

The Honorable Joseph R. Biden  
President of the United States  
The White House  
1600 Pennsylvania Ave., N.W.  
Washington, D.C. 20500

The Honorable Merrick B. Garland  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington DC 20530

Re: Abolition of DOJ McKittrick Policy

Dear President Biden and Attorney General Garland:

The undersigned organizations seek the abolition of the U.S. Department of Justice's "McKittrick Policy." This internal policy directs DOJ prosecutors not to request, and to object to, the use of general intent jury instructions in jury trials enforcing violations of the Endangered Species Act<sup>1</sup> ("ESA"), which then requires the prosecution to prove that a defendant knew the identity of the ESA protected species when they took it. This creates a higher threshold for conviction under the ESA than Congress intended, and effectively discourages prosecutors from bringing criminal cases forward. This Policy also discourages enforcement in the field by U.S. Fish & Wildlife Service ("USFWS") agents. Moreover, the recovery of multiple species listed as "endangered" or "threatened" under the ESA, including whooping cranes, Mexican gray wolves, California condors, Florida panthers, red wolves, gray wolves, wolverines, and grizzly bears, many of which have been intentionally reintroduced by the government, is severely threatened by this heightened evidentiary standard that has been controlling prosecutions since 1999.

Congress passed the Endangered Species Preservation Act of 1966, the first piece of comprehensive endangered species legislation, to protect and restore endangered species. The Endangered Species Conservation Act of 1969 improved upon the 1966 Act, providing better protection to species habitats and considered species in danger of worldwide extinction. Finally, Congress passed the Endangered Species Act of 1973 ("ESA") to provide even greater protections for endangered and threatened species. The United States Supreme Court has held that-

(T)he plain intent of Congress in enacting this statute...was to halt and reverse the trend toward species extinction, *whatever the cost*. .... Agencies in particular are directed by §§ 2 (c) and 3 (2) of the Act to "*use . . . all methods and procedures which are necessary*" to preserve endangered species.<sup>2</sup>

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<sup>1</sup> 16 USC § 1531 *et seq.*,

<sup>2</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978)

Unfortunately, the protection and recovery of multiple species listed under the ESA have been severely undermined and hampered by DOJ's McKittrick Policy. There are numerous critical examples.

The whooping crane (*Grus americana*) is a large white bird which has a seven ft. wingspread and at five ft. tall is the tallest bird in North America. Once found throughout North America, the last wild flock of whooping cranes had been reduced to fewer than 20 birds by the 1940s, due to habitat loss and hunting. By 1950, Louisiana's historical population of whooping cranes had been wiped out and reduced to one bird which was transferred to another State. As a result of these situations, the whooping crane became one of the species which prompted the passage of the predecessor laws to the current ESA in the 1960's mentioned above and is currently listed as endangered under the ESA. At present, the *entire* North American population of this bird, wild and captive, is approximately just 834 birds.

In 2011, Louisiana Department of Wildlife and Fisheries (LDWF) commenced a project to reintroduce whooping cranes into southwest Louisiana where they once thrived. Reintroduction costs LDWF and its partners \$85,000 per whooping crane currently. While Louisiana's non-migratory flock continues to slowly increase, there are only 81 in the current Louisiana flock. Sadly, Louisiana's efforts to discourage the indiscriminate and illegal shooting of these whooping cranes through education, billboards, and press releases has been largely ineffectual, as shootings continue because enforcement is nearly impossible due to the McKittrick Policy. Louisiana's death toll of whooping cranes is now the highest in the United States.

The Mexican gray wolf (*Canis lupus baileyi*) was reintroduced into the American Southwest in 1998 and has begun a halting process of recovery. The primary cause of mortality at present is illegal shootings. Of 40 confirmed gunshot deaths of Mexican gray wolves between 2008 and 2023, only 17 resulted in the identification of suspects, 13 were referred for prosecution, and U.S. assistant attorneys declined prosecution in 11 of those cases. At least five of those dismissed cases explicitly cited to the McKittrick policy.

Gray wolves (*Canis lupus*) and red wolves elsewhere in the United States have encountered similar problems. A gray wolf that dispersed from Yellowstone National Park to the north rim of the Grand Canyon in 2014 was shot by a hunter in Utah claiming to mistake the wolf for a coyote. That hunter was not prosecuted due to the McKittrick Policy.

Native to the Southeast, the red wolf (*Canis rufus*) is the world's most endangered canid and is uniquely "All-American" as its entire historical range is confined within what is now the United States. Once abundant across the Southeast, red wolves now live in just five counties in eastern North Carolina near the Alligator River National Wildlife Refuge. The leading cause of death in red wolves is poaching, and at least some of this is (legitimately or not) attributed to mistaken identity.

In 1987, a novel captive breeding and reintroduction program for red wolves began which also provided an important model for subsequent reintroduction programs to restore gray wolves, Mexican gray wolves, California condors and black-footed ferrets to the wild. Captive-bred red wolves were released into the wild every year between 1987 and 2014, which helped boost the

wild population to nearly 150 animals. Tragically, this progress came to a screeching halt and the population crashed due to a number of factors including a dramatic spike in illegal poaching with enforcement hampered by the McKittrick Policy. By 2020, only seven red wolves were left in the wild.

Lastly, further out in the West, grizzly bears (*Ursus arctos horribilis*) have also been affected by DOJ's McKittrick Policy. In at least 18 grizzly killings between 2015 and 2022, federal prosecutors declined to press charges due to claims of mistaken identity.

Abolition of the McKittrick Policy should improve the plight of all of these species. Indeed, the prospect of increased fines and jail time have been shown to be significant deterrents to future rule-breaking,<sup>3</sup> and the fear associated with these potential negative consequences creates an important deterrent by itself.<sup>4</sup> By eliminating these deterrents, the McKittrick Policy effectively enables if not encourages the killing of ESA-listed species and allows those who intentionally kill listed species to evade legal consequences. The existence of this Policy, and the ability to escape culpability for violations of the ESA, is well-known to those who have an interest in killing listed species, who do not include educated and responsible hunters and sportsmen.

Particularly concerning is the fact that the McKittrick Policy is not law, and actually exists in contravention of law, specifically the letter and spirit of the ESA. The Policy was not created pursuant to statute, rule-making, or judicial decision. Instead, its origin lies in a case of the same name, *United States v. McKittrick*,<sup>5</sup> where the perpetrator had shot, skinned and beheaded an endangered gray wolf and was convicted under general intent jury charges. His conviction was affirmed at which time the Ninth Circuit Court of Appeal held that McKittrick “**need not have known he was shooting a wolf to ‘knowingly violate’** the regulations protecting the experimental population.”<sup>6</sup>

For reasons that remain unclear,<sup>7</sup> when McKittrick sought an appeal before the U.S. Supreme Court, the Solicitor General voluntarily announced in the Government's Brief that DOJ would no longer use general intent jury instructions because he was unsure what “knowingly” meant under the ESA.<sup>8</sup> An internal DOJ Memo issued shortly thereafter requiring specific intent jury charges in all ESA enforcement actions. The so-called “McKittrick Policy” was thereby established.

As its origin story reflects, the McKittrick Policy directly contravenes the plain wording of the ESA requiring proof of only **general** intent as the ESA's “knowingly” standard was interpreted

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<sup>3</sup> Furlong, W.J. (1991), *The deterrent effect of regulatory enforcement in the fishery*. Land Economics 67(1):116–129

<sup>4</sup> May, P.J. (2005). *Regulation and compliance motivations: Examining different approaches*. Public Administration Review 65(1):31–44

<sup>5</sup> 142 F.3d 1170, 1177 (9th Cir. 1998)

<sup>6</sup> *Id.* (emphasis added)

<sup>7</sup> Newcomer, Ed; Palladini, Marie; and Jones, Leah -*Article- “The Endangered Species Act v. The United States Department Of Justice: How The Department Of Justice Derailed Criminal Prosecutions Under The Endangered Species Act,”* 17 Animal L. 251, 267 (2011)

<sup>8</sup> *Id.*

by the Ninth Circuit in *McKittrick*, which remains good law. Yet, under the McKittrick Policy bearing the same name, DOJ ironically still requires all federal prosecutors to request jury instructions with a heightened *mens rea* or *specific* intent requirement in all prosecutions under the ESA. Because of the McKittrick Policy, perpetrators need only claim that they thought they were shooting a different species, such as a great egret instead of a whooping crane, a coyote instead of a Mexican wolf, a vulture instead of a California condor, or, a black bear instead of a grizzly bear, to escape the more severe penalties of the ESA.

In sum, this requirement of specific intent in jury instructions under the DOJ's McKittrick Policy creates a nearly impossible burden of proof in ESA prosecutions, deterring federal prosecutors from pursuing maximum penalties under the ESA and encouraging them to pursue lesser penalties under other laws, if applicable, with their lesser burdens of proof. Meanwhile, relief in the courts remains elusive as the latest court direct challenge to the McKittrick Policy was initially successful,<sup>9</sup> but failed on appeal due to technical standing issues.<sup>10</sup>

All hope is not lost, however. Because the McKittrick Policy is not law, and because DOJ created and implemented the McKittrick Policy simply by issuing an internal DOJ Memorandum, the McKittrick Policy can therefore be revoked with another internal DOJ Memorandum, or, an Executive Order.

Accordingly, the undersigned organizations hereby call upon the U.S. Attorney General to revoke the policy known as the McKittrick Policy. Alternatively, we seek the support of President Biden to issue an Executive Order to eliminate the DOJ's McKittrick Policy in its entirety if the DOJ is unable to revoke the policy through internal memorandum.

Respectfully,

[signatories]

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<sup>9</sup> *WildEarth Guardians v. United States DOJ*, 283 F. Supp. 3d 783, 789 (D. Ariz. 2017)

<sup>10</sup> *WildEarth Guardians v. United States DOJ*, 752 F. App.'x 421, 423 (9th Cir. 2018)