the *Los Angeles Times* published an

article about DOJ's position – a fact Plaintiffs acknowledged before deleting the allegations in response to DOJ's statute of limitations defense. *See* Compl. ¶¶ 54-55.[4]

Plaintiffs are sophisticated environmental groups that have been closely involved in Mexican wolf reintroduction since the 1990s. ECF No. 87-10 ¶¶ 4-7; Third Am. Compl. (ECF No. 31) ¶¶ 32-33. WildEarth Guardians was formed in 1989, has 7,500 members nationwide, has an "active endangered species protection campaign," and has "a long history of litigation against federal and state governments in connection with protection of the Mexican gray wolf." Third Am. Compl. ¶ 32. Given its close involvement in ESA issues generally and Mexican wolf issues in particular, and the fact that DOJ's position was the subject of an article in a widely-read newspaper and was discussed in FWS's own annual law enforcement reports for four straight years, Plaintiffs clearly could have learned of DOJ's position and timely filed suit. Finally, Plaintiffs "did not file any pleading during the statutory period and [were] in no way tricked or induced into letting the statutory period pass. The doctrine of equitable tolling, therefore, should not be applied." *Carpenter v. Dep't of Transp.*, 13 F.3d 313, 317 (9th Cir. 1994); *Foss*, 161 F.3d at 590-91. Plaintiffs' claims are time barred.

IV. Even if Plaintiffs' claims are justiciable, they fail on the merits.

A. Because DOJ's position on proper jury instructions is reasonably designed to ensure consistency with Supreme Court precedent, Plaintiffs' APA claim fails on the merits.

Even if Plaintiffs' APA claim is reviewable, it fails on the merits. As shown below, the *McKittrick* instruction conflicts with the Supreme Court's "long-standing rule" that a "knowing" violation requires knowledge of the facts that constitute the offense. *Crowder*, 656 F.3d at 874. Because the Supreme Court would likely apply its rule when interpreting Section 1540(b)(1), DOJ reasonably decided to stop requesting the *McKittrick* instruction and promptly prepared an alternative instruction to facilitate take

[4] http://articles.latimes.com/2003/jun/22/nation/na-species22 (last visited Mar. 2, 2017).

prosecutions while remaining consistent with Supreme Court precedent. AR 148-151. Far from an arbitrary abdication of duty or usurpation of the judicial function, DOJ's approach constitutes a reasonable exercise of its authority to pursue criminal prosecutions in a manner that is likely to result in sustainable convictions, and to avoid subjecting citizens to erroneous criminal fines or imprisonment. Accordingly, DOJ is entitled to summary judgment on Plaintiffs' APA claim as a matter of law.

1. Supreme Court case law indicates that "knowingly" in a criminal statute requires knowledge of the facts that constitute the offense.

In *Bryan v. United States*, 524 U.S. 184 (1998), a decision issued shortly before Mr. McKittrick filed his petition for *certiorari*, the Supreme Court summarized several of its decisions addressing *mens rea* in the criminal context and stated unequivocally that, unless the statutory text indicates that knowledge of the law is also required, the term "knowingly" in a criminal statute "requires proof of knowledge of the facts that constitute the offense." *Id*. at 193 (summarizing *United States v. Bailey*, 444 U.S. 394 (1980), *Staples v. United States*, 511 U.S. 600 (1994), *Rogers v. United States*, 522 U.S. 252 (1998), and *Liparota v. United States*, 471 U.S. 419 (1985)).

In *Staples*, the Court made clear that even when the statute is silent on *mens rea*, a defendant generally must "know the facts that make his conduct fit the definition of the offense." 511 U.S. at 608 n.3. The defendant there was charged with possessing an unregistered machinegun. The instructions required the jury to find only that he possessed a gun, and that it was a machinegun. The Court held that the instructions were improper. The Court explained that even though the statute was "silent concerning the *mens rea* required for a violation," *id*. at 605, the government had to prove the defendant "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." *Id*. at 602. Because guns "traditionally have been widely accepted as lawful possessions," their dangerous nature alone "cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting [the

statute] as not requiring proof of knowledge of a weapon's characteristics." *Id*. at 612. That guns are highly regulated also was insufficient to "put gun owners on notice that they must determine the characteristics of their weapons and comply with all legal requirements." *Id*. at 613. The Court found "little doubt that … the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent." *Id*. at 614-15.

In their dissenting opinion in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), three justices cited *Staples* in effectively rejecting the very interpretation of Section 1540(b)(1) that DOJ had successfully advocated before the Ninth Circuit in *McKittrick*:

> A requirement that a violation be "knowing" means that the defendant must "know the facts that make his conduct illegal," *Staples v. United States*, 511 U.S. 600, 606 (1994). The hunter who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated § 1538(a)(1)(B) – not because he does not know that elk are legally protected (that would be knowledge of the law, which is not a requirement …), but because he does not know what sort of animal he is shooting. The hunter has nonetheless committed a purposeful taking of protected wildlife, and would therefore be subject to the (lower) strict-liability penalties for the violation.

515 U.S. at 722. Because the issue in *Sweet Home* concerned the meaning of the word "take" in ESA Section 9, the Court did not address whether the dissenting justices were correct. Indeed, citing *Staples*, the Court left open the possibility of reading a scienter requirement into Section 1540(a)(1)'s administrative penalty provision. *Id*. at 696 n.9.

More recent Supreme Court decisions have reinforced the rule that "knowingly" in a criminal statute requires proof that the defendant knew all of the facts that constitute the offense. In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Court addressed the meaning of "knowingly" in a statute making it illegal to "knowingly transfer[], possess[], or use[], without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1). The Court held that the knowledge requirement extended to each element of the crime, requiring the government to show "that the defendant *knew*

that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'" 556 U.S. at 647. The Court based its holding on the ordinary meaning and usage of "knowingly." "In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Id*. at 650; *see also McFadden v. United States*, 135 S. Ct. 2298, 2304-05 (2015) (under statute making it unlawful to knowingly manufacture, distribute, or dispense a controlled substance, the government "must prove that a defendant knew that the substance with which he was dealing was 'a controlled substance'").

The Supreme Court has also reiterated that even when a criminal statute is silent on *mens rea*, "a defendant generally must 'know the facts that make his conduct fit the definition of the offense.'" *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Staples*, 511 U.S. at 608 n.3). "In such cases, courts read the statute against a 'background rule' that the defendant must know each fact making his conduct illegal." *Torres v. Lynch*, 136 S. Ct. 1619, 1631 (2016) (quoting *Staples*, 511 U.S. at 619). The statute in *Elonis* "require[d] proof that a communication was transmitted and that it contained a threat." 135 S. Ct. at 2011. Even though the statute was silent on *mens rea*, the Court held that the defendant's knowledge that he was transmitting a communication was insufficient because "communicating *something* is not what makes the conduct 'wrongful.' Here 'the crucial element separating legal innocence from wrongful conduct' is the threatening nature of the communication … The mental state requirement must therefore apply to the fact that the communication contains a threat." *Id*. at 2011.

2. At a minimum, the *McKittrick* instruction is in serious tension with Supreme Court case law.

The interpretation of "knowingly" that DOJ successfully advocated before the Ninth Circuit in *McKittrick* was in serious tension with then-prevailing Supreme Court case law, and the tension has only increased since that time. Section 1540(b)(1) requires

a "knowing[]" violation of the ESA's take prohibition, which makes it unlawful, "with respect to any endangered species of fish or wildlife," for any person to "take any such species." 16 U.S.C. § 1538(a)(1)(B). For a violation to occur, the fish or animal taken must be the kind of animal that is subject to the ESA's protections; casting a fly at any fish, shooting a gun at any animal, or clearing vegetation used by any wildlife is not a prohibited take. Yet *McKittrick* holds that the defendant need not know what kind of fish or animal he is taking in order commit a "knowing[]" violation; the defendant need only be conscious of the fact that he is fishing, hunting, or otherwise taking some fish or animal. 142 F.3d at 1177. That holding clearly diverges from the Supreme Court's "long-standing rule" that a "knowing" violation requires knowledge of all of the facts that constitute the offense. *Crowder*, 656 F.3d at 874.

3. The Supreme Court would likely follow its prior decisions when interpreting Section 1540(b)(1).

Nothing in the text of the ESA suggests that the Supreme Court would depart from its long-standing rule when interpreting Section 1540(b)(1). The only possible textual basis for distinguishing Section 1540(b)(1) is the severity of the potential penalty. As Plaintiffs note, Br. at 6, 16, 22-23, the Supreme Court decisions discussed above involved felonies, whereas a violation of Section 1540(b)(1) is punishable by a maximum of one year in prison, a $100,000 fine, or both, which amounts to a Class A misdemeanor. 16 U.S.C. § 1540(b)(1); 18 U.S.C. §§ 3559(a)(6), 3571(b)(1), (5). The severity of the penalty can be a factor in determining the required *mens rea* when the statute is silent on the matter. *See, e.g., Staples*, 511 U.S. at 616-19 (where statute was silent on required mental state, potentially harsh penalties were a secondary factor "confirm[ing]" the Court's prior conclusion that "the usual presumption that a defendant must know the facts that make his conduct illegal should apply"). But where, as here, the statute expressly requires a "knowing" violation, the Supreme Court is unlikely to conclude that the meaning of "knowingly" varies with the penalty. *Flores-Figueroa*, for example, did not hinge on the fact that a violation was punishable by two years' imprisonment. The

analysis hinged on the ordinary meaning and usage of "knowingly." 556 U.S. 650-56. And in an analogous case involving a misdemeanor offense for violating a regulation, the Court held that a "knowing" violation occurs if the defendant either knew the essential facts or "willfully neglected to exercise [his] duty under the Regulation to inquire into" the relevant facts. *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952).

Contrary to Plaintiffs' assertions, nothing in the ESA's legislative history suggests the Supreme Court would interpret Section 1540(b)(1) any differently. *See* Br. at 6, 8, 25. Congress amended Section 1540(b)(1) in 1978, substituting the term "knowingly" for "willfully," to make the statute "a general rather than a specific intent crime." H.R. Conf. Rep. No. 95-1625, 26, 1978 U.S.C.C.A.N. 9453, 9476. Congress explained that it made the change because it "d[id] not intend to make knowledge of the law an element of either civil penalty or criminal violations of the Act." *Id*. (emphasis added). Although "general intent" and "specific intent" have "been the source of a good deal of confusion," *Bailey*, 444 U.S. at 403, Congress' explanation tracks the courts' equation of "specific intent" with willfulness, which requires proof that the defendant knew his conduct was unlawful. *See, e.g., United States v. Mousavi*, 604 F.3d 1084, 1092 (9th Cir. 2010) (noting that "'willful' generally indicates a requirement of specific intent"); *Bryan*, 524 U.S. at 193 ("willfully" requires a defendant to have "acted with knowledge that his conduct was unlawful"); *Dixon v. United States*, 548 U.S. 1, 5-6 (2006) (distinguishing "knowingly" and "willfully"). Thus, while the legislative history indicates that Section 1540(b)(1) is not a "specific intent" crime requiring a showing of willfulness, the legislative history provides no indication that "knowingly" means something other than what it normally means: knowledge of the facts that constitute the offense.

Plaintiffs note the ESA's broad purpose of conserving listed species. Br. at 8, 13 n.2. "The plain intent of Congress in enacting [the ESA] … was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *TVA v. Hill*, 437 U.S. 153, 184 (1978). But despite its plain intent, Congress elected not to criminalize mere

negligent violations of the ESA – as it did for certain violations of the Clean Water Act. *See* 33 U.S.C. § 1319(c)(1)(A); *United States v. Hanousek*, 176 F.3d 1116, 1120-21 (9th Cir. 1999). Nor did Congress make ESA violations strict liability misdemeanors – as it did in the Migratory Bird Treaty Act's comparable take prohibition. *See* 16 U.S.C. § 707(a); *United States v. Morgan*, 311 F.3d 611, 615 (5th Cir. 2002). Instead, Congress limited the availability of criminal penalties to "knowing[]" violations, 16 U.S.C. § 1540(b)(1), and provided for lesser penalties in other situations, *id*. § 1540(a)(1). Because Congress could have expanded the availability of criminal penalties but did not, the purpose of the ESA is unlikely to persuade the Supreme Court to give "knowingly" in Section 1540(b)(1) something other than its ordinary meaning.

Nor has FWS promulgated a regulatory definition of "knowingly" that might receive deference from the Supreme Court, as Plaintiffs suggest. Br. at 26-27. FWS has stated that shooting a wolf by mistake is illegal. *Supra* at 3. But FWS did not state that every illegal take is a criminal violation. *Id*. Nor did FWS address the level of factual knowledge required to commit a criminal violation. *Id*. Rather, FWS has stated that "[e]ach incident of take will be investigated and determinations regarding those investigations will be made on a case-by-case basis. Nothing in this rule predetermines the outcome of an investigation into the take of a Mexican wolf." 80 Fed. Reg. at 2534.

Plaintiffs argue that *Elonis* contains language "that clearly accommodates" the *McKittrick* instruction because *Elonis* states "that '[i]n some cases, a general requirement that a defendant *act* knowingly is itself' sufficient." Br. at 23-24 (quoting *Elonis*, 135 S. Ct. at 2010). But Plaintiffs ignore the preceding sentence in *Elonis*: "When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" 135 S. Ct. at 2010 (emphasis added) (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)). Section 1540(b)(1) is not silent; it requires a "knowing" violation. Moreover, the knowing commission of any act that results in take clearly would not suffice to separate wrongful from otherwise innocent conduct, given

the myriad lawful activities that can result in take *(e.g.*, fishing, hunting, vegetation management, modification of real property, water usage, etc.). *See* 16 U.S.C. § 1532(19) (defining "take" to encompass any act that harasses, harms, wounds, or kills listed species); 50 C.F.R. § 17.3 (defining "harm" in the statutory definition of take to include "significant habitat modification" that actually kills or injures wildlife). The ESA prohibits those actions only when directed at the kind of fish or wildlife the Act protects. Therefore, a person's knowledge of the kind of fish or wildlife he or she is taking is indeed necessary to separate wrongful from otherwise innocent conduct.

Perhaps the most compelling argument in favor of a narrow interpretation of "knowingly" in Section 1540(b)(1) is the practical one that lies at the heart of Plaintiffs' lawsuit: in "mistaken identity" cases, where the defendant claims he thought he was shooting at an unprotected species (*e.g.*, a coyote) that closely resembles a protected species (*e.g.*, a wolf), proving species knowledge can be difficult. *See* Pls.' Ex. 1 at 2-3. However, in *Flores-Figueroa*, the Court held that such practical considerations do not justify a departure from the general rule that "knowingly" requires knowledge of the facts that constitute the offense. The Court recognized "the difficulty in many circumstances of proving beyond a reasonable doubt that a defendant has the necessary knowledge," 556 U.S. at 655, but held that "concerns about practical enforceability are insufficient to outweigh the clarity of the text." *Id.* at 656.

The Supreme Court would likely reach the same conclusion when interpreting Section 1540(b)(1) for at least three reasons. First, notwithstanding the difficulties posed by "mistaken identity" cases, DOJ and FWS have continued to successfully prosecute the unlawful take and possession of wolves and grizzly bears (two species that resemble non-listed species). DCSF ¶¶ 11, 17, 24, 31, 43. Second, even in "mistaken identity" cases where DOJ cannot satisfy the knowledge requirement, strict liability penalties of up to $1,270 per violation remain available under Section 1540(a)(1).

Third, ESA Section 4(e) already addresses the situation where enforcement difficulties in "look-alike" cases pose an additional threat to listed species. Section 4(e) authorizes FWS to treat any "look-alike" species as a listed species if it finds that:

> (A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;
>
> (B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and
>
> (C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this chapter.

16 U.S.C. § 1533(e) (emphasis added). Thus, in *Illinois Commercial Fishing Ass'n v. Salazar*, 867 F. Supp. 2d 108 (D.D.C. 2012), the court upheld a Section 4(e) regulation treating the non-listed shovelnose sturgeon as threatened based on its resemblance to the listed pallid sturgeon. The court noted that "[t]reating the shovelnose as a threatened species would not only facilitate law enforcement's ability to determine when a fish has been unlawfully taken, but it would also prevent poachers from claiming that they innocently mistook a pallid sturgeon for a shovelnose." *Id*. at 116. Because Section 4(e) already provides a solution to the alleged problem Plaintiffs seek to address, enforcement difficulties in "look-alike" cases are unlikely to persuade the Supreme Court to give "knowingly" in Section 1540(b)(1) something other than its ordinary meaning.

Finally, nothing in the Ninth Circuit's *McKittrick* decision mitigates the serious litigation risk posed by Supreme Court case law. *McKittrick* preceded several important Supreme Court decisions noted above, including *Bryan*, *Flores-Figueroa*, *McFadden*, and *Elonis*. While the parties addressed prior Supreme Court decisions in their briefs, Br. at 13-16, the Ninth Circuit did not in its analysis. In addition to the legislative history, the Ninth Circuit relied on two district court decisions, *United States v. St. Onge*, 676 F. Supp. 1044 (D. Mont. 1988), and *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla.

1987), neither of which discusses Supreme Court case law or provides any potential distinguishing factors beyond those addressed above. *See* Br. at 8-9.

The Ninth Circuit also cited three circuit court decisions, *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990), *United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991), and *United States v. Grigsby*, 111 F.3d 806 (11th Cir. 1997), but none squarely addressed the relevant issue. In *Nguyen*, the Fifth Circuit held that Section 1560(b)(1) "did not require the government to show that Nguyen knew his conduct was illegal… [I]t is sufficient that Nguyen knew that he was in possession of a turtle. The government was not required to prove that Nguyen knew that this turtle is a threatened species or that it is illegal to transport or import it." *Id*. at 1018. The court did not squarely address what, if anything, a defendant must know about the kind of animal he is taking to "knowingly" violate the ESA. *Id*.; *see also Ivey*, 949 F.2d at 766 (rejecting claim that ESA "requires knowledge of the law" without addressing whether the statute requires knowledge of the facts that constitute the offense).

In *Grigsby*, the Eleventh Circuit held (wrongly, in our view) that the phrase "knowingly violates" in an analogous provision of the African Elephant Conservation Act "connotes deliberate, cognitive or specific intent as a requirement for criminal violation." 111 F.3d at 819. According to the court, the "relevant intent" required for a violation was "the [defendants'] knowledge of violating the [law]." *Id*. at 822. Thus, *Grigsby* is at odds with the Ninth Circuit's holding in *McKittrick*, as the Ninth Circuit itself later recognized. *See United States v. Lynch*, 233 F.3d 1139, 1145 (9th Cir. 2000).

Plaintiffs argue that *McKittrick* has not been overruled and remains "binding" in the Ninth Circuit. Br. at 20-21. Maybe so, but the Court need not reach that issue to resolve this case. DOJ is not "urg[ing] th[is] court to adopt" an interpretation of Section 1540(b)(1) that conflicts with *McKittrick*. Br. at 21. Rather, DOJ's position is that it is highly uncertain whether the Supreme Court would affirm a conviction obtained under the *McKittrick* instruction, and in light of that uncertainty, it is reasonable for DOJ to

devote its limited resources to pursuing cases that are more likely to be sustained, and less likely to subject citizens to erroneous fines or imprisonment.

Contrary to Plaintiffs' mistaken assumption, the Ninth Circuit did not mandate that DOJ continue requesting the *McKittrick* instruction in future prosecutions. Nor did the Ninth Circuit address whether a future decision by DOJ to stop requesting the instruction would amount to an arbitrary abdication of duty, as Plaintiffs claim, or a reasonable exercise of discretion in light of Supreme Court case law. And the Ninth Circuit most certainly did not prohibit DOJ from considering Supreme Court case law in deciding when to prosecute or what jury instructions to request in future prosecutions.

In short, the Ninth Circuit's decision does not control the question presented in this case. Regardless of whether the decision remains good law and would permit continued use of the *McKittrick* instruction within the Ninth Circuit, DOJ's decision to stop requesting the instruction was reasonable in light Supreme Court case law indicating that the instruction would not survive Supreme Court review.

4. DOJ's position respects the judicial function.

With no legitimate basis to contest DOJ's assessment of Supreme Court case law, Plaintiffs argue that DOJ usurped the judicial function by declining to defend the *McKittrick* instruction in response to McKittrick's petition for *certiorari*, and "impermissibly arrogated unto [itself] a role that is reserved for the judiciary." Br. at 17. Plaintiffs apparently base their view on the fact that the Solicitor General did not ask that the Ninth Circuit's judgment be vacated for further consideration in light of the government's position. *See id.* Plaintiffs' view is unfounded. While the government may confess error and ask that a judgment be vacated on that basis, it may equally identify an error of law or fact, yet contend that the judgment should be affirmed or that the error does not warrant further discretionary review. In either instance, the judiciary retains the authority to decide how to address the government's concession of error.

In response to McKittrick's petition, for example, the government identified an error in the jury instructions, but explained why it believed that further review was not

warranted as a matter of the Supreme Court's discretion over its *certiorari* docket. The government gave three reasons: first, no other court of appeals had squarely addressed the knowledge issue presented, and no circuit conflict existed; second, the issue would be unlikely to recur because of the government's decision to request jury instructions consistent with its view of the law; and third, any error had no impact on the defendant's sentence. AR 129-131. The Supreme Court elected to deny *certiorari*.

In other comparable cases, the Court has exercised its judicial discretion to issue an order granting the petition, vacating the judgment, and remanding for further consideration (a "GVR" order) in light of the government's concession of error *despite* the fact that the government opposed that course. In *Alvarado v. United States*, 497 U.S. 543 (1990) (per curiam), for example, the Court entered a GVR order where the government identified an error in a lower court's analysis of a claim of unconstitutional use of peremptory challenges, but argued that the judgment was valid and that further review was unwarranted. The Court explained that a GVR order is not "unusual" when "the Government has suggested that an error has been made by the court below," even "where error is conceded but it is suggested that there is another ground on which the decision below could be affirmed." *Id.* at 544. As that practice illustrates, the ultimate power to determine the law – and whether to provide for judicial consideration of a government concession of error on the merits – lies within the province of the judiciary. The government's brief in response to McKittrick's petition thus did not short-circuit the judiciary's power to interpret the law.

Similarly, the government's announcement in response to McKittrick's petition of its intention to request criminal jury instructions compatible with its best view of the law, even if Ninth Circuit precedent would permit a more lenient showing to obtain a conviction, does not assume or usurp the judicial function. In any prosecution, the trial court retains the power to decide what jury instructions are legally warranted and appropriate on the facts; it is not bound by the government's view of the law. *Cf. United States v. Apel*, 134 S. Ct. 1144, 1151 (2014). And in deciding whether to bring a

prosecution, it is fully appropriate – and well within the exercise of prosecutorial discretion – for the government not to subject citizens to criminal prosecution based on a view of the law that the government believes will ultimately be rejected by the courts. Indeed, it would be an unwise and potentially unjust use of prosecutorial resources for the government to seek convictions when it knows it would likely have to confess error in the judgment upon post-trial review. Therefore, nothing in the government's exercise of executive authority to request jury instructions it believes to be correct, or to refrain from bringing a prosecution the government believes to be flawed, prevents the judiciary from adjudicating disputes between parties and applying its correct understanding of the law. DOJ is entitled to summary judgment on Plaintiffs' APA claim.

B. DOJ is entitled to judgment on Plaintiffs' ESA claim because the issuance of the *McKittrick* Memorandum did not trigger a duty to consult on Mexican wolves.

The only ESA claim properly before the Court is Plaintiffs' claim that DOJ violated ESA Section 7(a)(2) by failing to consult on the effects of the *McKittrick* Memorandum on the Mexican wolf. Br. at 28-29; Third Am. Compl. ¶ 109. Plaintiffs do not argue that the Memorandum violates any other ESA provision and may not do so for the first time in their reply. "The rule that a moving party must present all of its evidence or raise all of its legal arguments in a substantive brief, rather than in reply, is a rule rooted in the notion of fairness between the parties." *Bergdale v. Countrywide Bank FSB*, No. CV-12-8057-PCT-SMM, 2013 WL 12174685, at *3 (D. Ariz. Dec. 5, 2013) (citing *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003), and *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993)).

Although Plaintiffs' brief attempts to broaden the scope of their Section 7(a)(2) claim to encompass species other than the Mexican wolf, the attempt is foreclosed by the Court's Order of August 12, 2014 (ECF No. 22), and by Plaintiffs' own complaint. As the Court is aware, in response to DOJ's motion to transfer venue, Plaintiffs represented that the scope of this lawsuit is limited exclusively to the Mexican wolf. On that basis,

the Court denied DOJ's motion and ordered Plaintiffs to amend their complaint to clarify the limited scope of their claims. *Id*. at 7-8. Plaintiffs subsequently amended their complaint to limit their Section 7(a)(2) claim to the Mexican wolf. Second Am. Compl. (ECF No. 23) ¶ 99; Third Am. Compl. ¶ 109. No other species are at issue in this case.

"A plaintiff's burden in establishing a procedural violation [of the ESA] is to show that the circumstances triggering the procedural requirement exist, and that the required procedures have not been followed." *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985); *Karuk Tribe*, 681 F.3d at 1028. Plaintiffs have not met their burden because DOJ's issuance of the *McKittrick* Memorandum did not trigger a duty under Section 7(a)(2) to consult with FWS about potential effects on Mexican wolves.

The duty to consult is triggered only when a federal agency action may affect a threatened or endangered species. 50 C.F.R. § 402.14(a). Because Mexican wolves have been designated a nonessential experimental population, they are treated as threatened only when they "occur[] in an area within the National Wildlife Refuge System or the National Park System." 16 U.S.C. § 1539(j)(2)(C)(i); DCSF ¶¶ 62-64, 68-70. Therefore, the only agencies that must consult are the National Park Service and FWS itself, and only when they take actions affecting Mexican wolves within a national park or wildlife refuge under their jurisdiction. DCSF ¶ 70. As FWS has explained, "Federal action agencies, other than the National Park Service and the Service on National Refuge lands, are not required to consult on activities that they authorize, fund or carry out." *Id*. Plaintiffs' Section 7(a)(2) claim fails for this reason alone.

Even if the *McKittrick* Memorandum could be considered an action within a national park or wildlife refuge (which it is not), DOJ's issuance of the Memorandum still would not have triggered consultation because wolves could not occupy any national parks or wildlife refuges under the regulations in effect at the time. DCSF ¶¶ 63-66. Mexican wolves were confined to the Blue Range Wolf Recovery Area ("BRWRA"), consisting exclusively of the Apache and Gila national forests administered by the U.S. Forest Service. *Id*.; 63 Fed. Reg. 1752; *see* 80 Fed. Reg. at 2518 ("the 1998 Final Rule

has a requirement that Mexican wolves stay within the BRWRA"). As a result, there were no threatened Mexican wolves that could have triggered consultation.

Although Plaintiffs also purport to challenge DOJ's "ongoing implementation" of the *McKittrick* Memorandum, it required no further "implementation" after it was issued. The Memorandum memorialized a decision not to act – to stop requesting a jury instruction. AR 130-131, 148-150. The Memorandum itself fully implemented DOJ's decision by directing prosecutors to stop requesting the instruction. AR 148-150. DOJ's ongoing authority and control over its prior decision is not itself an ongoing "action" requiring consultation. *Ctr. for Biological Diversity*, 2017 WL 460659, at *11. Plaintiffs also disavow challenging "any particular enforcement decision" in which the *McKittrick* Memorandum conceivably could have been applied. Br. at 1.

In any event, even if the Memorandum were issued today, Plaintiffs' claim would still fail because Mexican wolves still do not occupy any national park or wildlife refuge that would give them threatened status. Under current regulations, Mexican wolves may disperse into the larger Mexican Wolf Experimental Population Area ("MWEPA"). DCSF ¶ 71. But national parks and wildlife refuges contain less than two percent of the suitable wolf habitat in the MWEPA, DCSF ¶ 72, and there is no evidence that Mexican wolves presently occupy any park or refuge, *id*. ¶ 77.

Moreover, of the six national parks and wildlife refuges within the MWEPA that contain more than a negligible amount of wolf habitat, only one permits hunting, and it is located far from the area currently occupied by wolves. DCSF ¶¶ 73-77. Only six percent of that refuge contains wolf habitat. DCSF ¶ 77. The mere possibility that a wolf might one day wander onto that small area during a time when the refuge permits hunting and be shot by an unscrupulous hunter motivated by the *McKittrick* Memorandum is too remote to trigger consultation. *Cf. Ctr. for Biological Diversity v. HUD*, 359 Fed. Appx. 781, 783 (9th Cir. 2009) (holding that "agencies' loan guarantees have such a remote and indirect relationship to the watershed problems allegedly stemming from the urban development that they cannot be held to be a legal cause of any effect on protected

species for purposes of … the ESA"). The hunter's own decision to shoot the wolf would also break any purported causal connection between the *McKittrick* Memorandum and harm to the wolf. *See supra* at 12-13. Therefore, even if the Memorandum were issued today instead of 18 years ago, consultation still would not be required.

Plaintiffs' ESA claim fails for two additional reasons. First, DOJ's decision to stop requesting the *McKittrick* instruction is not an *affirmative* action within the meaning of Section 7(a)(2). The ESA "mandate[s] consultation … only before an agency takes some affirmative agency action, such as issuing a license." *Cal. Sportfishing Prot. All. v. FERC*, 472 F.3d 593, 595 (9th Cir. 2006). "Action" under Section 7 means activities "authorized, funded, or carried out" by an agency. 50 C.F.R. § 402.02. "Of particular significance is the affirmative nature of these words—'authorized, funded, carried [out]'—and the absence of a 'failure to act' from this list." *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1107-08 (9th Cir. 2006). Thus, the duty to consult is triggered only if "a federal agency affirmatively authorized, funded, or carried out the underlying activity" that affects listed species. *Karuk Tribe*, 681 F.3d at 1021. Agency "'action' will implicate section 7(a)(2) only if it legitimately authorizes [private] activity." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1511 (9th Cir. 1995); *Salmon Spawning & Recovery All. v. Ahern*, No. C05-1878Z, 2010 WL 890047, at *3 (W.D. Wash. Mar. 9, 2010) ("The alleged failure of Customs and FWS to enforce the salmon import ban does not constitute agency action within the meaning of ESA Section 7(a)(2).").

The *McKittrick* Memorandum does not authorize any wolf shootings. Nor does it repeal any laws, as Plaintiffs suggest. *Cf. Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1014-15 (9th Cir. 2009) (agency decision to repeal regulation that had imposed substantive environmental protections triggered duty to consult). Killing wolves is illegal, regardless of DOJ's position on proper jury instructions. *See supra* at 12-13. Because the *McKittrick* Memorandum does not authorize the illegal third-party activity that is affecting wolves, those activities do not impose a duty to consult on DOJ.

Finally, even if the *McKittrick* Memorandum were an affirmative agency action within the meaning of Section 7(a)(2) (which it is not), the duty to consult still would not apply. DOJ issued the Memorandum pursuant to its criminal enforcement authority under ESA sections 11 and 9. Section 7(a)(2) does not apply when an agency is "exercising authority drawn from its enforcement power under section 9 of the ESA." *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) (FWS's provision of letter to timber company specifying conditions for avoiding unlawful take did not trigger duty to consult). "The section 7 consultation procedures are not relevant to the enforcement of section 9." *Sierra Club*, 65 F.3d at 1511 n.15; *see id*. at 1509 n.10 ("To overlay section 9 enforcement with section 7 consultation creates a redundancy that is contrary to a basic rule of statutory construction"). Plaintiffs' ESA claim lacks merit.

V. Objections to Plaintiffs' extra-record evidence

Pursuant to LRCiv 7.2(m)(2), DOJ objects to certain of Plaintiffs' extra-record exhibits for the reasons stated below. The exhibits are not material to the above arguments demonstrating that DOJ is entitled to judgment as a matter of law. Plaintiffs' assertions based on the exhibits are also erroneous. *See* DCSF. Nevertheless, the exhibits are not properly before the Court and should be stricken.

A. Portions of Plaintiffs' standing declarations are inadmissible.

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Parts of Plaintiffs' standing declarations do not comply with those requirements. The declarants aver that the *McKittrick* Memorandum "eviscerates the deterrent effect of the ESA's criminal enforcement provision," that "the loss of this deterrent effect has led to elevated levels of illegal mortality," and that a favorable ruling would increase the wolf population. *E.g.*, ECF No. 87-8 ¶¶ 25, 28. Those statements are

inadmissible because the declarations do not establish that they are based on personal knowledge, or that the declarants are otherwise competent to testify on such matters. *See* Fed. R. Civ. P. 56(c)(4); *Block v. City of Los Angeles*, 253 F.3d 410, 419 (9th Cir. 2001). Therefore, the following paragraphs of Plaintiffs' standing declarations should be stricken: ECF No. 87-8 ¶¶ 2 (last sentence), 25, 26 (last sentence), 27 (last sentence), 28, 29 (third and fifth sentences); ECF No. 87-9 ¶¶ 19-21, 22 (last two sentences); ECF No. 87-10 ¶¶ 18-21; ECF No. 87-11 ¶¶ 9-10, 12 (last sentence), 13.

B. Most of Plaintiffs' other extra-record materials are inadmissible.

1. The Court should disregard most of Plaintiffs' exhibits in resolving Plaintiffs' APA claim.

"Generally, judicial review of an agency decision is limited to the administrative record on which the agency based the challenged decision." *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). The Ninth Circuit "allow[s] expansion of the administrative record in four narrowly construed circumstances." *Id*. Plaintiffs bear a "heavy burden" to show that one of the exceptions applies. *Id*.

In the Joint Case Management Plan, the parties agreed that, "[t]o the extent Plaintiffs rely on extra-record evidence in support of their APA claim, Plaintiffs shall address the admissibility of such evidence in their summary judgment brief." ECF No. 67-1 ¶ 10(iii). The Scheduling Order likewise states that Plaintiffs' APA claim "will be adjudicated on the basis of the administrative record … , together with any other extra-record material that fits within one or more of the exceptions to record review," ECF No. 71 ¶ 3, and it directed Plaintiffs "to include in the Motion for Summary Judgment any issue of admissibility of any extra-record evidence relied on in their motion." *Id*. ¶ 6. Plaintiffs, however, did not attempt to demonstrate that any of their exhibits fit within the narrow exceptions to record review. As a result, all such arguments have been waived. *Bergdale*, 2013 WL 12174685, at *3. Aside from copies of court filings (ECF Nos. 87-1

through 87-7) and a few exhibits that are subject to judicial notice,[5] the Court should disregard Plaintiffs' exhibits in resolving Plaintiffs' APA claim.

2. The Court should disregard Plaintiffs' exhibits in resolving their ESA claim.

"An agency's compliance with the ESA is [also] reviewed under the [APA]." *Karuk Tribe*, 681 F.3d at 1017. Because a lawsuit alleging an ESA violation "is a record review case, [the court] may direct that summary judgment be granted to either party based upon our review of the administrative record." *Id*. In *Western Watersheds Project v. Kraayenbrink*, the Court confirmed that "[i]rrespective of whether an ESA claim is brought under the APA or the citizen-suit provision, the APA's 'arbitrary and capricious' standard applies." 632 F.3d 472, 481 (9th Cir. 2011). However, the Court later stated that, because the ESA provides a remedy, "the APA does not apply in such actions," and the Court could consider evidence "outside the administrative record for the limited purposes of reviewing Plaintiffs' ESA claim." *Id*. at 497.

The contradictory statements in *Western Watersheds* have created "uncertain[ty] whether the panel discarded the APA record review rule entirely or simply found that the extra-record documents presented to the district court in that case fit within one of the four standard exceptions [to record review]." *All. for Wild Rockies v. Krueger*, 950 F. Supp. 2d 1172, 1177 (D. Mont. 2013). Regardless, the "arbitrary and capricious" standard applies, *Watersheds*, 632 F.3d at 481, and it precludes the liberal admission of extra-record evidence. "Under the arbitrary and capricious standard, [a court's] scope of review is narrow and deferential… The court is not empowered to substitute its judgment for that of the agency." *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008). "When a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency." *Asarco, Inc.*

[5] DOJ agrees that the Court may take judicial notice of exhibits 1-3, 5, 12, and 16 because they are publicly available agency records, the content of which is undisputed.

v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). "In so imposing its judgment, the reviewing court effectively conducts a *de novo* review of the agency's action rather than limiting itself to the deferential procedural review that the APA's arbitrary or capricious standard permits." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

Accordingly, at a minimum, Plaintiffs must demonstrate that their extra-record materials are necessary for the Court to conduct its "deferential procedural review" of whether the *McKittrick* Memorandum triggered a Section 7(a)(2) duty to consult about Mexican wolves. *Locke*, 776 F.3d at 992. Plaintiffs cannot meet their burden because their exhibits are not even relevant, given the limited applicability of Section 7(a)(2) to Mexican wolves. *Supra* at 31-32. Therefore, the Court should disregard Plaintiffs' exhibits in resolving Plaintiffs' ESA claim.

3. Most of Plaintiffs' exhibits are inadmissible under the Federal Rules of Evidence.

The exhibits addressed below are also inadmissible under the Federal Rules of Evidence and should be stricken on that basis. *See Orr*, 285 F.3d at 773.

Exhibit 4. Exhibit 4 is a declaration by an officer of Defenders of Wildlife who was director of FWS from 1997-2001. Paragraphs 6-9 contain inadmissible opinion testimony and hearsay regarding the purported effects of the *McKittrick* Memorandum on listed species, ESA enforceability, and other matters. Nothing in the declaration demonstrates that the declarants' statements are based on personal knowledge. Because the declarant left federal service 16 years ago, there is no basis for inferring that she has the requisite personal knowledge. The declarant also offers her "understanding" on various matters, ECF No. 88-4 ¶¶ 6-7, 9, but the phrase, "it is my understanding," indicates that the statements "are based upon statements made to [her] by third parties. Such statements are hearsay." *Booker v. Kessinger/Hunter Mgmt.,* No. 03-01064-CV-W-SOW, 2005 WL 2090777, at *6 (W.D. Mo. Aug. 29, 2005); *Block*, 253 F.3d at 419.

Nor does the declaration show that the declarant is qualified to offer an expert opinion on the matters addressed. *See* Fed. R. Evid. 702. And even if the declarant did qualify as an expert, the declaration does not demonstrate that her conclusions are reliably based on facts or valid methods and procedures. *See Recreational Devs. of Phoenix v. City of Phoenix*, 220 F. Supp. 2d 1054, 1062-64 (D. Ariz. 2002) (where party seeking summary judgment relies on expert testimony, "the Court must perform its 'gatekeeping' role to determine whether the evidence is reliable"), *aff'd,* 77 F. App'x 983 (9th Cir. 2003). Paragraphs 6-9 of Exhibit 4 are inadmissible and should be stricken.

Exhibit 6. Exhibit 6 is a declaration from a former FWS special agent who retired from federal service in 2009. He never worked in FWS's southwest region where the Mexican wolf is located. ECF No. 88-6 ¶ 3. His statements in paragraph 9 pertaining to the Mexican wolf are not based on personal knowledge and should be stricken.

The declarant also offers his opinion that the *McKittrick* Memorandum has adversely affected the government's ability to achieve the objectives of the ESA, and "eviscerated the deterrent effect of the [ESA]'s criminal enforcement provision and inevitably led to a higher incident of illegal mortality." ECF No. 88-6 ¶¶ 5, 15, 18. This opinion testimony should be stricken because the declaration does not identify any reliable basis for it. In paragraphs 6-14, the declarant attests that, in the cases in which he was involved, FWS and DOJ made charging decisions on a case-by-case basis. That is not a reliable basis for concluding that the *McKittrick* Memorandum has nullified the ESA's deterrent effect. The remainder of the declaration consists of unsupported speculation about the behavior of "careless and unethical hunters," ECF No. 88-6 ¶ 16, and about how individuals opposed to listed species may "feel" about the *McKittrick* Memorandum. *Id*. ¶ 17. Paragraphs 5 and 15-18 of the declaration should be stricken as speculative opinion testimony that is not reliably based on any facts or valid methodology. *See Recreational Devs.*, 220 F. Supp. 2d at 1061 (expert report inadmissible "because it is completely devoid of any reliable methodology").

Exhibit 11. Exhibit 11 is a declaration from a biologist who left FWS in 1999. His statements in paragraphs 5-8 about the understanding of FWS in the late 1990s should be stricken because they contain inadmissible legal opinion and because there is no indication the declarant is authorized to speak for the agency. To the extent the declarant is relaying his understanding of FWS's official position, the statements are inadmissible hearsay. Paragraphs 10-13 consist of the declarant's subjective beliefs and unsupported speculation. Not based on personal knowledge, they are inadmissible and should be stricken. *See Block*, 253 F.3d at 419.

Exhibits 7-10, 13-15, and 17-18. These exhibits are inadmissible because they have not been authenticated. *See Orr*, 285 F.3d at 773-74; *Ericson v. City of Phoenix*, No. CV-14-01942-PHX-JAT, 2016 WL 6522805, at *7 (D. Ariz. Nov. 3, 2016). There is also no indication that Exhibits 13-15, which purport to be materials drafted by employees of the Arizona Fish and Game Department, are official views or records of the agency itself. The portions of Exhibits 13-15 discussing the *McKittrick* Memorandum are also inadmissible hearsay, as they relay information derived from a 2003 newspaper article and from discussions with an FWS employee, and nothing in the documents indicates that the alleged statements of the FWS employee are based on personal knowledge. *See* ECF No. 88-13, at 5-6. Accordingly, Exhibits 7-10, 13-15, and 17-18 are inadmissible and should be stricken.

CONCLUSION

Although Plaintiffs' claims fail for all of the reasons addressed above, a single, fundamental point is dispositive: DOJ has discretion to pursue criminal prosecutions in a manner that it believes is consistent with Supreme Court precedent. Because the *McKittrick* Memorandum is an appropriate exercise of that discretion, it is not subject to judicial review. Therefore, and for the additional reasons set forth above, Plaintiffs' motion for summary judgment should be denied, and the Court should enter summary judgment in favor of DOJ pursuant to the Scheduling Order and paragraph 10(vii) of the Joint Case Management Plan (ECF 67-1).

DATED: March 9, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2017, the foregoing document filed using the United States District Court for the District of Arizona's electronic filing system, which automatically effects service on all parties.

/s/ Kevin W. McArdle

Kiren Mathews

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