
NATURAL RESOURCES JOURNAL

Volume 38
Issue 2 *Spring 1998*

Spring 1998

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Recommended Citation
Joel M. Carson, *Reintroducing the Mexican Wolf: Will the Public Share the Costs, or Will the Burden Be Borne by a Few*, 38 NAT. RES. J. 297 (1998).
Available at: https://digitalrepository.unm.edu/nrj/vol38/iss2/3

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COMMENT

Reintroducing the Mexican Wolf: Will the Public Share the Costs, or Will the Burden Be Borne By a Few?

Mexican wolves and cattle just don't get along. Yet, the United States Fish and Wildlife Service (FWS) expects them to live in harmony when the agency establishes a permanent population of approximately 120 Mexican wolves in rural areas of Western New Mexico and Eastern Arizona; areas where approximately 80,000 head of privately owned cattle roam. FWS and area ranchers agree that the reintroduced predators will kill cattle. However, the groups disagree about the number of kills that will take place and who should bear the cost of feeding the reintroduced wolves.

The Mexican wolf reintroduction program is not unique. FWS previously reintroduced the Red wolf in North Carolina and the Northern Gray wolf in the Yellowstone Park area of Wyoming. There has been a great deal of debate about the wisdom of these programs, including a significant amount of debate among constitutional law scholars regarding the Fifth Amendment implications that might arise when reintroduced predators prey on privately owned livestock. Not surprisingly, commentators flooded the pages of law reviews with differing views on whether livestock depredations by a reintroduced predator amounts to a Fifth Amendment taking.[1] One writer indicated that such depredation might even give rise to a *Bivens*[2] action against the agency official responsible for the predator's conduct.[3]

The issues raised by the Mexican wolf reintroduction program are emotional and highly charged. Wolves are majestic creatures that deserve protection. Steps must be taken, however, to prevent the federal government and a majority its citizens from trampling the constitutional rights

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1. Anna R.C. Casperson, Comment, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357 (1996); Robert C. Moore, Comment, *The Pack is Back: The Political, Social, and Ecological Effects of the Reintroduction of the Gray Wolf To Yellowstone National Park and Central Idaho*, 12 T.M. COOLEY L. REV. 647 (1995); Dale D. Goble, *Of Wolves and Welfare Ranching*, 16 HARV. ENVTL. L. REV. 101 (1992); Jeffrey E. Thompson, Note, *Damage Caused by Reintroduced Wildlife: Should the Government be Held Accountable*, 1992 U. ILL. L. REV. 1183 (1992); James S. Burling, *Takings, The Endangered Species Act, and Related Laws*, 27 LAND & WATER L. REV 309 (1992); Geoffrey L. Harrison, Comment, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 U. CHI. L. REV. 1101 (1991).

2. A *Bivens* action is an implied cause of action under the Constitution whereby a citizen may seek damages from a federal officer when that officer infringes upon his constitutional rights. Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337 (1989).

3. James S. Burling, *Takings, The Endangered Species Act, and Related Laws*, 27 LAND & WATER L. REV 309, 361 (1992).

of a rural minority. In a purely academic sense, the above commentators who conclude that depredations of livestock by reintroduced predators amount to a taking under the Fifth Amendment present a persuasive argument. Furthermore, a *Bivens* action presents academic appeal when federal agents allow the reintroduced predators to destroy privately owned livestock. However, because the process required for a livestock owner to prevail under either theory is economically unfeasible, a "takings" or *Bivens* action is simply not an acceptable method for restoring constitutional rights destroyed when reintroduced wolves kill privately owned livestock. Both the taxpayer and the livestock owner are better served by a final rule that includes a compensation program. Accordingly, this comment concludes with a proposed administrative procedure for compensating livestock owners that is fair, efficient, and respectful of the Constitution.

PART I: THE MEXICAN WOLF REINTRODUCTION PROGRAM

The Mexican wolf once roamed relatively undisturbed in the Southwestern United States and Mexico. However, in the early 1900s, a new wave of settlers moved to the Southwest. The settlers did not come alone; they brought herds of livestock that became a staple of the wolf's diet. The financial losses caused by wolf depredations culminated in a government-backed initiative to eradicate the wolves. Within 15 years, Mexican wolf numbers spiraled downward. This government initiative lasted until approximately 1960. The wolf gained endangered species status in 1976 and efforts to re-establish the wolf population began shortly thereafter.

On June 8, 1995, Fish and Wildlife Service Region 2 Director, Nancy M. Kaufman, issued a draft environmental impact statement (Draft EIS) addressing the impacts of reintroducing the Mexican wolf. The Draft EIS contains the FWS's proposal for reintroducing the wolves and three alternative approaches to re-establishing the subspecies under the Endangered Species Act.[4] The Draft EIS specifies a target release date of spring 1997. However, as of January 1, 1998, the Mexican wolves slated for release remained captive in one-third acre pens located in the Apache National Forest, awaiting an order from the Secretary of Interior which will set them free. Although FWS officials missed the target date originally proposed in the EIS, on March 29, 1998 the Secretary of the Interior ordered the wolves be released in the Blue Range area of Eastern Arizona.

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4. FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, DRAFT ENVTL. IMPACT STATEMENT – REINTRODUCTION OF THE MEXICAN WOLF WITHIN ITS HISTORIC RANGE IN THE SOUTHWESTERN UNITED STATES (1995).

A. Selecting and Releasing: Where Do They Come From and How Will They be Let Go?

Federal agencies believe that the entire living population of Mexican wolves resides in various zoos and wildlife parks in Mexico and the United States.[5] The reintroduced population of wolves will consist of "non-essential" wolves from FWS's captive breeding population.[6] Because these wolves were born and raised in captivity, FWS has moved them to large pens on the Sevilleta Wildlife Refuge.

After a short stay at Sevilleta, the wolves will be moved to pens inside the primary recovery area and FWS employees will begin a sort of training program to prepare the wolves for life in the wild.[7] The employees will attempt to teach the captivity-raised wolves predatory skills and how to recognize native prey. In addition, the wolves will undergo "aversive conditioning to livestock and humans."[8] Once the wolves have been trained and conditioned, FWS will select pairs for release based on "reproductive performance, behavioral compatibility, response to the adaptation process, and other factors."[9]

Once FWS selects pairs of wolves for release, the agency will begin "soft-releasing" the wolves. Soft releasing is thought to keep the wolves from rapidly dispersing from the release area.[10] The soft release program begins by moving the wolves to the release site and holding them in on-site cages for several months. The wolves are allowed to "breed, den, and whelp in the pens and exposure to humans is minimized."[11] After the wolves adjust, they are released from the on-site holding pens. FWS employees will scatter native food around the release area until the wolves begin hunting on their own.

B. Where Will the Wolves Be Released?

FWS's proposal recommends reintroducing the Mexican wolves in the Blue Range of Western Arizona and, if feasible, on the White Sands Missile Range in south central New Mexico.[12] The release areas are divided

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5. *See id.* at 1-1.
6. *See id.* at 2-7.
7. *See id.* at 2-20.
8. *Id.* at 2-1.
9. *See* FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, DRAFT ENVTL. IMPACT STATEMENT – REINTRODUCTION OF THE MEXICAN WOLF WITHIN ITS HISTORIC RANGE IN THE SOUTHWESTERN UNITED STATES at 2-2 (1995).
10. *See id.*
11. *Id.*
12. *See id.* at 2-7.

up into primary and secondary recovery areas.[13] The primary recovery area is a relatively small amount of land surrounding the initial release sites. The secondary recovery areas encompass more significant amounts of land. The wolves will be allowed to roam undisturbed into the secondary recovery areas. However, when they stray outside the secondary recovery area, FWS will attempt to capture and relocate them to a location within the recovery area.[14]

The Blue Range Wolf Recovery Area is comprised of 4,386,245 acres of land in Eastern Arizona and Western New Mexico.[15] The recovery area is home to an estimated 57,170 deer and approximately 15,800 Elk.[16] Smaller numbers of Javelina, Pronghorn, and Rocky Mountain Bighorn Sheep also live in the area. Livestock owners graze approximately 82,600 cattle on grazing allotments and private ranches within the Blue Range Recovery Area.[17] In addition, around 7,000 sheep graze near the northern boundary of the recovery area and numerous ranch horses graze throughout the recovery area.[18]

Comprised of 2,578,026 acres of generally arid land, the White Sands Wolf Recovery Area is significantly smaller than the Blue Range Area.[19] Approximately 7,500 mule deer, 350 Pronghorn, 1,700 Oryx[20], 1,800 wild horses[21], and 30 endangered Desert Bighorn Sheep inhabit the area.[22] Approximately 2,120 cattle graze within the extreme Western portion of the White Sands Recovery Area.[23] In addition, the United States Department of

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13. *See id.* 2-15.

14. *See id.*

15. *See* FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, DRAFT ENVTL. IMPACT STATEMENT – REINTRODUCTION OF THE MEXICAN WOLF WITHIN ITS HISTORIC RANGE IN THE SOUTHWESTERN UNITED STATES 3-4 (1995).

16. *See id.* at 3-8.

17. *See id.* at 3-15.

18. *See id.*

19. *See id.* at 3-36.

20. *See id.* at 3-41, 3-42. Oryx are not native to the White Sands Recovery Area. The animals have long, extremely sharp horns that they use to defend themselves. Oryx have no real predators in the White Sands Recovery Area other than humans. *See id.* Considering the Oryx's natural defense mechanism, it is unlikely that the reintroduced Mexican wolves will prey on them.

21. These wild horses are not protected by the Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195 § 4, 85 Stat. 650 (1971). The White Sands Recovery Area is entirely comprised of military land and the Act does not apply to wild horse living on military land. *See* 16 U.S.C. § 1334 (1994).

22. New Mexico law designates the Desert Bighorn Sheep as endangered. N.M. ADMIN. CODE tit. 19, § 33.1.8.1.1 (1998).

23. FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, DRAFT ENVTL. IMPACT STATEMENT – REINTRODUCTION OF THE MEXICAN WOLF WITHIN ITS HISTORIC RANGE IN THE SOUTHWESTERN UNITED STATES 3-49 (1995).

Agriculture grazes 1,100 cattle, 300 sheep and "a small number of horses" in the far Southwest portion of the recovery area.[24]

C. Fish and Wildlife Service Wolf Management

FWS has a pervasive management scheme in mind for the reintroduced Mexican wolves. Initially, the wolves may be equipped with radio collars containing a remotely activated tranquilizer dart.[25] Theoretically, this equipment will allow FWS to track the wolves' movements and if a wolf strays outside the recovery areas,[26] to activate the tranquilizer. The agency will then move the straying wolf to an area within the recovery area.

FWS also claims that the agency will remove wolves from private land if the landowner requests that it do so.[27] If the landowner does not request removal, the agency will take no action to remove the wolves from the land. However, if certain wolves become a nuisance to humans or begin having unreasonably adverse effects on livestock or wildlife, the agency will take measures to remove them.[28]

D. Protecting the Wolves and Protecting Private Property: Has Fish and Wildlife Succeeded?

The reintroduction program proposed by FWS is a somewhat laudable effort to comply with the mandates of the Endangered Species Act, while giving some protection to property owners who will be affected by the reintroduced Mexican wolves. Not surprisingly, however, the agency's effort seems to have pleased nobody and has been attacked from all directions. Wildlife conservation groups are concerned that the program does not provide adequate protection for the endangered predator. Property owners, on the other hand, are concerned that the program does not provide adequate protection for their livestock.

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24. The public would bear the burden when Department of Agriculture livestock is killed by wolves because tax dollars paid for the animals in the first place.

25. *See id.* at 2-2.

26. The wolves are not likely to adhere to the arbitrary boundaries drawn by FWS. Lone wolves may travel great distances each day. Therefore, FWS must keep a close watch to ensure that the wolves remain within the recovery areas. As discussed later in this article, this "close watch" will likely be the factor that ultimately renders portions of this reintroduction program constitutionally infirm.

27. *See id.* at 2-23.

28. *See id.* at 2-23, 2-24.

Although not without its problems, FWS's proposal appears to adequately protect the reintroduced wolves.[29] The FWS proposal suggests different measures for protecting the wolves depending on whether the human - wolf contact occurs on private or public land. On public land, FWS has gone to great lengths to protect the wolves. When a conflict occurs on private or tribal land, the protection measures are less but still seem to adequately protect the predators.

The proposed reintroduction areas are largely comprised of public land managed by the United States Forest Service (Blue Range) and the United States Army (White Sands Missile Range). Much of this public land is leased for grazing purposes. Thus, these areas are ripe for conflict when the reintroduced wolves come into contact with the livestock that grazes the land or the leaseholder that fears for his livestock's safety. FWS's proposal addresses the actions that a livestock owner may take when wolves on public land threaten his livestock.

On public land, when a wolf roams near livestock, a livestock owner may "harass wolves for purposes of scaring them away from livestock provided the harassment is promptly reported."[30] The plan even purports to allow livestock owners to "take" wolves that are "actually engaged in attacking livestock."[31] In reality, however, this latter provision is essentially superfluous. The provision contains a caveat that requires the livestock owner to jump through a significant number of hoops before the offending wolf may be killed.

In order to kill a wolf on public land, a livestock owner must first obtain permission from FWS.[32] FWS is not required to grant permission. In fact, under the proposed rule, FWS *cannot* give permission to "take" a wolf unless four requirements are met. First, there must be at least six breeding pairs present if the take will occur in the Blue Range Wolf Recovery Area or three breeding pairs if the take will occur in the White Sands Wolf Recovery Area.[33] Second, FWS, Animal Damage Control, or State Wildlife Agents must have documented losses of or injury to livestock by the

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29. A major concern regarding protecting the released wolves appears to relate to wolf - livestock conflicts. *See The Return of El Lobo? Getting Close*, THE ARIZ. REPUBLIC, Dec. 27, 1996, at B6, *available in* 1996 WL 7765553. Accordingly, in the interest of manageability, discussion of the plan's protection measures is limited to situations where humans, wolves, and livestock may come into conflict.

30. FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, DRAFT ENVTL. IMPACT STATEMENT – REINTRODUCTION OF THE MEXICAN WOLF WITHIN ITS HISTORIC RANGE IN THE SOUTHWESTERN UNITED STATES 2-21 (1995).

31. *Id.*

32. *See id.*

33. *See id.*

reintroduced wolves on previous occasions.[34] Third, FWS must be given the first opportunity to control the "offending wolves."[35] Fourth, the livestock owner must produce "physical evidence ... that an attack occurred at the time of the take."[36] Finally, the livestock owner must promptly report the take.

These measures seem to adequately protect the wolves. However, the program leaves the holder of a grazing permit in a vulnerable position. Ranches and grazing allotments in Western New Mexico and Eastern Arizona cover vast amounts of land. The large size is necessary because vegetation is sparse and large amounts of acreage are required to sustain livestock. Moreover, the land's topography is somewhat mountainous. Thus, even the most active rancher may go several days without seeing each individual animal he has grazing the allotment.

The ultimate effect of FWS public land proposal is that a livestock owner who is grazing animals on public land will rarely be able to protect his animals from wolf attack. Assuming the released wolves will be as averse to humans as FWS contends, the chances that a livestock owner will catch a wolf actually attacking his livestock is minimal at best. This aversiveness also makes it unlikely that he will ever have the opportunity to chase the wolf away from his livestock. In any event, by the time a livestock owner gets permission to "take" a wolf, the reintroduced predator will have already killed his livestock. Thus, a constitutionally suspect action will take place before the livestock owner is given a real, yet remote, opportunity to protect his private property.

Many of the private ranches in the Blue Range area are mixed with public grazing allotments. The typical ranch consists of a parcel of private land which "anchors" a public grazing allotment. Thus, although operated as single units, many ranches in the area are a mixture of private and public land.

FWS has proposed separate rules for determining when offending Mexican wolves may be "taken" or harassed on private land. On private land, livestock owners may "harass wolves near livestock, people, buildings, facilities, pets, or other domestic animals at any time."[37] Furthermore, a livestock owner may take wolves attacking livestock regardless of the number of wolves in the area and the owner need not

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34. *See id.*

35. *See id.* The program does not indicate how offending wolves will be identified when more than one wolf is in the area. Therefore, one must wonder how FWS will determine which wolf is the "offender" if there is a family group of several wolves present.

36. FISH & WILDLIFE SERV., U.S. DEP'T OF INTERIOR, DRAFT ENVTL. IMPACT STATEMENT – REINTRODUCTION OF THE MEXICAN WOLF WITHIN ITS HISTORIC RANGE IN THE SOUTHWESTERN UNITED STATES 2-21 (1995).

37. *Id.*

allow government agencies the "first chance" to take the depredating wolves.[38] "However, physical evidence that an attack occurred at the time of the take must be present and the take must be promptly reported."[39]

On paper, these measures appear to protect livestock and wolf alike. However, like the proposal for protecting livestock on public land, the proposed safeguards for livestock producers are virtually worthless. Generally, private and public lands in the reintroduction areas have the same livestock carrying capacities. They also have similar topographies. Thus, the odds of catching a wolf "attacking livestock" are poor. If a livestock producer does not see the wolves, it logically follows that he cannot scare them away from his cattle and cannot catch a wolf in the act of attacking. Therefore, considering the realities of Western New Mexico / Eastern Arizona ranching, FWS's proposed measures for protecting livestock fail to accomplish their intended purpose.

E. What's for Dinner and Who's Buying?

FWS and livestock producers agree that Mexican wolves eat livestock. However, they cannot agree on how many domestic animals will be killed by the reintroduced wolves. FWS predicts that the number of kills will be relatively small. Livestock producers believe that the number of depredations could rise far above FWS's estimates.

FWS's estimated livestock kills seem artificially low. The Blue Range Recovery Area is home to approximately 82,000 head of cattle, 7,000 sheep, and a number of horses. Approximately 73,000 deer and elk also inhabit the area. FWS predicts that wolves will kill between one and thirty-four head of Blue Range cattle per year.[40] However, the agency predicts that deer and elk populations within the area will be affected by approximately 11,000 animals.[41] There are approximately 17,000 more cattle, sheep, and horses in the Blue Range than deer and elk. Cattle and sheep are slower than deer and elk and generally will not jump fences. Common sense suggests that FWS's estimates of livestock kills are inaccurate.

Perhaps the reintroduction program's most significant shortcoming is the absence of a method for compensating livestock owners when the reintroduced wolves make a meal of livestock. FWS makes no effort to explain why a compensation program is not part of its reintroduction proposal. Perhaps the agency believes the program passes constitutional muster without providing for compensation. Perhaps the agency believes

38. *See id.*
39. *Id.* at 2-21, 2-22.
40. *See id.* at 4-5.
41. *See id.* at 4-2.

that the Defenders of Wildlife compensation program alleviates the need for a government backed compensation program.[42] Regardless of its reasons, the Fifth Amendment will likely compel FWS to pay for dinner.

PART II: PRIVATE PROPERTY, WOLF DEPREDATIONS AND THE FIFTH AMENDMENT

The framers of the Constitution strongly supported private property rights and believed that the government was morally obligated to compensate property owners when it interfered with their private property rights.[43] Those beliefs were formalized in the "Takings Clause" of the Fifth Amendment to the Constitution, which provides that the federal government may not take private property for a public purpose unless the government pays the property owner just compensation.[44] Throughout history, property owners have invoked the clause when government action threatened to deprive them of their interest in private property. Today, the clause continues "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[45]

Generally, a taking can occur in two ways. First, a taking occurs when the government deprives someone of his interest in private property through some sort of acquisitive action. Second, a taking occurs when a regulation limits a property owner's rights to the point that he is deprived of his interest in the private property. Although the proposition appears simple, "[t]he question of what constitutes a taking for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."[46]

The "Court, quite simply, has been unable to develop any set formula for determining when justice and fairness require that economic

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42. The Defenders of Wildlife currently operates a program which compensates livestock producers for losses caused by protected predators. If Defenders of Wildlife guaranteed compensation for all livestock lost to Mexican wolves, there would be little need for FWS's plan to include a compensation procedure. Compensation under the privately funded program, however, is not guaranteed. When disputes arise over the cause of livestock deaths, the Defenders of Wildlife appears to err on the side of denying compensation. *See infra*, note 130 and accompanying text. Moreover, although somewhat outside the scope of this comment, the notion that a livestock owner whose private property has been taken by government action must accept private compensation in lieu of seeking compensation from the sovereign is, at best, a dubious proposition.

43. JOHN E. NOWAK & ARTHUR R. MILLER, CONSTITUTIONAL LAW § 11.12, at 438 (5th ed. 1995).

44. U.S. CONST. amend. V.

45. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California, 482 U.S. 304, 318-19 (1987).

46. Penn Central Transportation Company v. City of New York, 438 U.S. 104, 123 (1978).

injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[47] Instead of setting a formula for when compensation is required, the court examines the taking question by engaging in an ad hoc factual inquiry considering: 1) the economic impact of the regulation on the property owner; 2) the regulation's interference with the property owner's investment backed expectations; and 3) the character of the governmental action.[48] However, the Court has described two "discrete" categories where it will award compensation without engaging in a fact specific inquiry.[49] First, if a regulation authorizes physical invasion of private property, "no matter how minute," there is a per se taking and compensation is due.[50] Second, if a regulation denies all economically beneficial use of land, then there is a per se taking.[51]

A. Physical Invasions—Per Se Takings

The "physical invasion" rule for determining whether a taking has occurred was introduced by the Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*.[52] In *Loretto*, a New York law authorized cable companies to attach cable boxes and lines on privately owned apartment buildings. The cable components occupied only 1.5 cubic feet of space on Loretto's building. Adhering to the "historical rule that a permanent physical occupation of another's property is a taking,"[53] the court ordered that the cable company pay just compensation.[54]

The "physical invasion" test has proven workable. The Federal Circuit applied the test and found just compensation due in *Hendler v. United States*.[55] In *Hendler*, the EPA and the state of California were monitoring a superfund site. Concerned that toxic waste was migrating and might be contaminating a domestic and agricultural water source, the agencies asked permission to place monitoring wells on Hendler's land. Hendler declined their request. The EPA then issued an administrative order granting itself and the state of California "access to plaintiffs'

47. *Id.* at. 124.

48. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

49. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

50. *Id.*

51. *Id.* "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking." *Id.* at 1019.

52. *See Loretto*, 458 U.S. 419, 421 (1982).

53. *Id.* at 435.

54. *See id.* at 441.

55. *See Hendler*, 952 F.2d 1364, 1375-78 (Fed. Cir. 1991).

property for, inter alia, 'locating, constructing, operating, maintaining, and repairing monitor/extraction wells.'"[56] Pursuant to the order, the EPA and the state subsequently entered plaintiffs' land and drilled and operated 18 monitoring wells.[57] The Federal Circuit had no trouble finding that the government's action amounted to a taking.[58]

The United States Supreme Court will not conduct its usual "ad hoc factual inquiry" when the government physically invades private property. Instead, when a strand of a property owner's "bundle of sticks" has been confiscated, a taking has occurred regardless of the public interest involved. Unfortunately, litigating a case to the Supreme Court for a small damage award on remand makes little financial sense and likely causes a number of unconstitutional deprivations to go unprosecuted.[59]

B. Total Losses of Value—Per Se Takings

The Supreme Court introduced the "total loss" rule for finding a taking in *Lucas v. South Carolina Coastal Council*.[60] In *Lucas*, a South Carolina law prevented a property owner from building homes on two beachfront lots. Lucas filed suit against the state agency responsible for enforcing the law alleging that he had been denied all "economically viable use" of his property and therefore suffered a taking under the Fifth and Fourteenth Amendments of the United States Constitution. The state trial court found that the ban on development rendered the property "valueless." Operating on the trial court's finding, the Supreme Court ruled in favor of Lucas and held that when a property owner is denied all economically beneficial use of his land, a taking has occurred.

Therefore, when a government action renders private property valueless, a per se taking has occurred. As with a physical invasion, cases involving total losses do not require the court to conduct its "ad hoc factual

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56. *See id.* at 1369.

57. *See id.* at 1369-70.

58. *See id.* at 1378. The Court of Claims recently concluded the damages phase in the *Hendler* case. 38 Fed. Cl. 611, 613 (Fed. Cl. 1997). The court concluded that although Hendler indeed suffered a taking, the government's invasive action actually bestowed special benefits on Hendler that outweighed any loss he incurred because of the government's action. *Id.* Thus, after appearing four times before the Court of Claims and once before the Federal Circuit, *Hendler* has proven to be little more than an academic exercise.

59. Of course, the government does not appeal every case awarding just compensation. The case-specific nature of takings law, however, results in trial court decisions amenable to appeal. Moreover, because broad interpretations awarding just compensation may place a heavy burden on taxpayers, the government clearly has an interest in restrictively shaping takings jurisprudence.

60. 505 U.S. 1003, 1019.

inquiry." Instead, the claim is immediately compensable on proving that the loss was total and the government caused it.

C. Grizzly Bears and Wild Horses—Circuit Dealings With Takings by Protected Wildlife

The federal courts have not decided whether a taking occurs when federally protected, reintroduced predators kill privately owned livestock. However, in *Christy v. Hodel*, the Ninth Circuit held that depredations by federally protected (but not reintroduced) Grizzly bears did not rise to the level of a compensable taking.[61] In *Christy*, a rancher owned 1,700 sheep which grazed on land leased from the Blackfoot Indian Tribe. Around July 1, 1982, Christy's herd became the subject of nightly attacks by Grizzly bears. Christy's herder attempted, with limited success, to repel the bears by building fires around the sheep and by shooting his gun in the air. Christy even sought assistance from the FWS, who dispatched a trapper to set snares for the bears. However, by July 9 the bears had killed approximately twenty of Christy's sheep, resulting in a financial loss of at least $1,200.

On the evening of July 9, 1982, Christy and the government trapper were with the herd when two Grizzlies entered the clearing. One bear quickly retreated into the forest. The remaining bear moved toward the herd. When the bear came within approximately sixty yards of the herd, Christy shot and killed it. For the next several weeks, the trapper unsuccessfully attempted to catch the offending bears. On July 24, Christy removed his sheep from the land. During the twenty-four day period, he lost a total of 84 sheep to the protected bears. He was also fined $3,000 by FWS for killing a federally protected Grizzly bear.

Joined by two similarly situated landowners, Christy filed suit in the United States District Court for the District of Montana. In his complaint, Christy sought a permanent injunction restraining FWS from enforcing the Endangered Species Act and Grizzly bear regulations against him. He claimed that the regulations deprived him of his fundamental right to possess and protect his property, deprived him of his property without just compensation, and deprived him of equal protection of the laws. The district court granted the government's motion for summary judgment and Christy appealed.

On appeal, Christy argued that the bears were "governmental agents" which had physically appropriated his sheep. The Ninth Circuit refused to analyze the case under a "physical invasion" analysis. Instead,

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61. *See* Christy v. Hodel, 857 F.2d 1324, 1335 (9th Cir. 1988).

the court purported to analyze whether the Endangered Species Act and the Grizzly bear regulations effected a regulatory taking on Christy.[62]

Before reaching its ultimate conclusion, the court presented a lengthy discussion of "pertinent" cases that primarily concern damage done to land by protected wildlife.[63] Interestingly, the "pertinent" cases the court discussed were largely inapposite to the issue before it. Christy suffered a *complete* loss each time a bear killed one of his sheep. The court's discussion focused on cases where the value of property was *diminished*, not destroyed. Arguably, the cases support the court's determination that the bear's conduct was not attributable to the government. The diminutions of value cases, however, do not support the proposition that federally-protected wildlife can *destroy* private property without the federal government being financially responsible. Thus, any such reliance on the cases was inappropriate.

Ultimately, the Ninth Circuit's decision turned on the court's determination that the bear's conduct was not attributable to the government. Relying primarily on a portion of *Douglas v. Seacoast Products, Inc.*,[64] the court stated that "[t]he federal government does not own the wild animals it protects, nor does the government control the conduct of such animals."[65] "It is pure fantasy to talk of 'owning' wild fish, birds or animals. Neither the States nor the Federal Government ... has title to these creatures until they are reduced to skillful capture."[66] Noting that the government did not reintroduce the bears to the area, the court refused to attribute the bears' conduct to the federal government.[67] The court did not, however, foreclose such an argument. Indeed, it explicitly reserved judgment on the question of whether destruction of private property by federally protected reintroduced predators amounted to a taking.[68]

A fair reading of *Christy* suggests that the Ninth Circuit panel was concerned with the lack of physical control the government had over the Grizzly bears. Although the issue was not before them, footnote nine of the opinion gives the impression that the panel may have attributed the bears'

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62. Although the court claimed to analyze the case under a regulatory takings framework, the court's analysis as a whole, indicates the court actually analyzed the case under a traditional physical invasion analysis. *See id.* at 1334-35.

63. *See id.*

64. Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).

65. *Christy*, 857 F.2d at 1335 (9th Cir. 1988).

66. *Id.* (quoting *Douglas*, 431 U.S. at 284).

67. *See id.*

68. "Whether the government may be held responsible for damage caused by bears or other wild animals that have been relocated by the government, under a theory that such animals are instrumentalities of the government, is a question we do not decide." *Id.* at 1335 n.9.

conduct to the government if the government had reintroduced the bears into the area. Considering the pervasive control FWS intends to exercise over the reintroduced wolves, a panel following the same logic as the *Christy* court may very well link depredations by Mexican wolves to the federal government.

Approximately three years before the Ninth Circuit decided *Christy*, the Tenth Circuit, sitting en banc, held that damage to private grazing land by federally protected wild horses did not amount to a compensable taking in *Mountain States Legal Foundation v. Hodel*.[69] In *Mountain States*, horses protected under the Wild Free Roaming Horses and Burros Act[70] entered the plaintiff's private grazing land, causing damage to forage and consuming significant amounts of plaintiff's privately owned forage and water. The Horse and Burro Act, however, prevented the plaintiff from chasing the horses off of the land. The plaintiff requested that the Bureau of Land Management (BLM), the agency charged with overseeing the Act, remove the animals from its private land. The BLM disregarded the plaintiff's initial requests. By the time the horses were removed, they had done significant damage to plaintiff's private grazing land.

Mountain States was before the Tenth Circuit on two occasions. Originally, a three-judge panel consisting of Judges Seth, Barrett and McKay held that the plaintiff was the victim of a taking; McKay dissented.[71] In the majority's view, the Horse and Burro Act created a level of control in the federal government that was more pervasive than other wildlife protection acts. The majority seemingly recognized that by taking away the citizen's ability to protect their property and delegating it to the BLM, the Horse and Burro Act created control that was so pervasive that the government was actually responsible for damage caused by the horses. Thus, the panel linked the horses' conduct to the BLM and ruled that a taking had occurred.

On rehearing en banc, a majority of the court held that no compensable taking had occurred.[72] The majority concluded that the government's control over the horses was no different from that of other

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69. 799 F.2d 1423, 1431 (10th Cir. 1986) (Seth, J., Holloway, J., and Barrett, J., dissenting) (*Mountain States II*).

70. The plaintiffs in both *Mountain States* and *Christy* applied pertinent regulations in a way similar to the Supreme Court in *Loretto*. In *Loretto*, the statute allowing the cable company to place its cable box on the apartment building made the government responsible for the invasion of the plaintiff's property. In *Christy*, the plaintiff argued that the statute created a relationship between the bears and government that made the government responsible for the bears' actions. In *Mountain States*, the plaintiff and dissenting judges argued that the Wild Horse and Burro Act created a relationship between the BLM and the wild horses by which the BLM was responsible for the horses actions

71. Mountain States Legal Found. v. Clark, 740 F.2d 792 (10th Cir. 1984) [hereinafter *Mountain States I*].

72. *Mountain States II*, 799 F.2d at 1431.

wildlife, and that it was therefore not responsible for the horses' conduct. Citing a string of cases holding that diminution of value did not rise to the level of a taking, the court reasoned that because the plaintiffs had not suffered a complete loss, but had only suffered a diminution in the value of their land, no taking had occurred.[73] Importantly, the majority did not hold that "pervasive control" was irrelevant. Rather, it held that pervasive control was not present in the case.

Although ultimately overturned, Judge Seth got it right the first time. Judge Seth recognized that when the government chooses to pervasively manage the conduct of wild animals and the citizens affected by them, at some point, it becomes responsible for damages flowing from its regulations. The Horse and Burro Act was purposefully designed to give the BLM exclusive management authority over the wild horses. Indeed, the act placed the horses "in a newly created legal category not wild animals, not estrays, not migratory, not related to treaty obligations but as part of the public lands . . . ."[74] Once Congress designated the horses components of the public lands, control over the animals' actions rested exclusively with the BLM; private landowners lost any ability to manage them. Thus, Judge Seth correctly concluded that because the wild horses were managed more pervasively than other protected wildlife, their actions were attributable to the federal government.

Read together, *Christy* and *Mountain States* provide a picture of when a property owner may receive compensation for property "taken" by protected wildlife. *Christy* lacked pervasive government control. The Ninth Circuit panel needed the government to exercise more control over the bears before they would hold the government liable for damage caused by the bears. *Mountain States* lacked a complete loss. The majority in *Mountain States* needed a complete loss (and pervasive control) before they would find a taking. Thus, the cases suggest that when the government has pervasive control over depredating wildlife and the property owner suffers a complete loss, a compensable taking has occurred.

D. Applying Per Se Takings Analysis to "Takings" Perpetrated by Mexican Wolves

The key factor for finding a taking when a Mexican wolf kills privately owned livestock is linking the wolf's conduct to the federal government. Although this may ultimately prove difficult, the Supreme Court and Western Circuits have mapped the course. The Ninth Circuit rejected the idea that the federal government "owned" or controlled the

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73. *Id.* at 1430.
74. *Id.* at 1435.

conduct of protected Grizzly bears. However, the Supreme Court's decision in *Douglas v. Seacoast Products* indicates that a situation could arise where the government can be held responsible for the actions of protected wildlife. In *Douglas,* the Supreme Court stated that "[i]t is pure fantasy to talk of owning wild fish, birds or animals. Neither the States nor the Federal Government ... has title to these creatures until they are reduced to possession by skillful capture."[75] Taken to its logical end, *Douglas* stands for the proposition that once the government has captured wild animals and exerted a certain amount of control over them, it "owns" them.

Every Mexican wolf slated for release was raised in captivity. Thus, the FWS has gone past the point of skillful capture and has actually raised the wolves. Furthermore, once released, the agency is not going to relinquish control of the wolves. The Draft EIS proposes comprehensive measures to control the wolves' behavior and to keep them within the confines of the reintroduction area. The conceptual link between the federal government and the reintroduced wolves is apparent in light of *Douglas.* Furthermore, the measures proposed by FWS make the agency's control over the reintroduced wolves different from its control over other protected wildlife. Therefore, *Christy* and *Mountain States* support the link between the wolves and the federal government as well.[76]

After this initial determination, the courts should have no trouble finding a compensable taking when a Mexican wolf depredates privately owned livestock under a *Loretto* physical invasion analysis, particularly if the depredation occurs on public land. The proposed rule requires a livestock owner to watch his animals fall prey to the wolves if the attack occurs on public land. Once a wolf has killed a sheep or cow, the animal is valueless. The "bundle of sticks" in livestock includes the right to a live animal.[77] Accordingly, private property has been taken for a public purpose and just compensation is due.

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75. *Douglas,* 431 U.S. 265, 284 (1977).

76. Notably, the California Court of Appeals has adopted a position regarding the control and ownership of reintroduced elk that appears to be at odds with a logical reading of *Douglas* and my position that the reintroduction program places the government in a position of responsibility over the reintroduced Mexican wolves. *See* Moerman v. State, 21 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993). In *Moerman,* the California Department of Fish and Game reintroduced a number of tule elk near Moerman's ranch. That winter, the reintroduced elk damaged Moerman's fences and consumed crops he raised to feed livestock. Moerman, alleging that the state was responsible for the elk's actions, filed suit seeking $94,000 in damages from the state of California. Concluding that the elk were not "instrumentalities of...nor...controlled by the state," the Court of Appeals affirmed the lower court's order granting summary judgment in favor of the state. *Id.* at 334.

77. Certainly, under state tort laws, if a private party releases a wolf that subsequently kills a neighbor's cow, that party is liable.

E. Regulatory Takings

Generally, a regulatory taking likely occurs when "a regulatory or administrative action places such burdens on the ownership of private property that essential elements of such ownership must be viewed as having been taken, even if the regulatory or administrative action has not deprived the owner of title or possession."[78] When a regulation deprives someone of an essential element of private property, courts embark on a three-factor analysis to determine if just compensation is due pursuant to the Fifth Amendment. The three factors considered by the courts are: 1) the character of the government action; 2) the economic impact of the government action; and 3) the extent to which the government action interferes with plaintiff's distinct investment-backed expectations.[79]

The character of government action element focuses on the property interest affected by the agency action. The inquiry examines the plaintiff's property interest under state law and the government's ability to regulate that interest.[80] For example, if a property owner is using his property for a noxious purpose, the state may, under its police power, regulate the property and prevent the noxious use. The plaintiff is not entitled to compensation because he never had the right to use his property for noxious purposes. However, if a property owner is using his property in a way protected by state property law, and the state regulates it, the property owner is entitled to just compensation if the other elements are met.

The second element examines the economic impact of the regulation on the property owner. This inquiry focuses primarily on the seriousness of the financial imposition the agency action forces the property owner to bear.[81] This economic impact "is measured by comparing the fair market value of the property before and after the alleged date of the taking."[82] If the agency action causes the plaintiffs to suffer a "serious financial loss," this element is satisfied.[83]

The third element of the *Penn Central* test requires a determination of whether the regulation or agency action interfered with the property owner's investment backed expectations. This criterion limits recoveries to plaintiffs who can demonstrate that they "bought their property in reliance

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78. Hendler v. United States, 36 Fed. Cl. 574, 585 (Fed. Cl. 1996).
79. Penn Central Transportation Co. v City of New York, 438 U.S. 104, 124 (1978).
80. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992).
81. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed Cir. 1994).
82. Bass Enterprises Production Co. v. United States, 35 Fed. Cl. 615, 619 (Fed. Cl. 1996).
83. *Id.* This appears to be a question of fact, which the Court of Claims judges are applying on a case by case basis. There seems to be no threshold standard for what is a "serious financial loss." *See, e.g., id.* at 618–19; Eastern Minerals Int'l, Inc. v. United States, 36 Fed. Cl. 541, 549–50 (Fed. Cl. 1996).

on a state of affairs that did not include the challenged regulatory regime."[84] This showing prevents plaintiffs who knew of the regulatory scheme prior to purchasing their property from receiving just compensation for the property.[85] A plaintiff who purchased with knowledge of the regulatory scheme would receive a windfall if just compensation were paid because the market had already discounted the property before he purchased it.[86]

Under this framework, depredations by reintroduced Mexican wolves seem to result in a regulatory taking. Livestock owners have a protected interest in their livestock. Of course, the interest is subject to the state's police power. So, if a livestock owner's cattle became infected with a disease that threatened the entire area's herds, the state could likely order his cattle destroyed without paying just compensation. However, if a livestock owner is lawfully grazing his cattle, and the government orders him to provide three cows per year to feed homeless people, then compensation would be due. In that situation, the livestock owner has a protected interest in his cattle which the government cannot effectively confiscate without compensation.

The Mexican wolf program creates a situation analogous to the examples above. Livestock owners in the reintroduction program will likely be grazing their cattle lawfully. On public and private land, the livestock owners have a protected state property interest in their live animals. Undoubtedly, the owner's "bundle of sticks" includes the right to exclude others from their livestock.[87] Thus, when a Mexican wolf kills and eats a cow, sheep, or horse it has appropriated the most essential "stick" for a public purpose. The taking of such a stick satisfies the first element of the *Penn Central* test.

The Wolf program also appears to violate the second prong of the *Penn Central* test. When a Mexican wolf kills livestock, he forces the livestock owner to suffer a "serious financial loss." The value of a live cow can range from approximately $400 to $1500, pre-taking. The value of a dead cow is $0, post-taking. In fact, a livestock producer may incur expenses in removing the dead animal. The economic impact of an agency action is measured by subtracting the value after the taking from the value before the taking [88] When a Mexican wolf kills a cow, there is a 100 percent loss. Accordingly, the second element is satisfied.

The third element, interference with the property owner's investment-backed expectations, also appears to be satisfied in relation to

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84. *Bass*, 35 Fed. Cl. at 620 (quoting *Loveladies Harbor*, 28 F.3d at 1177).
85. *Id.*
86. *See Loveladies Harbor*, 28 F.3d at 1177.
87. Indeed, "cattle rustling" appears to remain a crime in all fifty states.
88. *Bass*, 35 Fed. Cl. at 619.

the Wolf Program. Livestock owners invest money in brood stock so that they can make a profit. The current regulatory scheme gives them an expectancy interest in live animals. Therefore, if a livestock owner purchases livestock prior to the final reintroduction rule, he has relied "on a state of affairs that did not include the challenged regulatory regime."[89] Thus, any depredation of his livestock by the reintroduced wolves interferes with his investment-backed expectation.

Although this element is likely satisfied, the interference with investment backed expectations prong presents the most difficult portion of a plaintiff's case where a wolf depredates livestock. In *Lucas v. South Carolina Coastal Council*, Justice Scalia opined that "in the case of personal property, by reason of the state's traditionally high degree of control over commercial dealings [a citizen] ought to be aware of the possibility that the new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture)."[90] This statement by Justice Scalia suggests that a livestock producer is fighting an uphill battle when attempting to prove that the Wolf Program has interfered with his investment backed expectations.

Justice Scalia's statement is not the holding of *Lucas*. Indeed, Justice Scalia's extremely broad statement addressed an issue not before the court. Moreover, the discussion following the pronouncement narrows it considerably. For example, Justice Scalia's citation to *Andrus v. Allard*[91] suggests that the statement only applies if the regulation is directly aimed at a certain type of property. In *Andrus*, Congress passed a law banning the sale of eagle feathers. The plaintiffs owned a number of artifacts made with eagle feathers. They owned the eagle feathers before the law made it illegal to sell them. After the law was passed, they sold some artifacts that contained feathers. The plaintiffs were then prosecuted for violating the law. On appeal, the plaintiffs argued that the law prohibiting the sale of eagle feathers took their property without just compensation. The Supreme Court disagreed and held that no compensable taking had occurred.[92]

By its own language, *Andrus* is a very limited opinion. After announcing that no compensation would be awarded, the court explained the limits to its holding. The Court pointed out that "[t]he regulations ... do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them."[93] Instead, the regulations merely imposed a restriction on how the artifacts could be disposed. The Court recognized

89. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994).
90. 505 U.S. 1003, 1027 (1992).
91. *Id.* at 1028 (citing Andrus v. Allard, 444 U.S. 51, 66-67 (1979)).
92. Andrus v. Allard, 444 U.S. 51, 67-68 (1979).
93. *Id.* at 65.

that the regulation took away the most profitable use of the feathers, but did not take away all economic uses. "[F]or example, they might exhibit the artifacts for an admission charge."[94] The Court further limited its holding: "[i]n this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds."[95] The Court ultimately held that "the simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment."[96]

Justice Scalia's statement, made in reliance on *Andrus*, is inapplicable to Mexican wolf depredations.[97] First, the types of regulations at which Justice Scalia's statement is aimed are attempts to directly regulate certain conduct. In *Andrus*, that conduct was the sale of eagle feathers. The Mexican wolf program does not attempt to prohibit livestock production. Secondly, once livestock is killed and eaten by a Mexican wolf, the property owner is left with nothing of value. He cannot sell the animal, and it is highly unlikely that people would pay admission to see the dead animal. Unlike the plaintiffs in *Andrus*, a livestock producer has a total loss and not merely a diminution in the value of his property.

Depredations by Mexican wolves appear to fit neatly within the academic confines of takings law. Unfortunately, a takings suit over the loss of one cow or fifty cows for that matter is not practical. *Loretto* is a prime example. The case has an extensive history and the damage award received by the plaintiff did not justify her efforts. Likewise, litigating the loss of a cow to the Supreme Court is an unsatisfactory solution to the problems created by the reintroduction. The ultimate effect of the proposed program is that FWS may infringe on the citizen's constitutional rights, with no redress available to the citizen.

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94. *Id.* at 66.

95. *Id.*

96. *Id.* at 67-68.

97. *Mugler v. Kansas*, 123 U.S. 623 (1887), is not at odds with this result. In *Mugler*, prohibition made the sale of alcoholic beverages illegal. Mugler had invested in facilities used to produce alcoholic beverages. When Congress outlawed the sale of alcohol Mugler sued, claiming that the law worked a taking on his property. The Supreme Court denied his argument. The prohibition law was aimed at preventing citizens like Mugler from using their property to produce alcohol. Thus, the regulation he complained of was passed to prevent the exact conduct in which he was engaging. Moreover, nothing in the legislation prevented him from using his property in another manner. The Court's reasoning is largely in line with *Andrus*.

Part III: Mexican Wolves, Federal Officials, and the Lesson of Webster Bivens

Government officials in the United States are on the job 365 days per year assuring that the laws of the United States are upheld. Not surprisingly, federal agents sometimes overstep their authority and violate citizens' constitutional rights. A police officer acting under color of authority may exceed the strictures of his search warrant in violation of the victim's fourth amendment right to be free from unlawful searches and seizures. A customs agent may fail to perform his duties in a diligent manner and thereby violate a citizen's right to due process under the Fifth Amendment. A forest service agent may destroy a citizen's property without providing the citizen notice, thus depriving the citizen of property without just compensation. Similarly, a Fish and Wildlife Service agent may violate a citizen's constitutional rights if he fails to recover a Mexican wolf that strays onto private property and subsequently kills and eats a citizen's livestock.

Under 42 U.S.C. § 1983, a citizen may sue a *state officer* for damages if that officer oversteps his authority and violates the citizen's civil rights. However, no federal statute provides a method for compensating a citizen when a *federal agent*, acting under color of authority, violates the citizen's civil rights. In fact, before 1971, if a federal agent violated a citizen's constitutional rights while acting under the color of federal authority, the citizen had no federal alternative but to accept the deprivation. Then, in 1971, the Supreme Court held that when a federal agent acting under color of his authority violates a citizen's constitutional rights, such unconstitutional conduct gives rise to a cause of action for damages against the agent.[98]

A. *Bivens v. Six Unknown Named Federal Agents*: The "Constitutional Tort" Emerges

Webster Bivens was sitting at home with his family when six agents of the Federal Bureau of Narcotics entered and arrested him. The agents "manacled [him] in front of his wife and children, and threatened to arrest the entire family."[99] "They searched the apartment from stem to stern."[100] The agents then took Mr. Bivens to a federal courthouse where he was booked, interrogated, and subjected to a visual strip search.

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98. Bivens v. Six Unknown Named Federal Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971).

99. *Id.*

100. *Id.*

Unhappy (to put it mildly) with his treatment, Bivens filed suit in federal district court alleging that the officers had violated his Fourth Amendment rights.[101] Mr. Bivens sought $15,000 in damages from each officer as his remedy.[102] Unwilling to imply a damages action based upon a violation of the Constitution, the district court dismissed his lawsuit for failure to state a claim.[103] Following basically the same course as the district court, the Second Circuit affirmed.[104] Realizing the importance of the claim, the Supreme Court granted certiorari[105] and reversed.[106]

In finding that Mr. Bivens could directly sue for damages under the Fourth Amendment, the Supreme Court relied largely on the status of the defendants as Federal Officers. The Court noted the special relationship between citizens and federal agents. The Court explained that "power [granted to federal agents] . . . does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."[107] Accordingly, the Justices rejected the officers' argument that Mr. Bivens should have to sue them as citizens under state tort law. Instead, the Court exercised its power to "use any available remedy to make good the wrong done."[108] The court determined that damages were an appropriate remedy,[109] and that Bivens was entitled to recover monetary damages "for any injuries he . . . suffered as a result of the agents' violation of the [Fourth] Amendment."[110] Thus, Bivens was given his day in court and the "Constitutional Tort"[111] entered the arena of American jurisprudence.

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101. *Id.*

102. *Id.* at 389-90.

103. Bivens v. Six Unknown Named Federal Agents of Federal Bureau of Narcotics, 276 F. Supp. 12 (E.D.N.Y. 1967).

104. Bivens v. Six Unknown Named Federal Agents of Federal Bureau of Narcotics, 409 F.2d 718 (2d Cir. 1969).

105. Bivens v. Six Unknown Named Federal Agents of Federal Bureau of Narcotics, 399 U.S. 905 (1970).

106. *Bivens*, 403 U.S. at 390.

107. *Id.* at 392.

108. *Id.* at 396.

109. "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395.

110. *Id.* at 397.

111. The term "Constitutional Tort" apparently comes from the Supreme Court's decision in *Monroe v. Pape*. *See* Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337 (1989).

B. Actions Against Federal Agents Under *Bivens*

In order to prevail in a *Bivens* action, a plaintiff must prove that the federal agent acting under color of authority deprived him of a clearly established right guaranteed by the Constitution. Although this analysis seems simple, the requirements of a *Bivens* suit are, in reality, quite complex. For example, what is a clearly established constitutional right? When is a federal agent acting under color of authority?

Moreover, a *Bivens* defendant may raise several defenses that will prevent a plaintiff from recovering even if he actually violated the plaintiff's constitutional rights. First, if the offending government agent "reasonably believed he was acting properly in light of clearly established principles of law," he is immune from suit under a qualified privilege. The test for establishing qualified privilege is objective, the agent's subjective intent is irrelevant. The agent can knowingly and purposefully violate someone's constitutional rights; but if a reasonable agent would have thought the conduct to be lawful, the offending agent is immune from suit.[112] As for the "clearly established law" portion of the qualified immunity test, "so long as there is a 'legitimate question' about the constitutionality of the official's conduct, it cannot be said that such conduct . . . violates clearly established law."[113] Determining when conduct violates clearly established laws requires a fact intensive inquiry. However, courts seem inclined to find that conduct violates clearly established laws when officers' actions infringe upon rights protected under the First, Fourth, Fifth, and Eight Amendments.

Second, a *Bivens* defendant may escape liability for violating a citizen's constitutional rights if "special factors counsel hesitation" exist that counsel against in implying a cause of action based on the Constitution.[114] Supreme Court jurisprudence is not exactly illuminating as to what constitutes a "special factor counseling hesitation." However, a fair reading of the cases suggests that suits arising out of military service or government employment are especially susceptible to a finding of a special factor.[115] Furthermore, where Congress has paid special attention to an area and provided special remedial schemes, the courts will likely find a "special factor counseling hesitation."[116]

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112. John E. Nordin, *The Constitutional Liability of Federal Employees: Bivens Claims*, 41 FED B. NEWS & J. 342, 346 (1994).

113. *Id.* (quoting Mitchell v. Forsythe, 472 U.S. 511, 535 n.12 (1985)).

114. Davis v. Passman, 442 U.S. 228, 245 (1979).

115. *See* Chappel v. Wallace, 462 U.S. 296 (1983); Bush v. Lucas, 462 U.S. 367 (1983).

116. Schweiker v. Chilicky, 487 U.S. 412 (1988).

Finally, if Congress has "provided an alternative remedy that it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective," a *Bivens* action will not lie. In determining whether the alternative remedy is equally effective, the court may consider, inter alia, whether the alternative remedy provides a right to a jury trial and the deterrent effect on the offending officer. A Ninth Circuit panel found a takings action under the Tucker Act to be an inferior alternative to a *Bivens* action against the offending federal agent.[117]

C. *Bivens* Actions When Federal Officials Fail to Control Mexican Wolves Under Their "Supervision"

The idea that a federal official charged with "supervising" wild animals may properly be the subject of a *Bivens* action is not novel. In *Mountain States Legal Foundation v. Hodel*, the plaintiffs apparently advanced the theory against the BLM.[118] Neither the original nor the en banc opinions clearly addressed the issue. However, Judge Seth briefly mentioned it in his dissent to the en banc opinion.[119] The plaintiffs theorized that the BLM was responsible for the continued trespass on their private land by the wild horses. The plaintiffs informed the appropriate BLM authority that the horses were trespassing. The BLM officer knew the horses were eating plaintiffs' forage, drinking plaintiffs' stock water, and damaging plaintiffs' land. The BLM officer neglected his duty to promptly remove the horses from plaintiffs' land. Thus, the BLM officer's inaction deprived plaintiffs of their property without due process of law and a *Bivens* action was in order.

In his brief discussion, Judge Seth appeared unwilling to extend *Bivens* to a "complete failure to act."[120] However, *Bivens* jurisprudence clearly permits *Bivens* actions based on omissions.[121] For example, in *Seguin v. Eide*, the Ninth Circuit affirmed *Bivens* liability where a customs agent failed to take prompt action regarding a seized automobile.[122] Also, in *Estelle v. Gamble*, the Supreme Court recognized a *Bivens* action based on a federal

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117. Weiss v. Lehman, 642 F.2d 265, 267-68 (9th Cir. 1981) *vacated & remanded* 454 U.S. 807 (1981). Although vacated, the Supreme Court's remand order and the panel opinion on remand did not appear to attack this finding. *See id.* (remand order); Weiss v. Lehman, 676 F.2d 1320 (9th Cir. 1982) (decision on remand).

118. Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1434 (10th Cir. 1986) (Seth, J., dissenting).

119. *Id* at 1434-35.

120. *Id.* at 1434.

121. Estelle v. Gamble, 429 U.S. 97 (1976); Seguin v. Eide, 645 F.2d 804 (9th Cir. 1981) *vacated & remanded* 462 U.S. 1101 (1981) *on remand* 720 F.2d 1046 (9th Cir. 1984) (same result as original decision).

122. *Seguin*, 645 F.2d at 811.

official's failure to provide a prisoner with medical care.[123] A fair reading of these cases clearly establishes that a *Bivens* action may arise from a federal agent's omissions as well as direct actions.[124]

A *Bivens* action would probably arise in regards to Mexican wolf depredation in the following situation. FWS's proposed rule places a duty on the agency to remove the wolf if the landowner so requests. A wolf roams onto private land where cattle graze. The landowner requests that FWS remove the wolf. The owner notifies the agency that cattle are present. The agent responsible for removing the wolf does not diligently and promptly remove the wolf. The wolf kills livestock owned by the landowner.

This situation appears to be a picture perfect scenario for a *Bivens* claim. The agent is acting (failing to act in this situation) under color of authority. Under the proposed rule, FWS agents are vested with federal authority to remove the wolf. In fact, the proposed rule goes one step further and places agents under a duty to remove the wolf. There should not be any qualified immunity because the agent knows that the wolf is in the vicinity of livestock and that wolves kill livestock. Moreover, a reasonable agent would know that the livestock owner has a property interest in the livestock.

There is no alternative remedy that will prevent a *Bivens* action in this hypothetical. Neither Congress nor the FWS have created an administrative process for compensating livestock owners for depredations. Perhaps there is an action under the Tucker Act and the Fifth Amendment. However, a court will likely find such an action inadequate when compared to the *Bivens* action.

Finally, there appears to be no insurmountable "special factor counseling hesitation" of allowing a *Bivens* action in this case. The proposed reintroduction plan creates pervasive control by the FWS. Congress has not chosen to become directly involved with the reintroduction program, and the claim is not arising out of military or other federal employment. Certainly, neither Congress nor FWS has provided a comprehensive remedial scheme for implementing the program. In fact, the absence of such a scheme suggests that Congress is not taking an adequately active role in the reintroduction to create a "special factor counseling hesitation." Therefore, a *Bivens* action arising out of the above

123. *Estelle*, 429 U.S. at 97.

124. Certainly, Judge Seth did not view this claim as meritless. Indeed, he proposed that the claim should be remanded to the trial court for additional fact-finding on the *Bivens* issue. *Mountain States II*, 799 F.2d at 1435. Moreover, he described the claim as having "much appeal under these circumstances where its elements seem to be admitted by the officials and the other facts supporting it are not challenged." *Id.* at 1434.

factual scenario should not be vulnerable to an adverse summary judgment decision based on this factor.

The hypothetical scenario described above is, of course, designed to fit a *Bivens* analysis. However, it took little imagination to create. FWS provided the framework. The way the reintroduction program is set up, the FWS places a burden on its agents that is likely to place their duties in direct conflict with the livestock owner's constitutional rights.[125] In reality, it is quite possible that a situation substantially similar to the one outlined above could occur now that the wolves have been released.[126]

Although *Bivens* has academic appeal in this scenario, like a takings case, a *Bivens* action simply makes no sense when the loss suffered is between $500 and $1,500. *Weiss v. Lehman* is a prime example. In that case, a forest service agent destroyed some property located on an old mining claim. The owner of the property sued the forest service agent under *Bivens*. The case survived summary judgment and a jury awarded the plaintiff $1000 in damages against the agent.[127] The agent, represented free of charge by the Justice Department, appealed to the Ninth Circuit. The Ninth Circuit affirmed[128] and the agent appealed to the Supreme Court. The Supreme Court for review in light of a recently decided Supreme Court case vacated the Ninth Circuit's judgment and remanded the case.[129] On remand, the Ninth Circuit decided that the record needed further developing and remanded the case to the trial court.[130]

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125. FWS's proposed reintroduction program appears to overstate the agency's abilities to control the released wolves. As the Draft EIS acknowledges, wolves do not adhere to arbitrary boundaries drawn on paper. The agency's representations would seemingly require around the clock monitoring of the wolves.

126. This analysis is merely intended to show that a Mexican wolf depredation could possibly fit within the academic framework of *Bivens*. Bivens v. Six Unknown Named Federal Agents of Federal Bureau of Narcotics, 409 F.2d 718 (2d Cir. 1969). On a day to day basis, courts are quite reluctant to let plaintiffs proceed with *Bivens* suits. To put the numbers into perspective, I include the following excerpt:

> While federal officials have been inundated in Bivens lawsuits, adverse judgments have not been a problem. Of the some 12,000 Bivens suits filed, only thirty have resulted in judgments on behalf of the plaintiffs. Of these, a number have been reversed on appeal and only four judgments have actually been paid by the federal defendants. Moreover, very few Bivens cases have settled with any money paid to the plaintiff.

Rosen, *supra* note 109, at 343.

127. Weiss v. Lehman, 642 F.2d 265, 266 (9th Cir. 1981).

128. *Id.*

129. Lehman v. Weiss, 454 U.S. 807 (1981).

130. Weiss v. Lehman, 676 F.2d 1320, 1323 (9th Cir. 1982).

The history of *Weiss* is outrageous and is not isolated.[131] The plaintiff likely spent over $1000 in legal fees before he ever stepped into the courtroom. Moreover, the taxpayer's cost to litigate the case was likely exorbitant. Two appearances before the trial court, two appearances before the Ninth Circuit, and one appearance before the Supreme Court -- all over a claim of $1000. *Weiss* is a perfect example of why an administrative procedure for compensating livestock owners for animals killed by reintroduced Mexican wolves is necessary. When the government infringes upon citizen's rights, the citizen should not have to spend $100,000 litigating the issue, particularly when his out of pocket losses are considerably smaller than his legal fees. Furthermore, several years of litigation over claims worth a few hundred dollars is a tragic waste of the taxpayers' dollar.

PART IV: PROPOSED PROCEDURE FOR COMPENSATION

FWS's Draft EIS expressly states that the agency will not compensate livestock owners for depredations by reintroduced Mexican wolves. This decision is made in light of the agency's suspicious prediction that only 1-34 head of cattle will be killed each year by the wolves. The agency's logic is puzzling. If its predictions on livestock losses is correct, the total cost of a compensation program is minute when compared to programs annual $6 million budget. Thus, one must wonder why FWS has not included a compensation program in its reintroduction proposal.

One explanation for the conspicuous absence of a compensation program may be the availability of private funding. The Defenders of Wildlife has offered to compensate livestock owners for any losses caused by the reintroduced Mexican wolves. Payment by Defenders, however, is not guaranteed. An Idaho rancher recently lost a calf to a reintroduced Rocky Mountain Gray wolf. A local veterinarian and a FWS employee agreed that the wolf killed the calf. However, a FWS autopsy determined that the calf was stillborn and that the wolf was just eating the dead carcass. The autopsy also turned up a bone from another calf in the wolf's stomach,

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131. In *Seguin v. Eide*, 645 F.2d 804 (9th Cir. 1981), a plaintiff won a jury award of around $7300 against a customs agent in a *Bivens* suit. The Ninth Circuit affirmed the liability under *Bivens*, but reversed and remanded the damage award because the jury improperly awarded damages for emotional distress. The customs agent, represented free of cost by the Justice Department, appealed to the Supreme Court. The Supreme Court vacated and remanded for consideration in light of one of its recent cases. On remand, the Ninth Circuit reached the same result and remanded the case for re-determination of damages. $7300 is substantially more money than $1000. However, this much litigation over $7300 is ridiculous. These two cases are perfect examples of why *Bivens* actions are not tenable in the case of livestock depredations by Mexican wolves.

which indicated that he had eaten at least one other calf. The Defenders of Wildlife refused to compensate the livestock producer because of the autopsy findings. This decision on the part of the Defenders of Wildlife indicates that when the livestock producer and FWS disagree over the cause of an animal's death, Defenders will give the wolf the benefit of the doubt and refuse compensation.[132]

The following administrative procedure for compensating livestock owners for depredations is fair, simple, and efficient. The first step is the livestock producer's prompt report of the depredation to FWS. The producer must then permit FWS access to the carcass and scene of attack. FWS agents then prepare a report of the scene and state their conclusion as to whether the depredation is attributable to the wolves. If the agents conclude that the wolf is responsible, then the FWS pays the livestock owner market value for his loss. For calves, lambs, or colts, the market value should be calculated on the animal's prospective value at shipping time.[133] For mature animals, the market value would be the value of the animal at the time of death. For example, if a pregnant cow is killed, compensation should be based on the value of a pregnant cow. Conversely, if a cow is not pregnant, compensation should be based on the value of an open cow.[134]

If the FWS agent disagrees with the livestock owner over whether or not the animal was killed by a wolf, the agent should immediately notify the livestock owner that the FWS will contest liability. This will allow the livestock owner to obtain an independent expert to evaluate the claim at his own expense. Both the agent and the expert should complete detailed reports of what caused the animal's death. If the FWS deems necessary, the agency may also have an additional expert examine the dead animal.[135] The agent and expert reports should contain all of the information relied upon

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132. FWS eventually paid off in this case. After a lawsuit was filed on behalf of the livestock owner by Mountain States Legal Foundation, a high level official in the Department of Justice approved a $400 payment to compensate the owner for his calf.

133. Damages should be awarded in this manner to put the livestock owner in the position he would have occupied had the wolf not killed his calf. Deciding what amount will restore the status quo may ultimately prove difficult. At first, logic dictates that the rancher be compensated for the value of the calf on the date of its death. Such an approach would not be consistent with ranching practices, however. Typically, a livestock producer cannot simply purchase another two-day-old calf from a livestock auction and force the dead calf's mother to adopt it. Indeed, the mother may refuse to adopt the calf or the young orphan may not survive the stressful trip to the ranch. Furthermore, the livestock owner will likely receive the compensation in a matter of months, not days. Therefore, the best approach for valuing the animal is to fix the value at the date its siblings are shipped, not from the date of death.

134. An open cow is a cow that is not pregnant.

135. It is likely that local FWS offices will have personnel capable of determining an animal's cause of death.

by the person completing the report. The next step would be to file a claim with an administrative law judge ("ALJ").

The ALJ should be given a strict set of criteria for evaluating the claim. In addition, the ALJ should decide the claim based on the parties' reports in order to keep litigation costs down. However, if the ALJ determines that a full evidentiary hearing is necessary, he should retain the discretion to order one. The standard appeal process would be available once the ALJ renders his decision.

This proposal may seem deceivingly simple. In fact, it is simple. A lengthy, complex procedure for compensating livestock owners subverts the purpose of having a procedure in place at all. Unless a livestock owner loses a large number of animals to the reintroduced wolves, the amount of money involved does not justify a formal judicial hearing. Moreover, the ability of the administrative procedure to function properly will depend on the good faith efforts of livestock owners and FWS. If either group chooses to prove a point, the case will likely be litigated and appealed for years to come.

PART V: CONCLUSION

Despite local opposition, the Mexican wolf is coming home. The wolf is a valuable part of our Western heritage, and it is undoubtedly in the citizens' best interest that the species survives. However, "a strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[136]

The FWS knows that Mexican wolves are going to kill and eat privately owned livestock. Yet, the agency has not proposed to compensate these citizens for their loss. The framers promised that "Nor shall private property be taken for public use, without just compensation."[137] When citizens lose livestock to Mexican wolves, their private property has been taken for a public purpose. Just compensation is due and the citizen should not be required to litigate all the way to the Supreme Court to recover.

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136. Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

137. U.S. CONST. amend. V.