

December 8, 2022

Debra Haaland
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240
doiexecsec@ios.doi.gov

Martha Williams
Director
U.S. Fish and Wildlife Service
1849 C. Street NW
Washington, D.C. 20240
Martha.Williams@fws.gov

Sent via email with exhibits as attachments, return receipt requested

Re: Petition Requesting that the U.S. Department of the Interior and the U.S. Fish and Wildlife Service to Designate Coyotes (*Canis latrans*) as “Endangered” under 16 U.S.C. § 1533(e) 50 C.F.R. § 17.50, Because of the Species’ Similarity of Appearance to the Mexican Gray Wolf (*Canis lupus baileyi*) in Parts of Arizona and New Mexico.

Dear Secretary Haaland and Director Williams,

This is a formal petition to list the coyote (*Canis latrans*) as “Endangered” within the Mexican Wolf Experimental Population Area (MWEPA) in Arizona and New Mexico under the similarity of appearance provision of Section 4(e) of the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq. (ESA). The similarity of coyotes and Mexican gray wolves is undeniable. Publications and posters by regional wildlife managers encouraging hunters to know the difference between coyotes and Mexican gray wolves have not stopped the misidentification of the latter resulting in high levels of human-caused mortality, much to the detriment of the recovery of the imperiled wolf.

Mexican gray wolves (*Canis lupus baileyi*) are a federally-listed Endangered species, with an experimental population managed under section 10(j) of the ESA, and found in the southwestern United States and northern Mexico. Human-caused mortality and illegal killing of lobos are primary threats to the recovery of this species (87 CFR 39349). Coyotes and Mexican gray wolves are sympatric throughout the MWEPA.

As required by 50 C.F.R. § 424.14(b), Western Watersheds Project provided written notice on November 7, 2022 to Arizona Game and Fish Department and the New Mexico

Department of Game and fish, the agencies responsible for the management and conservation of coyotes within the MWEPA, more than 30 days prior to the submission of this petition.

The U.S. Fish and Wildlife Service ("Service") has jurisdiction over this petition. This petition sets in motion a specific process, placing definite response requirements on the Service. Specifically, the Service must issue an initial finding as to whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted... within 90 days after receiving the petition." 16 U.S.C. § 1533(b)(3)(A).

Authored by:



Greta Anderson
Deputy Director
Western Watersheds Project
738 N. 5th Ave, Suite 206
Tucson, Arizona 85702
greta@westernwatersheds.org
(520)623-1878

On behalf of petitioners:

Western Watersheds Project
Center for Biological Diversity
Colorado Wolf and Wildlife Center
Grand Canyon Wolf Recovery Project
Great Old Broads for Wilderness
Plan B to Save Wolves
Project Coyote
Rio Grande Chapter – Sierra Club
Sierra Club – Grand Canyon Chapter
The Rewilding Institute
Western Wildlife Conservancy
White Mountain Conservation League
WildEarth Guardians
Wolf Conservation Center

Cc: Amy Lueders, Regional Director, RDLueders@fws.gov

Rulemaking Petition to List the Coyote (*Canis latrans*) as “Endangered” in Parts of Arizona and New Mexico under the Endangered Species Act, 16 U.S.C. § 1533(e) and 50 C.F.R. § 17.50-52 (Similarity of Appearance)

December 9, 2022



Screengrab for recent news coverage of Mexican wolves, featuring the image of a coyote.

Prepared by and to whom correspondence should be addressed:

Greta Anderson, Deputy Director
Western Watersheds Project
738 N. 5th Ave, Suite 206
Tucson, Arizona 85705
(520)623-1878
greta@westernwatersheds.org

Rulemaking Petition to List the Coyote (*Canis latrans*) as “Endangered” in Parts of Arizona and New Mexico under the Endangered Species Act, 16 U.S.C. § 1533(e) and 50 C.F.R. §§ 17.50 (Similarity of Appearance)

PETITIONERS

Greta Anderson, Deputy Director
Western Watersheds Project
738 N. 5th Ave, Suite 206
Tucson, Arizona 85705
greta@westernwatersheds.org

Michael J. Robinson, Senior Conservation Advocate
Center for Biological Diversity
P.O. Box 1727
Silver City, NM 88062
michaelr@biologicaldiversity.org

Darlene Kobobel, CEO
Colorado Wolf and Wildlife Center
PO Box 713
Divide, Colorado 80814
Darlene@wolfeducation.org

Emily Renn, Executive Director
Grand Canyon Wolf Recovery Project
PO Box 233
Flagstaff, AZ 86002
emily@gcwolfrecovery.org

Sally Sharp, Grassroots Regional Coordinator
Great Old Broads for Wilderness
555 Rivergate Lane, B1-110
Durango, CO 81301
sally@greatoldbroads.org

Betsy Klein, Founder
Plan B to Save Wolves
1785 W SR 89A, Ste. 3A
Sedona, AZ 86336
b@planb.foundation

Michelle L. Lute, PhD, Carnivore Conservation Director
Project Coyote
P.O. Box 5007
Larkspur, CA 94977
mlute@projectcoyote.org

Mary Katherine Ray, Wildlife Chair
Rio Grande Chapter Sierra Club
HC 30 Box 244
Winston, NM 87943
mkrscrim@gmail.com

Sandy Bahr, Chapter Director
Sierra Club - Grand Canyon Chapter
514 W Roosevelt St.
Phoenix, AZ 85003
Sandy.bahr@Sierraclub.org

David Parsons, Carnivore Conservation Biologist
The Rewilding Institute
2723 Decker Ave NW
Albuquerque, NM 87107
ellobodave@gmail.com

Kirk C Robinson, Executive Director
Western Wildlife Conservancy
1021 Downington Ave.
Salt Lake City, Utah 84105
lynx@mission.com

Thomas Hollender, President
White Mountain Conservation League
PO Box 72
Nutrioso, AZ 85932
twollender@gmail.com

Chris Smith, Southwest Wildlife Advocate
WildEarth Guardians
301 N. Guadalupe, Suite 201
Santa Fe, NM 87501
csmith@wildearthguardians.org

Rulemaking Petition to List the Coyote (*Canis latrans*) as “Endangered” in Parts of Arizona and New Mexico under the Endangered Species Act, 16 U.S.C. § 1533(e) and 50 C.F.R. §§ 17.50 (Similarity of Appearance)

I. INTRODUCTION

Petitioners hereby submit to the U.S. Fish and Wildlife Service (“Service”) a petition to promulgate a rule pursuant to 16 U.S.C.1533(e) to list coyotes (*Canis latrans*) in parts of Arizona and New Mexico in accordance with 50 C.F.R. §§ 17.50-51.

Under Section 4(e) of the Endangered Species Act (“ESA”), whenever a species which is not Endangered or Threatened closely resembles an Endangered or Threatened species, the Secretary of the U.S. Department of the Interior, acting through the Director of the Service, has the ability to determine whether its “similarity of appearance” imperils the listed species’ survival and recovery, thereby warranting ESA listing-status for the similarly appearing species to adequately protect the listed species. 16 U.S.C. § 1533(e); 50 C.F.R. § 17.50.

The Mexican gray wolf (*Canis lupus baileyi*) is a subspecies of the gray wolf that currently occupies the Mexican Wolf Experimental Population Area (“MWEPA”) in central and southern Arizona and New Mexico, as well as portions of northern Mexico (87 FR 39349). It is listed under the ESA as “endangered” everywhere except within the MWEPA, where the species is classified as an experimental, nonessential population.¹

The coyote (*Canis latrans*) is a species native to North America, weighing approximately 20-35 pounds and standing about 1.5 feet tall when fully grown, with a nose to tail length of four feet. They visually differ from adult Mexican gray wolves (*C. lupus baileyi*) because adult coyotes are generally smaller than adult Mexican gray wolves (but not smaller than juvenile wolves), and because coyotes have pointed ears and a narrow, pointed nose when compared to Mexican gray wolves. The two species’ fur color is very similar and both are commonly gray, rust, or buff. The patterns of coloration are quite similar overall. Visual distinction between the species, especially at a distance or in low-light conditions, can be difficult, even for wildlife professionals and the most astute hunters.

It is currently legal to kill coyotes throughout the MWEPA, and it is illegal to kill, harm, or harass Mexican gray wolves anywhere they are found, but even collared Mexican gray wolves have been killed numerous times under the claim of misidentification by the hunter: “I thought it was a coyote.” It is unknown how many uncollared Mexican gray wolves perish this way. Despite the prevailing hunting ethics requirement of knowing one’s target before shooting, the so-called “McKittrick Policy” of the U.S. Department of Justice effectively provides protection from prosecution in cases of misidentification of endangered species.

¹ Petitioners contest the “nonessential” experimental designation. See *Grand Canyon Wolf Recovery Project et al. v. Haaland*, 4:22-cv-00453-BGM (complaint filed Oct. 3, 2022).

The McKittrick policy is widely known among hunters and has been invoked numerous times to limit the penalties of careless hunters who used the excuse of misidentification for killing endangered wolves. The policy enables and encourages the killing of federally-protected Mexican gray wolves because it effectively eliminates the possibility of legal accountability for the poacher in question.

Mexican gray wolves are gravely threatened by illegal shootings. On July 1, 2022, the Service published a final rule to revise the regulations for the nonessential experimental population of the Mexican gray wolf (87 FR 39348-39373). This rule identifies threats to the species from “demographic stochasticity (fluctuations in survival and reproduction associated with small population size); genetic issues including inbreeding, loss of heterozygosity, and loss of adaptive potential; and excessive human caused mortality, including illegal killing” (*Id.* at 39349)(emphasis added).² It is within the duty and mandates of the Service to protect Mexican gray wolves within the MWEPA and thus prevent the accidental misidentification and human-caused mortality of this highly-endangered canid by claiming mistaken identity with coyotes. Listing the coyote under the ESA’s Similarity of Appearance provision, 16 U.S.C. 1533(e); 50 C.F.R. §17.50, would facilitate enforcement of the law and prevent harmful, illegal take of the Mexican gray wolf.

II. LEGAL REQUIREMENTS

The ESA, 16 U.S.C. §§ 1531 *et seq.*, was enacted in 1973 “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

After receiving a petition to list a species, the Secretary is required to determine “whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). Such a finding is termed a “90-day finding.” A “positive” 90-day finding leads to a status review and a determination whether the species will be listed, to be completed within twelve months of receipt of the petition. 16 U.S.C. §1533(b)(3)(B). A “negative” initial finding ends the listing process, and the ESA authorizes judicial review of such a finding. 16 U.S.C. § 1533(b)(3)(C)(ii). The applicable regulations define “substantial information,” for purposes of consideration of petitions, as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b)(1).

III. CRITERIA FOR EVALUATING OF SIMILARITY OF APPEARANCE

The ESA provides for the listing of a species which is not Endangered or Threatened but so closely resembles an Endangered or Threatened species that its protection furthers the

² Please note that citing to the existing regulations and explanations for revisions should in no way imply that signatories are in full support of the rules promulgated by the Service, nor does our reliance on these documents in order to demonstrate illegal killing as a threat to lobos reflect on our existing litigation against these revisions.

purposes of the Act. The relevant regulations for a Similarity of Appearance ESA listing are as follows:

§ 17.50 General.

- (a) Whenever a species which is not Endangered or Threatened closely resembles an Endangered or Threatened species, such species may be treated as either Endangered or Threatened if the director makes such determination in accordance with section 4(e) of the Act and the criteria of paragraph (b) of this section. After the Director has made such determination in accordance with the notification procedures specified in the Act, such species shall appear in the list in § 17.11 (Wildlife) or § 17.12 (Plants) with the notation “(S/A)” (similarity of appearance) in the “Status” column, following either a letter “E” or a letter “T” to indicate whether the species is being treated as Endangered or Threatened.
- (b) In determining whether to treat a species as Endangered or Threatened due to similarity of appearance, the Director shall consider the criteria in section 4(e) of the Act, as indicated below:
 - (1) The degree of difficulty enforcement personnel would have in distinguishing the species, at the point in question, from an Endangered or Threatened species (including those cases where the criteria for recognition of a species are based on geographical boundaries);
 - (2) The additional threat posed to the Endangered or Threatened species by the loss of control occasioned because of the similarity of appearance; and
 - (3) The probability that so designating a similar species will substantially facilitate enforcement and further the purposes and policy of the Act.

The coyote and the Mexican gray wolf meet these criteria, as explained below.

IV. COYOTES MEET THE CRITERIA FOR LISTING UNDER THE SIMILARITY OF APPEARANCE PROVISIONS OF THE ESA, FOR THE SAKE OF BETTER PROTECTING MEXICAN GRAY WOLVES.

A. It is difficult for enforcement personnel, and even experienced wildlife agents, to distinguish between Mexican gray wolf and coyotes.

Under Section 17.50(b)(1), the Director must consider, “The degree of difficulty enforcement personnel would have in distinguishing the species, at the point in question, from an Endangered or Threatened species (including those cases where the criteria for recognition of a species are based on geographical boundaries),” (emphasis added). In the case of the Mexican gray wolf, there is a specific incident that exemplifies that coyotes meet the criterion.

In 2013, an off-duty Wildlife Services' "Wildlife Specialist" named Bill Nelson shot and killed Mexican gray wolf #1288 within the MWEPA. *See* Exhibit A, letter from William Nelson to New Mexico Wildlife Service's State Director Alan May. In his statement to the New Mexico Wildlife Services' State Director Alan May, Mr. Nelson said, "[We] saw an animal that we both believed to be a coyote at about 400 yards. I drove up the road in the direction of the animal and spotted it again. I carefully looked through my rifle scope and identified it as a coyote." *Id.*, p. 1. Mr. Nelson's letter goes on to say, "When we arrived at the carcass, I discovered I had mistakenly shot a wolf," and "I absolutely believed I was shooting a coyote when I pulled the trigger." *Id.*, p. 2.

The law enforcement investigation report on the event emphasizes that Mr. Nelson claimed to have worked diligently towards the proper identification, stating:

"[Redacted] observed the animal for several minutes with [redacted] scope which is mounted on [redacted] rifle and identified it as a coyote. [Redacted] proceeded to "bark" at the canine as [redacted] does with coyotes and observed its behavior for a short time. [Redacted] again observed the canine through [redacted] rifle scope and once again identified it as being a coyote. [Redacted] proceeded to shoot the canine with one (1) shot. The canine ran for approximately twenty (20) yards then collapsed."

See Exhibit B, FWS Investigation Report MGW1288, at pp. 3-4.

Additionally, the report quotes: "[Redacted] stated [redacted] was 'certain that the animal was a coyote.'" *Id.*, p. 7.

Thus, as this accounting shows, even an experienced "Wildlife Specialist" who had worked extensively with both wolves and coyotes during his tenure at Wildlife Services apparently mistook his target. And, the account of the death of Mexican gray wolf #1288 suggests that, at least, the Service's office of law enforcement and the U.S. Attorney's office were convinced of that likelihood – that coyotes and wolves look so similar as to be indistinguishable. The investigation report into the death of #1288 includes a special request to analyze the canid's genetic composition to ensure it was a Mexican gray wolf. *See* Exhibit C, p.1. Ultimately, no charges were filed against Mr. Nelson and he continued to work for Wildlife Services.

After leaving Wildlife Services, "William Bennett Nelson dba Bill Nelson Wildlife Control" was hired by the Service under a sole source contract to trap, capture, and radio collar wolves. Exhibit D. The government announcement about Mr. Nelson's credentials said: "Mr. Nelson has extensive expertise in trapping around wolf depredations and was the primary person to determine the cause of depredations and trap for wolves in New Mexico through his work with USDA/APHIS/Wildlife Services." *Ibid.*

Section 17.50(b)(1) specifies that the difficulty in identification extend to *enforcement personnel* at the point in question, but Mr. Nelson's case demonstrates that even the agencies' own personnel believed that distinguishing coyotes and wolves was difficult enough that professionals with experience, plenty of time, a clear shot, and contemporaneous knowledge that

wolves are in the area, can mistake Mexican gray wolves for coyotes. This clearly evinces the need for a “Similarity of Appearance” listing for coyotes in the MWEPA in order to adequately protect Mexican gray wolves.

B. Hunting regulations in Arizona and New Mexico allow for the year-round killing of coyotes, which limits the Service’s ability to control illegal take of Mexican gray wolves within the range overlap of the two species.

The Secretary must consider the additional threat posed to the listed Mexican gray wolf by the loss of control occasioned by the similarity of appearance to the unprotected coyote, per Section 17.50(b)(2). Coyote killing within the range of Mexican gray wolves is a year-round state-sanctioned recreational activity in both of the states that currently host the imperiled Mexican gray wolf (Arizona and New Mexico).

In Arizona, there is year-round hunting of coyotes, although hunters do need to have a valid hunting license. Exhibit E, Arizona Game and Fish Department webpage.³ Coyotes can be killed by hunters any day of the year, and there is no limit to the number of coyotes that each hunter may kill. *Ibid.* There is no reporting requirement for hunting coyotes, though trappers are required to report their ‘harvest.’ *Ibid.* The Arizona Department of Game and Fish 2022-2023 hunting regulations include information about the Mexican gray wolf and caution that distinguishing between wolves and coyotes can be difficult. Exhibit F, AGFD (excerpt), p. 79.⁴ The regulations booklet especially encourages caution while hunting coyotes between July to November because the appearance and behaviors of wolf pups can be so similar to that of coyotes. *Ibid.*

In New Mexico, coyotes are classed as “unprotected furbearers” which means that there is no closed season nor a bag limit for the species, and there is no requirement to have a hunting license for daylight hunts.⁵ Exhibit G, New Mexican Department of Fish and Game (excerpt), p.5. The New Mexico Department of Game and Fish 2022-2023 hunting and trapping rules and information booklet includes information about Mexican gray wolves and what to do if one is accidentally trapped. *Id.*, p.15. These regulations are also available in Spanish.⁶ A separate flier produced by the New Mexico Department of Game and Fish helps generally distinguish coyotes and wolves, admitting that they “can be difficult to differentiate at a distance or at a quick glance.” Exhibit H, NMDFG wolf education flyer. The New Mexico flyer also states that it is illegal to shoot a wolf because of mistakenly identifying it as a coyote “or anything else.” *Ibid.* Because there is no hunting license requirement in New Mexico, there is also no way of knowing who may be out hunting coyotes, and thus no way of even potentially identifying who may have been hunting coyotes in the area at the time of an illegal Mexican gray wolf killing.

³ <https://www.azgfd.com/hunting/species/predator/coyote/>

⁴ Full version: https://azgfd-portal-wordpress-pantheon.s3.us-west-2.amazonaws.com/wp-content/uploads/archive/2022-Arizona-Hunting-Regulations_220616.pdf

⁵ https://www.wildlife.state.nm.us/download/publications/rib/2022/furbearers/2022_2023-New-Mexico-Furbearer-Rules-and-Info.pdf

⁶ https://www.wildlife.state.nm.us/download/publications/rib/2022/caceria/2022_2023-Nuevo-Mexico-Caceria-Reglas-e-Informacion.pdf

Neither state requires hunters to review the brochures or attend any educational sessions on distinguishing coyotes from Mexican gray wolves. The similarity of appearance between coyotes and Mexican gray wolves is undeniable, and it is clear from a review of law enforcement records that Mexican gray wolves are threatened by this similarity, and that the Service has lost “control” of its ability to protect wolves from being killed and to recover the species.

C. Listing the coyote under the Similarity of Appearance provision of the ESA will substantially facilitate enforcement of take prohibitions on Mexican gray wolves and prevent accidental or unlawful take of Mexican wolves within the MWEPA.

Under Section 17.50(b)(3), the Secretary must consider whether designating coyotes within the MWEPA as a listed species will substantially facilitate enforcement and further the purposes and policy of the Endangered Species Act. It seems unquestionable that by protecting coyotes within the Mexican gray wolf recovery area, a major cause of Mexican gray wolf mortality can be eliminated.

It is unknown how many Mexican gray wolves are killed in cases of real or alleged mistaken identity. However, it is known that human-caused mortality is the primary cause of mortality for the species. The primary source of human-caused mortality is illegal killing by gunshot.⁷

A peer reviewer of the 2022 Revision to the Nonessential Experimental Population of the Mexican gray wolf recommended using a “similarity of appearance listing” for the coyote in order to help Mexican gray wolves reach the demographic recovery criterion of the proposed rule. The reviewer stated:

“[I] offer once more potential option to help curb illegal take and that would be to designate similar species off limits to harvest in the MWEPA. Under section 4(e) Similarity of Appearances Cases of the Endangered Species Act (1973) the Secretary of the Interior can deem another species as threatened or endangered if that species is so similar in appearance that curtailing take of that species would help conserve the endangered species. In this case, preventing take of coyotes (*Canis latrans*), which can be confused with the Mexican wolf... may help curtail illegal take of wolves. Even though it is illegal to kill a Mexican wolf because one mistook it for a coyote, if coyotes cannot be killed within the MWEPA, individuals may not even attempt to ‘shoot, shovel, and shut-up.’”

Exhibit I, Peer review for the draft rule p. 23. Simply put, the scientists hand-picked by the agency for their expertise with regard to recovery actions for Mexican gray wolves themselves suggested that coyotes be listed for the sake of wolf protection.

A public commenter suggested the same thing by stating, “[P]reventing take of coyotes, which can be confused with the Mexican gray wolf, may help curtail illegal take of wolves,” (87

⁷ “The primary source of human-caused mortality to the Mexican wolf is illegal killing by gunshot, followed by, to a much lesser extent, vehicular mortality.” <https://www.fws.gov/story/2022-04/improving-protections-mexican-wolves-wild>

FR 39348 at 39358). The Service didn't dispute this idea on the merits, but instead claimed that a section 4(e) listing would be "a separate regulatory action under the ESA and therefore beyond the purview of this rule" (*Ibid*).

The following examples demonstrate some of the instances in which Mexican gray wolf take was attributed to the species' similarity of appearance with coyotes, and in which the misidentification was invoked as an excuse by the perpetrator.

- Mexican gray wolf #2560 (collared), was shot and killed in Arizona on February 1, 2021, by an individual who self-reported his actions. Exhibit J, FWS Investigation Report MGW 2560. p.1. He claimed that he "saw what he thought was a coyote come through the junipers and shot twice at the animal," but, "[a]fter tracking I learned it was a wolf." *Ibid*. The AUSA declined to prosecute, "based on the U.S. Department of Justice's McKittrick Policy." *Id.*, p 30, 31. The killer was assessed a civil penalty of \$2500.00.
- Mexican gray wolf #1677 (collared), a yearling male of the Hoodoo Pack, was killed on the San Carlos Apache Reservation of Arizona on March 15, 2019 by a person who claimed "he was out predator hunting with his brother and killed what he thought was a coyote. Exhibit K, FWS Investigation Report MGW1677, p.1. He approached the carcass and realized he killed a Mexican gray wolf." *Ibid*. In this case, the Assistant United States Attorney closed the case after the Service received payments of \$1,700.00 for the Global Position System collar and \$5,400.00 as a contribution to the Mexican Wolf Conservation Fund. *Id.*, p.27.
- Mexican gray wolf #1486 (collared), was killed in New Mexico on November 17, 2018 by a person who claimed "he was out coyote hunting and killed a coyote and, as he approached the carcass, he observed the collar and realized he may have killed a wolf." Exhibit L, FWS Investigation Report MGW1486, p. 1. The person turned themselves in to Operation Game Thief. *Id.*, p. 3. The Service was advised in February 2019 by the Supervisory Assistant United States Attorney (SAUSA) that the case would be affected by the McKittrick policy, and referred to the Solicitor. *Id.* at p. 22. The Solicitor issued a notice of a civil violation and the killer was fined \$250.00 for violating the Endangered Species Act. *Id.* p. 26.
- Mexican gray wolf #1280 (collared), the breeding female of the Bluestem pack, was killed in Arizona on February 12, 2016 by an individual who was self-reporting that he "fired downhill at what he initially thought was a coyote responding to his calling. ... It was after the shot that he claimed to have noticed the collar on the animal as he walked towards the carcass and realized it was a wolf and not a coyote." Exhibit M, FWS Investigation Report MGW1280, p. 2. He was fined \$530.00, which was paid in June 2018. *Id.*, p. 36.
- Mexican gray wolf #1292 (collared; a.k.a. 825) of the Shepherders Baseball Park pack in New Mexico was killed in April 2013 by a person who admitted shooting at the female wolf the previous night, "though he thought it was a coyote and that he had missed the animal." Exhibit N, FWS Investigation Report MGW1292, p. 2. Additionally, the killer "didn't give much thought to the idea that he may have

been shooting at a Mexican gray wolf since the canine didn't appear to be very large." *Id.* p. 6, emphasis added. However, the individual was aware there were wolves in the vicinity. *Id.*, p. 5. The forensics reports indicated that the wolf's stomach contained "soft tissue and bone fragments identical to domestic cattle," and noted that some of the bone fragments appeared to have been 'cut at a level plane' or 'shaved,' (*Id.*, p.18) which the shooter attributed to having left table scraps around for his dogs. *Id.*, p. 39. On October 7, 2013, the U.S. Attorney's Office/District of New Mexico declined criminal prosecution of [REDACTED] due to the U.S. Department of Justice's McKittrick Policy. *Id.*, p. 43.

- Mexican gray wolf #1277 (collared) was trapped, shot, and killed in New Mexico on December 21, 2013. Exhibit O, FWS Investigation Report MGW1277. p.1. The wolf was caught in a trap but the shooter "saw what he thought was a large 'mountain coyote.'" *Id.*, p.2. The killer claimed to have poor eyesight that prevented him from seeing the collar around the wolf's neck. *Id.*, p.3. The SAUSA declined to prosecute. *Id.*, p. 38. This decision was attributed to the McKittrick policy. *Id.*, p. 41.
- Mexican gray wolf #1288 was killed in New Mexico in February 2013 (discussed above); the U.S. Attorney's Office, District of New Mexico, declined to prosecute a wolf killer and it "reached this decision after reviewing the facts and evidence of the investigation, and the issues of the shooting in which Mexican gray wolf was misidentified as a coyote. This misidentification issue fell within the U.S. Department of Justice's McKittrick policy." Exhibit B, FWS Investigation Report MGW1288, p. 7.
- Mexican gray wolf #1154 (collared), a wolf from the Bacho Pack, was killed on April 15, 2010 by a person who claimed to have misidentified the wolf as a coyote, and then panicked, buried the carcass and destroyed the collar. Exhibit P, FWS Investigation Report MGW1154, p.5.⁸ In this case, the shooter pleaded guilty.
- Mexican gray wolf #521, a ten-year old collared female member of the Fox Mountain pack was shot and killed by two men who "misidentified a canid as a coyote" on December 2, 2010. Exhibit Q, FWS Investigation Report MGW521, p.1. The two people involved in the wolf's death claimed to have been trying to shoot coyotes off a cow carcass located in the immediate vicinity, but also acknowledged that they had been told two days prior that there were wolves in the area. *Id.*, p.5. It also appeared that the collar had been recently cut or torn. *Id.*, p.7. One person was charged in this instance.
- Mexican gray wolf #1053, a female wolf that was collared and released near the home range of Fox Mountain pack in 2009, was killed in New Mexico two days after she was released by a person who claimed, "He saw the animal standing in his front yard before sunrise and he misidentified the wolf as a coyote." Exhibit R, FWS Investigation Report MGW1053, p.1. The person subsequently added a new

⁸ Notably, this report includes a statement from the wolf killer who said he worried that he might go to jail and "also did not believe anyone would consider that a rancher accidentally shot a wolf." Exhibit I, p. 5.

claim to his story that “he was threatened by the presence of a predator ten feet from his front door and that is why he shot the wolf.” *Id.* p.31. The bullet entered the body from the back. The US Attorney’s office apparently declined to prosecute the case (*Ibid.*), but the reasoning for that decision was not provided in the records on file.

- Mexican gray wolf #1008, the collared breeding male of the Laredo Pack, was killed in New Mexico in August 2008. Exhibit S, FWS Investigation Report MGW1008, p.3. by a ranch caretaker who confessed to “shooting an unidentified canine that was chasing his cattle and, upon inspecting the carcass, he determined the animal was a Mexican gray wolf. [REDACTED] then buried the wolf carcass to conceal his involvement in the wolf mortality.” *Id.*, p.1. His confession included claims that he believed the canine in his pasture was either a coyote or a dog and that he shot the canine without hesitating. *Id.*, p.9. This person was prosecuted, sentenced to one year probation, forfeiture of the firearm and fined \$10.00.

These documented instances are just the incidents we know about; numerous other law enforcement reports have been withheld under Exemption 7 of the Freedom of Information Act and we are unable to assess the reasons for a lack of prosecution. In the vast majority of cases, the wolf killers are never identified and their potential justification of misidentification is never tested. Notably, some of the mortality investigation reports we reviewed showed evidence of prior, non-mortal gunshot injuries.⁹

Even in cases of mistaken identity, killing a Mexican gray wolf qualifies as unlawful take. However, the current prosecutorial policy of the Department of Justice provides a “get out of jail free” card for lobo poachers: the so-called “McKittrick Policy,” in which the species’ similarity of appearance with coyotes in effect provides prosecutorial immunity for wolf killers who claim mistaken identity.¹⁰

This unofficial (yet controlling) policy flows from a jury instruction in *United States v. McKittrick*, 142 F.3rd 1170, 1176-77 (9th Cir. 1998) in which Mr. McKittrick, who killed a gray wolf and claimed he believed it was a coyote, was found guilty of violating the ESA because he killed a listed species. The case ultimately wound up at the Supreme Court but, in a reversal of their position in the lower courts, the Solicitor General expressed a belief that the jury instructions in the case were unlawful because the standard of *mens rea* was misapplied in the lower courts. Exhibit T, Bucella Memo 1999, p. 3. In that case, jurors were instructed that the government need *not* prove that the defendant knew the biological identity of the endangered species at the time he shot it. The Department subsequently reversed and stated that Department prosecutors “are instructed not to request, and to object to, the use of the knowledge instructions at issue in McKittrick.” In practice, this means that jurors must find that the defendant(s) knew

⁹ See, e.g., Exhibit G, p. 10, “An old gunshot wound to the left hind leg had resulted in extensive scarring and a non-healing toe fracture. [] this injury occurred weeks or longer before the fatal injury.”; Exhibit M., p.18., “It was determined that the wolf had sustained past trapping and gunshot injuries.”

¹⁰ See Newcomer, et al. 2011. <https://www.animallaw.info/article/endangered-species-act-v-united-states-department-justice-how-department-justice-derailed>

that they were killing an imperiled species, which creates an evidentiary standard that is hard to meet.

The McKittrick Policy has resulted in a situation in which the Department of Justice will rarely charge or prosecute individuals for the illegal killing of ESA-listed species unless the government can prove that the defendant knew the biological identity of the animal [they] were killing at the time [they] killed it. As evidenced above, between 2008 and 2019, the McKittrick policy has explicitly come into play in at least five (5) decisions by the AUSA not to prosecute illegal take of Mexican gray wolves where the killer claimed to have thought they killed a coyote, and the excuse of mistaken identity with coyotes has been used in at least seven additional instances of illegal mortality of wolves.¹¹

It stands to reason that uncollared lobos are more likely to be killed by coyote hunters, and the deaths of uncollared lobos may be unreported and therefore be unknown. Many wolves are classified as simply “lost to follow up” and the cause of their disappearance is unresolved. It could be that some of these wolves were killed by mistake and the killers, not knowing that they did anything more than legally kill a coyote, never report or even verify the animal's identity. It could also be that these wolves were killed with intention but since the mortality remains undiscovered, the crime went unnoticed.

Designating coyotes within the MWEPA as a listed species will substantially facilitate enforcement and further the purposes and policy of the Endangered Species Act because it will eliminate accidental or alleged misidentification of Mexican gray wolves.

IV. ADDITIONAL EVIDENCE IN SUPPORT OF A SIMILARITY OF APPEARANCE LISTING FOR COYOTES WITHIN THE MWEPA

Though apparently not wholly effective in preventing the unlawful take of Mexican gray wolves, there have been efforts by the state and federal agencies to educate the public in distinguishing the species from coyotes. This alone suggests that the similarity of appearance of the species is close enough to merit exceptional efforts by agencies.

In Arizona, a public flier includes visual distinctions as to the coyote and Mexican gray wolves' tails. Exhibit V. It also acknowledges comparative differences in the gait of the two canids, and urges “Hunters: Know the Difference.” *Id.*

In New Mexico, the New Mexico Game and Fish Department's “Wildlife Notes” discusses the difference between Mexican gray wolves and coyotes: “Mexican gray wolves weigh two-three times more, have larger blocky heads, more rounded ears and feet larger in proportion to the body than coyotes. As a result of reintroduction, many wolves have radio

¹¹ The McKittrick policy was also the reason that the AUSA decline the prosecution of the killer of Mexican wolf #1569, though in that case, the shooter claimed to have mistaken the wolf for his neighbor's German shepherd. Exhibit U. FWS Investigation Report OLE MGW1569, p. 40.

collars – coyotes do not.”¹² The fact that many collared wolves (*see above*) have been shot illustrates that state education efforts often fail to result in compliance.

The Service hosts a webpage called “Size comparison of wolves and coyotes.”¹³ Though the focus of the information is on height, length, and weight, the profile images of the adults of the species show some physical differences (i.e. the shapes of ears, snout). The page includes the statement, “If you see a wolf in Arizona or New Mexico, it is a Mexican gray wolf. However, it is possible to confuse Mexican gray wolves and coyotes, as they cooccur.” *Id.*

An implicit assumption in all of these identification guides is that a person will be familiar enough with one species to determine if a particular animal has, for example, smaller ears or a ‘blockier nose’ than the other. The shooter must already know the relative sizes of both species to know wolves’ ears “are small in proportion to the head ” versus the coyotes’ “large and pointy ears.” These subtle differences can also be difficult to discern at a range of hundreds of yards, the distance at which shots are commonly taken. It is also assumed that the observer is comparing adult morphs of both species, rather than a juvenile Mexican gray wolf which is more similar in appearance to a coyote because of its potentially identical size.

The Service itself has recognized the threat that mistaken identity poses to the Mexican gray wolf. In the 2022 revised recovery plan for the species, pursuant to court orders that required additional site-specific management to address human-caused mortality, the Service added as a recovery action, “Conduct education and outreach in local communities within occupied Mexican gray wolf range in the MWEPA and other areas where the wolves disperse...”¹⁴ The aim of this recovery action is to reduce illegal killing, and states, “Education and outreach materials to emphasize the physical differences between Mexican gray wolves and coyotes may reduce the likelihood of unintentional shooting of Mexican gray wolves due to mistaken identity as coyotes” (*Id.*).

V. CONCLUSION

Upon acceptance of the petition, the Service is required to begin assessing its determination as to whether the petition presents substantial information indicating that the listing of coyotes under U.S.C. § 1553(e), 50 C.F.R. §1750, may be warranted. We believe that we have provided sufficient evidence for a reasonable person to determine that the petitioned action is warranted herein, and have complied with the requirements of 50 CFR § 424.

Affirmatively listing the coyote as an Endangered species due to “Similarity of Appearance” in accordance with ESA Section 4(e) and the Service’s implementing regulations at 50 C.F.R. § 17.50, the Service would help to prevent coyote killing in the MWEPA of Arizona and New Mexico, and thereby, would proactively inhibit the killers of Mexican gray wolves

¹² Approximately half of the wild population of wolves have collars.

¹³ <https://www.fws.gov/media/size-comparison-wolves-and-coyotes>

¹⁴

https://ecos.fws.gov/docs/recovery_plan/Final%20Mexican%20Wolf%20Recovery%20Plan%20Second%20Revision%202022%20signed_508%20compliant_1.pdf , page 31.

from their use of alleged misidentification as an excuse to justify their illegal killing of an Endangered species.

For the reasons listed above, the signatory organizations and our members urge you to move swiftly to protect Mexican gray wolves by listing coyotes under the Similarity of Appearance provision of the ESA. We look forward to your response.

Thank you for considering our petition.

LIST OF EXHIBITS (attached)

- A. Letter from Bill Nelson to Wildlife Services regarding the killing of wolf 1288
- B. FWS investigation report for MGW 1288
- C. FWS request for genetic determination of species
- D. FWS announcement of sole source/trapping and capturing wolf capture
- E. Arizona Game and Fish Department Coyote Hunting webpage
- F. Arizona 2022 Hunting Regulations (excerpt)
- G. New Mexico 2022 Furbearer Rules and Info
- H. NMDFG Wolf identification flyer
- I. Peer reviews of FWS 2022 10j rule
- J. FWS investigation report for MGW 2560
- K. FWS investigation report for MGW 1677
- L. FWS investigation report for MGW 1486
- M. FWS investigation report for MGW 1280
- N. FWS investigation report for MGW 1292
- O. FWS investigation report for MGW 1277
- P. FWS investigation report for MGW 1154
- Q. FWS investigation report for MGW 521
- R. FWS investigation report for MGW 1053
- S. FWS investigation report for MGW 1008
- T. Dept. of Justice/Bucella memo on McKittrick policy
- U. FWS investigation report for MGW 1569
- V. Arizona flyer “Hunters: Know the Difference.”

Exhibits also available online: <https://bit.ly/3iJJzdp>