

2016 WL 1714687 (D.Ariz.) (Trial Motion, Memorandum and Affidavit)

United States District Court, D. Arizona.

WildEarth GUARDIANS et al., Plaintiffs,

v.

Daniel ASHE, et al., Federal-Defendants.

Nos. CV-15-00285-TUC-JGZ, CV-15-0019-TUC-JGZ, CV-15-00179-TUC-JGZ.
February 23, 2016.

Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment

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Pursuant to Local Rule 56.1(a), Plaintiffs hereby submit this statement of undisputed facts in support of their motion for summary judgment. As this is a record review case brought under the Administrative Procedures Act (APA), [5 U.S.C. § 706](#), the undisputed material facts for summary judgment purposes are the facts contained in the administrative record. [Great Basin Mine Watch v. Hankins](#), 456 F.3d 955, 961 (9th Cir. 2006). There are therefore no genuine issues of fact precluding summary judgment. The following facts are included in the administrative record filed in this case. Additional facts are also included in Plaintiffs' accompanying memorandum of law.

The Mexican wolf

1. The Mexican wolf “is the smallest, rarest, southernmost occurring, and most genetically distinct subspecies of the North American gray wolf.” N052624. The Mexican wolf's life history is similar to that of other gray wolves. *Id.*
2. Mexican wolves (unless a breeder within a natal pack) naturally disperse. N042678. Mexican wolves “naturally disperse from their natal pack in response to a variety of factors including food competition, mating opportunities, environmental disruptions, social aggression and/or pressures associated with pack dominance hierarchy.” *Id.* The benefits of dispersal include “increased reproductive success, decreased probability of inbreeding, release from intraspecific competition for resources and range expansion.” *Id.* Dispersal better supports natural Mexican wolf biology and behavior. N042677. Natural dispersal also improves the resilience and probability of persistence of the single Mexican wolf population. N042677; N052275.
3. Mexican wolves are largely associated with montane woodlands. N034453. The factors making this vegetative communities attractive to Mexican wolves likely include the abundance of ungulate prey, the availability of water, and the presence of hiding cover and suitable den sites. *Id.* Mexican wolves prey on white-tailed deer, mule deer, elk, pronghorn, big horn sheep, and small rodents and rabbits. *Id.*

4. The best available science reveals that having wolves on the landscape may play an important role in overall ecosystem health. C043000. In “ecosystems where wolves have been displaced or locally extirpated, their reintroduction may represent a particularly effective approach for passive restoration.” C043000. “Synthesis results generally indicate that the reintroduction of wolves restored a trophic cascade with woody browse species growing taller and canopy cover increasing in some, but not places.” *Id.* Biologists believe the “preservation or recovery of gray wolves may represent an important conservation need for helping to maintain the resiliency of wildland ecosystems, especially with a rapidly changing climate.” C043007.

The Mexican wolf's decline and eventual extirpation from the wild

5. Mexican wolves historically numbered in the thousands and were distributed across portions of Arizona and New Mexico, western Texas, and Mexico, mostly in or near mountainous forest terrain that supported populations of deer, elk, and other ungulates. FR000001; FR000138; *see also* R000671 (map). By the early and mid-1900s, the population declined rapidly due to government and private efforts across the southwestern United States to kill wolves. N034452; FR000001. Many methods were used to exterminate Mexican wolves, including trapping, snaring, shooting, and poisoning. R000672. The government's program reported “over 900 Mexican wolves killed in New Mexico and Arizona” during a ten year period alone, from 1915-1925. R000672-R000673. It is believed that a “greater number of wolves were killed for bounties from 1890 to 1915.” R000673. In addition to government action, the Mexican wolf's precipitous decline is also attributed to “commercial and recreational hunting and trapping, killing of wolves by game managers on the theory that more game animals would be available for hunters, habitat alteration, and human safety concerns (although no documentation exists of Mexican wolf attacks on humans). FR000002. By 1976 the Mexican wolf was extirpated from the United States and Mexico. N034452.

The Mexican wolf is listed as an endangered species under the ESA

6. On April 28, 1976, the Mexican wolf was listed as an endangered subspecies of gray wolf under the federal Endangered Species Act (ESA) even though no wild populations were known to remain in the United States or Mexico. FR000137; FR000061. This listing decision was replaced two years later by a rule reclassifying the Mexican wolf as part of the larger gray wolf species (*Canis lupus*) in the contiguous United States as endangered, except in Minnesota where it was listed as threatened. *Id.* The decision was due to the Service's understanding of gray wolf taxonomy and the recognition that “individual wolves sometimes disperse across subspecific boundaries, resulting in intergradations of neighboring populations.” N034449. The “reclassification” was done to “accurately express the current status of the gray wolf, based solely on an evaluation of the best available biological data.” 47 Fed. Reg. at 9607.

7. After the 1978 listing, the Service initiated recovery programs for wolves in three geographic areas: the Northern Rockies, the Western Great Lakes, and the Southwest. FR000137. In the Southwest, a recovery plan was prepared for the Mexican wolf in 1982. *Id.*; R000887. The recovery plan did not contain recovery criteria because the status of the species at the time “was so dire that the recovery team could not foresee full recovery and eventual delisting.” FR000138. The recovery plan was focused solely on the animal's “immediate survival.” *Id.* Ensuring the survival of the Mexican wolf “is the most that can be achieved today . . .” R000913. The objective was to start a captive breeding program and reestablish a viable, self-sustaining population of at least 100 Mexican wolves in the wild. *Id.* This number was derived solely “to prevent the Mexican wolf from going extinct, not to recover the species.” FR000138.

8. From 1977 to 1980, a captive-breeding program between the United States and Mexico, referred to as the Species Survival Plan (SSP), was initiated “with the capture of the last remaining Mexican wolves in the wild in Mexico and

subsequent addition of wolves from captivity in Mexico and the United States.” FR000139. All Mexican wolves alive today “descend from three captive lineages founded between 1960 and 1980 from a total of seven wolves.” N053226. Through the breeding of these seven, “founding” Mexican wolves and generations of their offspring, the captive population of has grown into approximately 248 wolves in 55 facilities in the United States and Mexico. FR000139; N048845. The primary purpose of the SSP and captive breeding program is to maintain a population of wolves for eventual release. *Id.* Due to historic management, much of the genetic variability of Mexican wolves has been lost. “When gene diversity falls below 90% of that in the founding population, reproduction may be increasingly compromised by, among other factors, low birth weights, smaller litter sizes, and greater neonatal mortality.” N048845. The current gene diversity of the captive population of Mexican wolves is 83.36%. *Id.*

The Service's 1998 experimental population rule authorizing the release of Mexican wolves

9. In 1996, the Service completed an environmental impact statement (EIS) to release Mexican wolves to the species' historic range in Arizona and New Mexico. FR000137; N050858. In 1998, the Service published a final rule establishing an experimental population of Mexican wolves for reintroduction pursuant to section 10(j) of the ESA. FR000001. The 1998 experimental population rule determined that the reintroduced Mexican wolves were geographically separate from other, non-experimental populations of the same species and that the reintroduction effort would “further the conservation of the species.” FR000001. The Service also determined the experimental population of Mexican gray wolves -- which, at this time, was still part of the general gray wolf (*Canis lupus*) listing, see FR000012 -- to be “nonessential” to the continued existence of the species. *Id.* The Service explained that this is because, even if the entire experimental population died in the wild, the “captive population [of Mexican wolves] could produce more surplus wolves and future reintroductions still would be feasible if the reasons for the initial failure are understood.” FR000003. The Service's 1998 experimental population rule also included special regulations dictating how and when the “take” of Mexican wolves would be allowed. FR000012-FR000013.

10. In 1998, the Service released a population of 13 Mexican wolves in eastern Arizona and western New Mexico in an area known as the “Blue Range Wolf Recovery Area.” N053226; FR000019 (map). During the first 5 years, from 1998-2002, the Service conducted a total of 110 releases and translocations and 58 removals, resulting in a net gain of 38 Mexican wolves in the wild. FR000140. No documented successful reproduction and recruitment in the wild was documented until 2003. N053226.

11. From 2003-2007, the Service conducted a total of 68 initial releases and translocations. FR000140. During this same period, the Service removed 84 Mexican wolves from the wild, primarily because of depredation claims. N053226.; N042670 (table 1-2); FR000140. Many of the wolves removed were from “the most successful packs.” N053226. “These large-scale removals and the near cessation of reintroduction efforts fundamentally altered the trajectory of the population.” N053227. Part of the slow increase in population growth during the period can also be attributed to “low fitness in the population” and the high number of illegal Mexican wolf killings. N053227; N042670. By 2010, 89 Mexican wolves released into the wild had been killed, primarily due to illegal killings, vehicle collisions, legal killings (in response to livestock depredations), and natural causes. N042670 (table 1-2). By January, 2010, there were only 42 Mexican wolves detected in the wild. N053226. This number represented a decline from the 2006 number of 59. *Id.*

12. Wayne and Hedrick (2010) states that overall “human-caused mortality from illegal killing and road kills, and removals mainly due to human conflict, had severely impacted the ability of this population to increase.” N053227. Human-caused mortality from illegal killing, vehicle collisions, trapping, and livestock depredation or “nuisance” behavior is a major problem and one that has kept the subspecies' persistence in question. N053227. The “illegal killing

(or 'take,' as it is referred to in the Act) of Mexican wolves currently occurs at significant levels in both the United States and Mexico." N034462.

13. In the United States, of the 100 documented Mexican wolf mortalities reported as of December 31, 2013, 55% (55 total) were from illegal killings, *see* N052664 (table 4) and N042670 (table 1-2), making it a "significant threat" to the subspecies. N034470. "In the southwest, illegal shooting of wolves is the single greatest source of wolf mortality in the reintroduced population." N052274. Additional sources of human-caused Mexican wolf mortality include 14 from vehicle collisions, 5 from "capture related mortalities and legal shootings by the public," and 12 killed by lethal control due to "nuisance" behavior or livestock depredations, N042670 (table 1-2, note 2). Additional Mexican wolves were also captured and removed from the wild and not put back, resulting in a net loss to the wild population of 17 animals. N042670 (table 1-2, note 3).

14. Human caused "take" in the form of human-cause mortality or removal has had adverse impact on recovery efforts. Approximately 112 of the 200 Mexican wolves released in the wild as of December 31, 2013 -- over 50% of the reintroduced population -- were either killed by humans (86 wolves) or permanently removed from the wild (17 wolves). N042670 (table 1-2). These are only the documented incidents. The Service admits it "may not be documenting all mortalities to the population because mortality of uncollared wolves is not typically detected." N034463. We "may be underestimating the number of mortalities caused by illegal shooting." N034462.

15. Mexican wolves cannot maintain themselves at the current levels of human caused mortality. N034462. Given the Mexican wolf's extremely small population size (approximately 100) and low genetic diversity, the current level of "take" is having a significant influence on the subspecies' survival and extinction rate in the wild. N034469. "The small population size of the Mexican wolf exacerbates the potential for all other factors, [including take] to disproportionately affect the Mexican wolf." N034469. The human-caused Mexican wolf mortalities are "additive," i.e., they are in addition to other mortalities, rather than compensatory mortality where the deaths from illegal shooting would substitute for deaths that would occur naturally. N034462. Such mortalities are thus having a "negative effect on the size and growth rate" of the experimental population. *Id.* "Overall, human-caused mortality from illegal killing and road kills, and removals mainly due to human conflict, have severely impacted the ability of [the Mexican wolf] population to grow." N053227.

16. Extinction rates for Mexican wolves are dependent on assumptions about adult mortality rates. J015416; J015417; R000187 (Fig. 3). "In simulations that assumed mortality rates would remain greater than 22.9%, extinction risk was substantially higher and larger population sizes were necessary to achieve an extinction risk of 5% or less." J015416; R000187 (fig. 3). The current mortality/removal rate for the Mexican wolf experimental population is above 50%. N042670 (table 1-2).

17. From 2010 to 2013, 10 Mexican wolves were released or translocated into wild. N042670 (table 1-2). During this same period, the Service also documented a "higher average population growth rate" than previous phases of the reintroduction effort. FR000140. As of today, the estimated population of Mexican wolves in the wild in the United States is approximately 100. N043051. Due to the Mexican wolves' social structure and based on documented pack sizes, a population of approximately 100 individual Mexican wolves would have an effective population (number of breeding animals) of approximately 28 animals. N042674. This number is "inadequate to ensure short or long-term genetic fitness" for the existing population. *Id.*

The Mexican wolf is reclassified and listed as a distinct subspecies under the ESA

18. On January 16, 2015, the Service issued a final rule reclassifying the Mexican wolf as a distinct subspecies of gray wolf. N034449. The new listing removes the Mexican wolf from the single gray wolf listing and identifies a distinct subspecies of Mexican wolf that qualifies for “endangered” status by itself. N034449; N034473. The reclassification was made due to “substantial revisions” to the gray wolf’s taxonomy, including “major taxonomic revision” recognizing the Mexican wolf as a distinct subspecies. N034450. Three studies on morphometric variation published since the 1978 listing “conclude that the Mexican wolf is a morphologically distinct and valid subspecies.” N034450. The Service also relied on genetic research studies to provide “additional validation” for its decision to reclassify the Mexican wolf as a subspecies. *Id.*

The Service's 2015 revised experimental population rule for the newly listed Mexican wolf subspecies

19. On January 16, 2015, the Service issued a revised experimental population rule pursuant to section 10(j) of the ESA for the newly reclassified Mexican wolf subspecies (“revised rule”). FR000136. The Service states the revised rule “is necessitated by a related action we are taking to classify the Mexican wolf as an endangered subspecies . . . we need to revise 50 CFR 17.11(h) such that the experimental population will be associated with the Mexican wolf subspecies listing rather than with the gray wolf species.” *Id.*; J006381 (same). The Service also explained that it needed to revise the earlier, 1998 experimental population rule in order to improve the “effectiveness of the reintroduction project in managing the experimental population.” FR000136.

20. The Service's revised rule also authorizes the issuance of a permit under section 10(a)(1)(A) of the ESA, 16 U.S.C. § 1539(a)(1)(A), to remove Mexican wolves both inside and outside the new experimental population area. *Id.* The Service also completed intra-agency consultation on its revised rule and section 10(a)(1)(A) permit pursuant to section 7 of the ESA. N043093. This consultation resulted in the issuance of a biological opinion and finding that the revised rule and section 10(a)(1)(A) permit are not likely to jeopardize the continued existence of the Mexican wolf. N043129.

21. In the revised rule, the Service determined that the reintroduced Mexican wolves were geographically separate from other, non-experimental populations of the same subspecies and that the reintroduction effort would “further the conservation” of the newly listed subspecies. FR000137; FR000181. The best available science reveals that the conservation of Mexican wolves requires the establishment of at least three populations connected by dispersal, with each population simultaneously having at least 250 animals for a minimum of eight years (approximately two generations). N053227; N004187; R000181; C043056; N067606. Based on a landscape analysis, Carroll (2006), Wayne and Hedrick (2010), and Carroll (2014) recommend establishing at least three Mexican wolf populations in the southwest connected by habitat linkages. These populations would include the current population in the “blue range recovery area, a second population near the north rim of the Grand Canyon in Arizona (north of Interstate 40), and a third population in north-central New Mexico's and southern Colorado's San Juan and Sangre de Cristo Mountains. N053227; *see also* N053226 (map); R000188 (same); N004187 (same); C0430556-C043060 (discussing three areas). This is the “minimum” necessary for recovery of Mexican wolves in the southwest. N053227.

22. In the revised rule, the Service determined the experimental population of Mexican wolves to be “nonessential” to the continued existence of the species in the wild. FR000181; 50 C.F.R. § 17.84(k)(2). The Service chose to maintain the earlier, 1998 “nonessential” status without change and in the absence of a new analysis or evaluation. FR000174. The Service originally stated that it “reaffirmed” its 1998 nonessential finding. J007811; *see also* J001807 (same); J006364 (same); J008573 (same); J016442 (same). The Service later changed its characterization as a decision not to “revaluate” or “revisit” the issue. FR000174.

23. Pursuant to NEPA, the Service prepared an EIS for its revised rule. N042613. The EIS evaluated four alternatives. N042621-N042627. The Service selected alternative one as its chosen alternative and issued a record of decision (ROD)

on January 6, 2015 outlining the various aspects of that decision which would be included in the revised rule. N034602. The Service's EIS did not consider the alternative of designating the newly listed subspecies of Mexican wolf an "essential" experimental population pursuant to section 10(j) of the ESA. This alternative satisfies the stated purpose and need of the proposed action. FR000136; *see also* N067538 (same); FR000136 (same).

24. The need to evaluate and consider an essential alternative was raised by members of the public when commenting on the draft EIS. *See, e.g.*, C042920; N058652. Members of the public requested the Service analyze an alternative that designates the experimental population essential, noting, in particular, that "re-designating the reintroduced Mexican wolf population as essential . . . would allow the Service to require consultation under [section 7 of the ESA], thereby creating opportunities to place affirmative requirements for good livestock husbandry, coexistence, and conflict avoidance on users of public lands in the [experimental population area]." C042920. No response to these and other comments on this proposed alternative are provided in the final EIS. *See* N043067 -- N043090. The Service does not explain why the alternative was eliminated for consideration. *See* N067602. In an earlier, preliminary draft of the "comment/response matrix," the Service includes the public's request to consider the essential status alternative, *see* N058652, but it was never carried forward and addressed in the final EIS or ROD, *see* N034615-N034622.

25. The Service's revised rule includes many of the same management regulations and provisions included in the 1998 experimental population rule but also some significant changes. FR000181-FR000191; 50 C.F.R. § 17.84(k).

The population cap

26. The revised rule caps the experimental population of Mexican wolves at 300-325. FR000187; N042672. So as not to exceed this population cap, the Service "will exercise all management options with preference for translocation to other Mexican wolf populations to further the conservation of the subspecies." FR000187. This means Mexican wolves inside the experimental population area can be forcibly removed from the wild or killed, once the 300-325 population cap is met. *Id.*

27. The Service originally stated Mexican wolf recovery "will require the establishment of several large populations, connected by dispersal." N059003; *see also* N073707 (same); N052278 (same); C043056 (same). In the revised rule, the Service inserted a hard population cap of 300-325 Mexican wolves. FR000187. The Service stated that this decision is consistent with the best available science, including Wayne and Hedrick (2010) and Carroll (2014). FR000141. Wayne and Hedrick (2010) and Carroll (2014), however, predicted a rate of extinction for a "restored" metapopulation Mexican wolves with three distinct but connected subpopulations, not a single isolated population of 300-325 Mexican wolves. *See* J015414; N053227; R000181.

28. The authors of the published papers (Wayne, Hedrick, and Carroll) wrote the Service to "correct the record" and address the Service's citations which "misstate, misinterpret or provide incorrect context for the results and implications" of their studies. J015414. The authors explained that the published science predicted a rate of extinction "for a population when it is present within a metapopulation of three connected populations," not a "single isolated population." J015415. The predicted extinction rate only occurs "if each population is present within a larger population." *Id.* According to the biologists, the Service's population cap of 300-325 for the lone population of Mexican wolves inhabiting the southwest is wholly inadequate to provide for the conservation (recovery) of the subspecies. An isolated population of 300-325 wolves, originating from the genetic composition of the Mexican wolves currently in the wild -- as currently authorized by the Service's final rule -- "showed a relatively high extinction rate," long term decline in population size in those populations that did not go extinct, and significant decline in genetic viability. J015417 to J015418.

29. There is no mention or evaluation of a population cap in the Service's biological opinion, *see* N043093, draft EIS or proposed experimental population rule, *see* FR000087 and N042671, so the concept of a population cap was never submitted for public review and comment or subjected to peer review. *See* C085862; C085818 -- C085819. In the draft EIS, the Service expressly disavowed the use of “hard caps” on population size or “fixed population objectives” and said it would not do so because such restrictions would hinder conservation efforts. According to the Service, a population cap coupled with removal of wolves should the population exceed the “maximum numerical target, would constrain rather than provide needed flexibility to the reintroduction project in making decisions related to the release, translocation, take and removal of Mexican wolves.” N067610. Setting “fixed population objectives” would not further conservation efforts. *Id.*; *see also* N057673 (“Hard cap on number of wolves” is not appropriate); N074315 (we said “at least” so there “is no upper bound”).

30. In the preamble to the proposed rule, the Service explained it was committing itself to a self-sustaining population “of at least 100 Mexican wolves in the wild.” FR000095. This population would be one of many and would be allowed to grow and disperse without an “upper bound” or limit on size. N074315; *see also* N073707 (describing proposed population objectives). This approach -- which sets the floor but no ceiling for population growth inside the experimental population area -- comports with the “no hard cap” approach discussed by the Service in the draft EIS. *See* N067610.

Restricting the amount of “effective migrants”

31. The revised rule restricts the amount of effective migrants, i.e., individuals from outside the population that successfully breed and pass along their genes, entering the experimental population. FR000142; N042674. Effective migration for Mexican wolves is achieved by using “initial releases from the captive population as a source of effective migrants to the experimental population.” N042674.

32. The current population of Mexican wolves in the wild is experiencing low levels of gene variation, well below what is needed for healthy reproduction so increasing the number of effective migrants is vital. N042673. “When gene diversity falls below 90% of that in the founding population, reproduction may be increasingly compromised by, among other factors, lower birth weights, small litter sizes, and greater neonatal mortality.” N048845; N042673. As of July, 2014, Mexican wolves in the wild had a retained gene diversity of 74.52% and there is currently “evidence of inbreeding depression” in the wild population. N042673. Mexican wolves in the wild are currently 50% more closely related to one another than those in captive population. *Id.* As such, “without management action to improve its genetic composition, inbreeding will accumulate and heterozygosity and alleles will be lost much faster than in the captive population.” *Id.*

33. In the revised rule, the Service limits the number of effective migrants to two per generation (four years) “while the population is around 100-250 animals.” N042674; *see also* FR000141 (same). The Service states this “number could decrease to one effective migrant per generation at population sizes greater than 250.” *Id.* This provision of the revised rule is not evaluated in the Service's biological opinion. *See* N043093.

34. For support of this number and approach, the Service relies on Carroll (2014) and Wayne and Hedrick (2010) but these papers estimated a “rate of effective migration that would ensure acceptably low long-term erosion of genetic health in a recovered metapopulation of three populations,” not a single population. J015417. As explained by the authors, the Service's proposal regarding the amount of “effective migrants” needed to maintain population viability would be “inadequate” to address the genetic threats already facing the population. J015416. Carroll, Wayne, and Hedrick explain that while two effective migrants per generation “may be enough to maintain the existing level of heterozygosity in the [experimental] population” under certain conditions, those conditions are not present in the existing Mexican wolf experimental population. *Id.* Given the “current depauperate genetic composition” and the “high relatedness” of the

existing experimental population, in order “for this population to contribute to recovery it is necessary to not only forestall further genetic degradation but also reduce the high relatedness of the [experimental] population and increase its levels of genetic variation.” *Id.* Releases from the captive population, therefore, at the rate proposed by the Service of two effective migrants per generation “would be inadequate to address current genetic threats” facing the experimental population. *Id.*

Prohibiting dispersal north of Interstate 40

35. The Service's revised rule restricts where Mexican wolves can move and disperse. Pursuant to the revised rule and in accordance with the Service's associated section 10(a)(1)(A) permit, Mexican wolves that travel outside the experimental population area will be captured and removed and either returned or transferred to captivity or Mexico, regardless of whether they have been engaged in nuisance behavior or a depredation. P002311; FR000149; N042684; N043123. The capturing of Mexican wolves involves inherent risks, including injury or death. N043123.

36. A Mexican wolf population that is “larger and more widely dispersed across a broader landscape would be more resilient to stochastic demographic and environmental events, as well as human caused mortality.” N042678. Conversely, removing Mexican wolves for no other reason than being outside an artificial boundary (like the experimental population area) restricts natural dispersal, increases the costs of the overall recovery program, and excludes important habitat that could enhance recovery efforts. *Id.*

37. Pursuant to the Service's revised rule, Mexican wolves are excluded from habitat north of Interstate 40 in Arizona and New Mexico. *See* N004187 (Fig. 2); R000188 (Fig. 4); N053226 (Fig. 1). This area, specifically habitat near the north rim of the Grand Canyon and portions of northern New Mexico are “suitable” for recovery, meaning they meet the “productivity threshold” that allows for breeding. N004187 (Fig. 2); N053226 (Fig. 1); *see also* N059594 (map). These areas are deemed critical to the long-term recovery of the subspecies. N053227; N004193. The Grand Canyon site is exceptional for Mexican wolf recovery. N0004193. The landscape shows “a high probability of success (low extinction rates) and rapid geographic expansion” and habitat that is “more resilient to landscape change” than other areas, including the experimental population area currently occupied by Mexican wolves. *Id.*

38. Restricting the ability of Mexican wolves to disperse north of Interstate 40 excludes habitat that could enhance recovery and prohibits the establishment of new populations necessary for recovery. N053227; N004187; R000181. Two of these populations will likely need to be north of Interstate 40. *See* N053226 (map); R000188 (same); C043056 (same). By prohibiting dispersal to these areas the Service is limiting recovery and increasing the likelihood of extinction. N052275; FR000175. This provision of the revised rule is not evaluated in the Service's biological opinion. *See* N043093.

39. The Service concedes that the establishment “of a single experimental population of Mexican wolves is inadequate for recovery, and we are fully cognizant that a small isolated Mexican wolf population, such as the existing experimental population, can neither be considered viable or self-sustaining.” FR000175; N042669 (same). Biologists note that there is an important relationship between “short-term management actions” proposed now and “the conditions (population size, number, and connectivity)” ultimately needed for recovery at a later date. J015418. Limiting dispersal now “could have deleterious effects in the near term on the genetic viability of the subspecies.” *Id.*

Allowing additional take in response to “unacceptable impacts” to ungulate herds

40. The Service's revised rule allows the “take” of Mexican wolves if “unacceptable impacts” are deemed to occur to wild ungulate herds. FR000185. An “unacceptable impact” will either be determined by “a State game and fish agency

WildEarth GUARDIANS et al., Plaintiffs, v. Daniel ASHE, et al., 2016 WL 1714687...

based upon ungulate management goals” or a “15 percent decline in an ungulate herd as documented by a State game and fish agency.” FR000182. The Service does not define what the “ungulate management goals” needed to determine “unacceptable impacts” are; presumably leaving that task entirely up to the Arizona and New Mexico state game and fish agencies. FR000182; FR000185. Once Arizona and New Mexico determine an unacceptable impact to a wild ungulate herd has occurred then, upon approval of the Service, they will be allowed to take, including kill, Mexican wolves. FR000185. This new take provision gives significant leeway to states to determine, at their discretion, when unacceptable impacts occur and when they do not. FR000182. This provision of the revised rule is not evaluated in the Service's biological opinion. *See* N043093.

41. The new ungulate take provision was added at the behest of Arizona and New Mexico to “protect” ungulate populations in their respective states so they can make more money by selling more hunting permits. *See* J013484 (e-mail to New Mexico asking for approval of definition); FR000150 (definition based on information from Arizona and New Mexico); J013487 (Arizona and New Mexico are “are good with the language”); J013474 (same). As noted during a meeting with the state agencies, because the issue pertains to an “acceptable number of decreased [hunting] permits that could result from wolf impacts,” the issue should be “considered within the economic analysis rather than the biological resources analysis.” N059006.

Respectfully submitted this 23rd day of February, 2016.

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WildEarth GUARDIANS et al., Plaintiffs, v. Daniel ASHE, ..., 2016 WL 1714687...

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