No. 25-3936

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRAND CANYON WOLF RECOVERY PROJECT, et al.,
Plaintiffs-Appellants

v.

DOUG BURGUM, Secretary of the Interior, et al.,
Defendants-Appellees

and

STATE OF ARIZONA,
Intervenor Defendant-Appellee

Appeal from the United States District Court for the District of Arizona,
Nos. 4:22-cv-00303-SHR, 4:22-cv-00453-SHR (Rash, J.)

PROPERTY AND ENVIRONMENT RESEARCH CENTER'S AND ROCKY MOUNTAIN ELK FOUNDATION'S AMICUS BRIEF SUPPORTING DEFENDANTS-APPELLEES/AFFIRMANCE

JONATHAN WOOD
DYLAN P. SOARES
Property and Environment
Research Center (PERC)
2048 Analysis Drive, Suite A
Bozeman, Montana 59718-6829
Telephone: (406) 587-9591
Email: jonathan@perc.org
Email: dsoares@perc.org

Counsel for Amici Curiae
Property and Environment Research Center
and Rocky Mountain Elk Foundation

Corporate Disclosure Statement

The Property and Environment Research Center is a nonprofit corporation organized under the laws of Montana, which has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

The Rocky Mountain Elk Foundation is a nonprofit corporation organized under the laws of Montana, which has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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The Property and Environment Research Center (PERC) and the Rocky Mountain Elk Foundation (RMEF) respectfully submit this amicus brief supporting Defendants-Appellees, Secretary Doug Burgum et al., Defendant Intervenor-Appellee, the State of Arizona, and affirmance of the district court.[1]

Statement of Interest

PERC is the national leader in market solutions for conservation, with over 45 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

For decades, PERC has sought to make the Endangered Species Act (ESA) work better to promote species recovery.[2] To address the persistent

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than PERC or RMEF, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

[2] *See, e.g.,* PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It*

lack of recovery progress,[3] PERC and its researchers have produced extensive scholarship on how to improve incentives to restore habitat and recover species.[4] In particular, it has studied how to proactively address conflicts generated by species reintroductions to make it easier to implement this essential recovery tool.[5]

RMEF is a nonprofit public benefit corporation located in Missoula, Montana. RMEF's mission is to ensure the future of elk, other wildlife, their habitat, and our hunting heritage. RMEF and its members work

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(2023), https://www.perc.org/wp-content/uploads/2023/09/PERC_Field-Guide-for-Wildlife-Recovery.pdf.

[3] *See* Katherine Wright & Shawn Regan, *Missing the Mark*, PERC (July 26, 2023), https://perc.org/2023/07/26/missing-the-mark/ (finding that only 3% of listed species have recovered in the 50 years after the ESA was enacted).

[4] *See Field Guide*, *supra* note 2; Jonathan Wood & Tate Watkins, *Critical Habitat's "Private Land Problem": Lessons from the Dusky Gopher Frog*, 51 Envtl. L. Rep. 10565 (2021); Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Pol'y Rep. (Apr. 25, 2018), https://perc.org/wp-content/uploads/2023/06/endangered-species-road-to-recovery.pdf.

[5] *See* Tate Watkins, *The Great Sea Otter Comeback: How Cooperation Can Restore Ecosystems*, PERC Policy Br. (Dec. 2025), https://www.perc.org/wp-content/uploads/2025/12/PERC-Sea-Otter-Comeback.pdf; *Field Guide*, *supra* note 2, at 30–33.

with federal agencies, states, and private landowners to fund and implement conservation projects, such as prescribed burns, forest thinning, planting native vegetation, and installing wildlife-friendly fencing. In addition, RMEF works with private landowners and federal, state, and local agencies to conserve habitat through conservation easements and fee purchases. RMEF has over a million members and supporters in the United States, including landowners, hunters, guides, outfitters, wildlife enthusiasts, and conservationists. These members and supporters have environmental, recreational, and economic interests in the conservation of wildlife and their habitat, including the Mexican gray wolf.

RMEF has conserved or enhanced over 9.1 million acres of wildlife habitat in North America. Within the Mexican Wolf Experimental Population Area, RMEF has completed over 400 projects conserving or enhancing over 630,000 acres. This work includes habitat occupied and used not only by elk and other big game species, but also by other wildlife, including threatened and endangered species. RMEF has supported nearly 100 research projects in the Southwest United States that concern or could benefit Mexican gray wolf recovery efforts, at a cost exceeding

$1.3 million. Since 2020, RMEF has contributed nearly $100,000 to support research assessing the impacts of the Mexican wolf reintroduction on elk. RMEF has been involved in wildlife management and other efforts associated with nonessential experimental populations under 10(j) of the ESA, including gray wolf recovery in parts of the Northern Rocky Mountains, grizzly bear recovery in the Northern Continental Divide, Greater Yellowstone and Bitterroot Ecosystems, and the Colorado Gray Wolf reintroduction.

Summary of the Argument

More than 25 years ago, the Fish and Wildlife Service (the Service) reintroduced the Mexican gray wolf in eastern Arizona and western New Mexico as a "nonessential experimental population" under Section 10(j) of the ESA. This section of the Act authorizes a more relaxed and flexible approach to regulating reintroduced populations to mitigate conflict and build goodwill with cooperating states and landowners. Since the initial release, the Service has periodically supplemented the population with additional captive-bred wolves, managed conflicts with livestock and local communities, and expanded the reintroduction area to encompass all of Arizona and New Mexico south of Interstate 40. As a result of these

efforts, this population has increased steadily, growing from an initial release of 11 wolves to roughly 200 wolves by 2021, with a parallel reintroduction program underway in Mexico.

In 2022, the Service promulgated a revised rule governing the experimental population and, in response to an earlier district court ruling, *see Center for Biological Diversity v. Jewell*, No. 4:15-cv-19-JGZ, 2018 WL 1586651 (D. Ariz. Mar. 31, 2018), reaffirmed its original determination that the population is nonessential to the continued existence of the species. Plaintiffs argue that the Service was required to override its original determination and declare the experimental population "essential," which would trigger increased regulation. The primary reason they cite for this demand is the population's growth over the last two decades. *See* Dkt. 16-1 at 13–15.

A ruling for the Plaintiffs would fundamentally rewrite Section 10(j). Congress requires the Service to decide whether an experimental population is essential or nonessential "[b]efore authorizing the release of any population." 16 U.S.C. § 1539(j)(2)(B). Congress required this decision to precede the population's release, rather than postdate it by decades, because it determines the regulatory assurances given to states

and landowners to secure their cooperation. Nothing in the ESA authorizes—much less requires—that determination to be revisited later because of a reintroduced population's recovery success. If Plaintiffs are correct, assurances to incentivize stakeholder cooperation and tolerance of reintroductions would become a trap, with recovery success triggering stricter regulations and reduced flexibility. This would disincentivize conservation organizations, landowners, states, federal agencies, and other stakeholders from supporting efforts to recover nonessential experimental populations and reduce funding for their conservation.

Because Plaintiffs' interpretation finds no support in the statutory text and would invert Congress's incentive structure, the district court's judgment should be affirmed.

Argument

I. Congress sought to encourage reintroduction efforts by providing durable regulatory relief to cooperating states and landowners

Congress added Section 10(j) to the ESA for a specific purpose: A decade after the law's enactment, it had become clear that federal agencies, states, and private landowners were reluctant to reintroduce species "unless some assurances were simultaneously extended to

prevent the creation of Endangered Species Act problems." H.R. Rep. No. 97-567 (1982). By clarifying how prospective experimental populations would be regulated, Congress intended to assuage these concerns and encourage states and private parties "to host experimental populations on their lands." *Id.*

This reintroduction authority has been responsible for some of the ESA's biggest success stories. In the mid-1990s, the Service established a nonessential experimental population of gray wolves in Idaho, Montana, and Wyoming, with regulatory assurances to facilitate management of the population and to address conflicts with livestock. Establishment of a Nonessential Experimental Population of Gray Wolves, 59 Fed. Reg. 60252 (Nov. 22, 1994). Due to the growth of that population and expansion of its range, the Service delisted the population as recovered. *See* Finding for the Gray Wolf in the Northern Rocky Mountains and the Western United States, 89 Fed. Reg. 8391 (Feb. 7, 2024) (collecting regulations delisting the Northern Rocky Mountains population of gray wolves). From there, the population continued to fare well, ultimately expanding beyond the boundaries drawn by the Service to repopulate several other western states. *Id.* at 8393–94.

The key factor in determining what assurances are offered to states and landowners is a requirement for the Service to determine whether an experimental population is essential to the species' survival. All experimental populations, regardless of whether they are essential, are treated as "threatened" under the ESA, meaning that the statute's prohibition against "take" does not automatically apply. 16 U.S.C. §§ 1538(a), 1539(j)(2)(C). Instead, take is regulated by the Service issuing regulations that are "deem[ed] necessary and advisable to provide for the [experimental population's] conservation." 16 U.S.C. § 1533(d); *see* Designation of Experimental Populations, 88 Fed. Reg. 42642, 42645 (July 3, 2023) (explaining the importance of this flexibility). For nonessential populations, Section 10(j) further guarantees that the Service will not designate critical habitat. 16 U.S.C. § 1539(j)(2)(C)(ii). Finally, the ESA's complex Section 7 consultation requirements do not apply to nonessential populations, except for federal actions within National Parks or National Wildlife Refuges. 16 U.S.C. § 1539(j)(2)(C)(i).

The regulations governing the experimental population at the center of this dispute demonstrate how these statutory flexibilities are routinely used to provide assurances to states, conservation

organizations, landowners, and other stakeholders. While Mexican gray wolves are generally listed as endangered and take is categorically prohibited without a permit, *see* 50 C.F.R. § 17.11, the experimental population is treated as threatened and subject to a species-specific rule that is tailored to its conservation needs. 50 C.F.R. § 17.84(k). Under this rule, unintentional take is not prohibited. 50 C.F.R. § 17.84(k)(7)(viii). Further, ranchers may haze wolves to prevent conflict or take wolves "in the act of biting, killing, or wounding" livestock or dogs. 50 C.F.R. § 17.84(k)(7)(ii), (iv). The Service may also authorize ranchers and state wildlife agencies to remove wolves to prevent conflicts with livestock and native elk, deer and other ungulates. 50 C.F.R. § 17.84(k)(7)(iv)-(vi). Through these provisions, the Service sought to mitigate concerns among ranchers, sportsmen, and state wildlife agencies that wolf reintroduction would come at the cost of their interests. The population's nonessential status also eliminated the risk that critical habitat would be designated, which assured landowners that their property values would not be diminished. *See* 50 C.F.R. § 17.84(k)(2).[6] The streamlined process for

[6] *See* Maximillian Auffhammer et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 Land Econ. 188 (2020) (finding that critical habitat designations can

federal agencies to confer on projects that may affect this experimental population (such as forest restoration projects) minimizes unnecessary burdens on them too. 16 U.S.C. § 1539(j)(2)(C)(i).

In short, the regulatory assurances triggered by the nonessential determination for experimental populations are enormously important in getting ranchers, farmers, conservation organizations, and state wildlife agencies on board with reintroductions of wolves, condors, ferrets, and other species that might otherwise not have happened due to local opposition.[7] And Congress' expectation that these flexibilities are necessary is backed up by evidence. A review of every experimental population by the Environmental Policy Innovation Center found that stakeholder support is pivotal to whether a reintroduction is successful, and that the Service adjusts its approach to developing a Section 10(j) rule depending on how socially controversial the species is.[8]

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significantly reduce land values as prospective purchasers account for future regulatory risks).

[7] *See Field Guide*, *supra* note 2, at 30–33.

[8] Hunter Sapienza & Ya-Wei Li, *Reintroduction: An Assessment of Endangered Species Act Experimental Populations* 25–27, Environmental Policy Innovation Center (June 2021),

Where the Service has been unable to provide sufficient assurances to secure state and community buy-in, reintroduction efforts have faltered. In 2000, for instance, the Service issued a 10(j) rule for the introduction of grizzly bears to the Bitterroot Ecosystem in Montana and Idaho. *See* Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 65 Fed. Reg. 69624 (Nov. 17, 2000). More than a quarter-century later, the rule remains on the books but not a single bear has been reintroduced because of local opposition.[9]

Crucially, this system only works if the regulatory structure provides durable assurances, rather than mere fleeting flexibility.[10] Section 10(j) can only achieve its intended purpose if states, landowners,

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https://www.policyinnovation.org/s/EPIC-Experimental-Population-Analysis.pdf.

[9] Sapienza & Li, *supra* note 8, at 21.

[10] *See Field Guide*, *supra* note 2, at 30–33. *See also* U.S. Fish and Wildlife Serv., *Feasibility Assessment: Sea Otter Reintroduction to the Pacific Coast* (2022), https://www.fws.gov/sites/default/files/documents/SEA%20OTTER%20REINTRO%20REPORT%202022%20508%20compliant%20-%20FINAL%2007082022%20with%20cover.pdf (reporting that stakeholder distrust of the Service due to it changing the rules over a previous sea otter reintroduction is an obstacle to further reintroduction efforts).

and other stakeholders trust that the agreed-upon rules won't suddenly change once the species is established or recovering. If these assurances are later withdrawn, the credibility and viability of every current and future 10(j) reintroduction is jeopardized.

II. The ESA requires the Service to determine essentiality before the population is established, not decades later

While the Service previously resisted the argument that it must perpetually reevaluate whether an experimental population is essential after it has been established, *see Jewell*, 2018 WL 1586651, at *19–20, it defends this case on the grounds that its recent reaffirmation of the Mexican gray wolf's nonessential status satisfied the ESA, *see generally* Dkt. 27-1. This Court can affirm on this theory alone. But doing so risks implicitly holding that the ESA requires or authorizes a nonessential determination to be changed post-reintroduction. That is contrary to the Act and would undermine the 10(j) program. If the Court takes this approach, it should explicitly reject such implication by, for instance, assuming without deciding the question. But the most straightforward path is simply to apply the ESA as written and reject Plaintiffs' claims as contrary to it. Because the ESA forecloses the relief Plaintiffs seek, the Court need not reach hypothetical questions about how the Service might

exercise its discretion if such authority existed.

Section 10(j) imposes a temporal limit on the Service's authority to determine whether a population is essential and, therefore, what regulatory flexibilities are available. This Section states that the Service must determine whether an experimental population is essential "[b]efore authorizing the release of [the] population." 16 U.S.C. § 1539(j)(2)(B). This is the only time that the ESA authorizes the Service to evaluate the experimental population's essentiality.[11]

Importantly, this language refers to the release *of the population*. *Id.* Thus, a new essentiality analysis is not required each time the Service releases additional animals to the experimental population. *Id.* This choice reinforces the Section's temporal limit. A population's release is necessarily a one-time event, whereas the release of individual animals to that population may be ongoing. If Congress wished to authorize the Service to revisit essentiality after a population's release, it would have

[11] Because Section 10(j) was enacted nearly a decade after the ESA's enactment, the provision includes a narrow exception allowing the Service to evaluate essentiality after a population's release if that release occurred prior to October 31, 1982. 16 U.S.C. § 1539(j)(3). That provision is not implicated here and would be superfluous if Plaintiffs' arguments are correct.

said so by pegging the determination to releases of additional animals or some other recurring event.[12] Alternatively, it could have added to Section 10(j)'s mandatory requirement to make an essentiality determination before the population's release a discretionary authority to revise the determination thereafter.

Congress notably took the latter approach in another section of the 1982 amendments that established the 10(j) provisions. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 2, 96 Stat. 1411, 1411 (1982). It provided that critical habitat shall be designated "concurrently with" a listing decision. 16 U.S.C. § 1533(a)(3)(A)(i). But Congress went on to provide that the Service "may, from time-to-time thereafter as appropriate, revise such designation." 16 U.S.C. § 1533(a)(3)(A)(ii).[13] Congress knew how to authorize ongoing revision of

[12] This Court might once have interpreted the lack of an explicit prohibition on revising the essentiality determination post-reintroduction to implicitly delegate the question to the agency. *See Cal. Sea Urchin Comm'n v. Bean*, 883 F.3d 1173, 1174 (9th Cir. 2018) (interpreting different language in a statute specific to sea otter reintroduction). But the Supreme Court subsequently overturned this mode of analysis in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

[13] The shift from a mandatory obligation to designate critical habitat concurrently with the listing to a discretionary authority to revise the designation later is critical under the Administrative Procedure Act's

designations. Its decision not to include such authority under 10(j), while providing it in another section of the same bill, must be given effect.

Moreover, evaluating an experimental population's essentiality decades after reintroduction is not merely a reconsideration of the prior decision but a different kind of analysis altogether. Before the reintroduction, an essentiality analysis focuses on the effects of removing members from wild or captive populations to facilitate the reintroduction effort. In its 1984 regulations implementing Section 10(j), the Service rejected arguments that all experimental populations would be biologically essential to their species. Experimental Populations, 49 Fed. Reg. 33885, 33888 (Aug. 27, 1984). It did so by emphasizing that the analysis focuses instead on the effect on the populations supplying individuals for the reintroduction. Where "individuals [could] be removed to provide a donor source for reintroduction without creating adverse impacts upon the parent population," an experimental population should

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judicial review provision. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Unmooring Section 10(j)'s mandatory essential determination from the statute's temporal limit would make it a continuous, mandatory obligation and invite endless litigation. Needless to say, there is no indication that Congress intended Section 10(j) to be so fraught with conflict.

be deemed nonessential. *Id*. Noting Congress' expectation that "*in most cases experimental populations [would] not be essential*," the Service explained that a finding that an experimental population is essential would be "a special case, not the general rule." *Id*.[14]

Once a population has been reintroduced, however, the analysis would fundamentally differ due to the existence of the experimental population. Here, for instance, Plaintiffs' arguments don't focus on the effect of future releases on a parent population. Instead, it focuses on the effect of the potential loss of the experimental population *on the experimental population*. Dkt. 16-1 at 2. How an experimental population would contribute to the species' recovery is relevant under Section 10(j), but not in the pre-establishment essentiality determination. Instead, that is addressed through the requirement that the establishment of an experimental population "will further the conservation of [the] species."

[14] To date, no experimental population has been found to be essential. Erin H. Ward & Benjamin M. Barczewski, Cong. Rsch. Serv., *Experimental Populations Under the Endangered Species Act and Gray Wolves* 4 (July 28, 2023), https://www.congress.gov/crs_external_products/R/PDF/R47581/R47581.5.pdf. This reflects that, where a reintroduction would unduly threaten the parent population, the Service first seeks to recover that population or establish a captive population to mitigate that risk.

16 U.S.C. § 1539(j)(2)(A).[15]

None of this is to suggest that the Service is powerless to adapt its approach based on how a reintroduced population fares. But Section 10(j) channels such adaptation through other means. As noted above, the ESA directs that all experimental populations are treated as threatened for purposes of the take prohibition. 16 U.S.C. § 1539(j)(2)(C). The Service may, and regularly does, update tailored regulations for threatened species. *See, e.g.,* Revising the Special Rule for the Utah Prairie Dog, 76 Fed. Reg. 31906 (June 2, 2011). Tweaking such regulations for an experimental population is far less disruptive to Section 10(j)'s approach to providing regulatory assurances than tossing out an essentiality determination.

This Court recently rejected an interpretation of the ESA that would have effectively punish recovery progress. *See WildEarth Guardians v. U.S. Forest Serv.*, 23-35352, 2024 WL 3042396, at *2 (9th Cir. June 18, 2024) (rejecting an argument "that an *increase* in population" required an earlier an environmental analysis to be redone).

[15] This determination guides whether the reintroduction can go forward, not what regulatory assurances are available to secure state and landowner cooperation.

It should follow the same approach here. Turning recovery progress into a trigger for stricter regulation would punish success and undermine the very incentives Congress created in Section 10(j). The consequences of these perverse incentives are clearly seen in this case. This nonessential experimental population has "nearly doubled in size" since it was established. *Ctr. for Biological Diversity v. Haaland*, 774 F. Supp. 3d 1206, 1216–17 (D. Ariz. 2025). Instead of celebrating this recovery progress, Plaintiffs sued and argued that this growth should trigger stricter regulation that would chill future state and landowner cooperation.

Plaintiffs' claim presents an equally concerning problem in the other direction. If an experimental population's growth and increasing share of the species' total numbers can justify reclassifying it as "essential," then an experimental population's decline would logically justify reclassifying it as "nonessential," relaxing regulatory restrictions on a struggling population. Under this approach, experimental populations would face a Catch-22: population growth and success would trigger heightened regulatory burdens, while decline and vulnerability would invite diminished protections. This Court should not invite such

absurd results but should, instead, apply the ESA as written and hold that the Service has no obligation to constantly reassess the essentiality of experimental populations.

Conclusion

The ESA's purpose and text require the essentiality assessment for experimental populations before reintroduction. This structure creates stable, trust-based recovery efforts that incentivize stakeholder collaboration and conservation work. The ESA does not require the Service to continuously analyze the Mexican gray wolf's designation, especially not to penalize the growth of the wolf's population and range. Doing so would undermine the collaborative conservation model Congress intended and hinder future reintroductions.

For these reasons, this Court should affirm the decision below on alternate grounds.

Dated: February 20, 2026

Respectfully submitted,

/s/ *Dylan P. Soares*

JONATHAN WOOD
DYLAN P. SOARES
Property and Environment
Research Center (PERC)
2048 Analysis Drive, Suite A
Bozeman, Montana 59718-6829
Telephone: (406) 587-9591
Email: jonathan@perc.org
Email: dsoares@perc.org
Attorneys for Amici Curiae
Property and Environment
Research Center and Rocky
Mountain Elk Foundation

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/s/ Dylan P. Soares
Dylan P. Soares
Counsel of Record for Amici Curiae

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Dated: February 20, 2026

/s/ Dylan P. Soares
Dylan P. Soares
Counsel of Record for Amici Curiae