2016 WL 3919464
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

WILDEARTH GUARDIANS, et al., Plaintiffs,
v.
Daniel ASHE, et al., Defendants.

Nos. CV-15-00019-TUC-JGZ, CV-15-00285-TUC-JGZ
|
Signed 05/16/2016

Attorneys and Law Firms

Andrea Lynn Santarsiere, Center for Biological Diversity, Victor, ID, Heidi J. McIntosh, Jessica Townsend, Daniel J. Cordalis, Earthjustice, Denver, CO, Timothy J. Preso, Earthjustice, Bozeman, MT, Andrea R. Buzzard, Karen Budd-Falen, Budd-Falen Law Offices LLC, Cheyenne, WY, John R. Mellgren, Western Environmental Law Center, Eugene, OR, Judith Bella Calman, New Mexico Wilderness Alliance, Albuquerque, NM, Matthew K. Bishop, Western Environmental Law Center, Helena, MT, Sarah K. McMillan, Wildearth Guardians, Missoula, MT, for Plaintiffs.

Andrew Allen Smith, US Dept. of Justice, Albuquerque, NM, Bridget Kennedy McNeil, US Dept. of Justice, Denver, CO, Tanya Camille Nesbitt, US Dept. of Justice, Washington, DC, for Defendants.

ORDER

Jennifer G. Zipps, United States District Judge

***1** Pending before the Court is a Motion to Dismiss filed by Intervenor-Defendant State of Arizona ("Arizona") on December 2, 2015 in the above captioned consolidated matter. (Doc. 97.) Arizona seeks dismissal of the Complaint in its entirety under Fed. R. Civ. P. 12(b)(1), arguing that Plaintiffs WildEarth Guardians, New Mexico Wilderness Alliance, and Friends of Animals lack Article III standing. Arizona also moves to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Plaintiffs filed a Response in Opposition on February 29, 2016. (Doc. 118.) Arizona filed a Reply on March 21, 2016. [1] (Doc. 121.) For the reasons stated herein, the Court will deny Arizona's Motion to Dismiss. [2]

[1] Federal Defendants Daniel Ashe, United States Fish and Wildlife Service, Sally Jewell, and United States Department of the Interior did not participate in the briefing on the present Motion to Dismiss.

[2] Although Plaintiffs requested oral argument, the Court finds this case is suitable for decision without oral argument. *See* LRCiv 7.2(f).

FACTUAL BACKGROUND

The Mexican gray wolf (*Canis lupus baileyi*) is an endangered subspecies of the gray wolf, native to the forested and mountainous terrain of the American Southwest and northern Mexico. 63 Fed. Reg. 1752, 1753 (Jan. 12, 1998). Thought to be completely extirpated from its historic range by the 1970s, the Mexican gray wolf was first listed under the Endangered Species Act (ESA) as an endangered subspecies in 1976. 80 Fed. Reg. 2512 (Jan. 16, 2015). [3]

[3] The Mexican gray wolf was first listed as an endangered subspecies in 1976. In 1978, the subspecies listing was subsumed by the designation of the entire gray wolf species as endangered throughout North America, with the exception of Minnesota, where the species was listed as threatened. In 2015, following the delisting of the gray wolf, the Mexican gray wolf was again listed as an endangered subspecies. 80 Fed. Reg. 2488 (Jan. 16, 2014); 50 C.F.R. § 17.11(h).

Since that time, wildlife authorities in the United States and Mexico established a captive breeding program, and in 1998 the United States Fish and Wildlife Service (FWS) issued a rule pursuant to Section 10(j) of the ESA, [4] which established a nonessential experimental population of wolves to be released into the wild. *See* 63 Fed. Reg. 1752. The 1998 rule authorized the release of 14 family groups of wolves over a period of five years, with the goal of reaching a population of 100 wild wolves in a 5,000 square mile area within the subspecies' historic range. *Id.* at 1752-54. The wolves chosen for release were selected "based on genetics, reproductive performance, behavioral compatibility, response to the adaptation process, and other factors." *Id.* at 1754. All wolves were released into the designated Blue Range Wolf Recovery Area (BRWRA), which occupied 6,854 square miles across the border of central Arizona and New Mexico and lay within the larger Mexican Wolf Experimental

Population Area (MWEPA). *Id.* at 1753. Under the 1998 rule, released wolves were not permitted to establish territories on lands wholly outside the BRWRA. *Id.* at 1754. Wolves found outside the BRWRA would be captured and released back into the BRWRA, returned to the captive population, or "otherwise managed according to the provisions of a [FWS] approved management plan or action." *Id.* at 1769.

4 Under Section 10(j), the Secretary of the Interior may authorize the release of an experimental population of an endangered species outside the species' current range if the Secretary determines that the release will further the recovery and conservation of that species. 16 U.S.C. § 1539(j).

***2** On January 16, 2015, FWS issued revisions to the 1998 rule. 80 Fed. Reg. 2512. Like the 1998 rule, the 2015 rule designates the experimental population of Mexican gray wolves as "nonessential." *See id.;* 63 Fed. Reg. 1752. The "nonessential" designation increases FWS's management flexibility by permitting FWS to treat the population as if the species were "proposed for listing" or "threatened," depending on where the population is located, rather than "endangered." 63 Fed. Reg. 1752. The revised rule also sets a population objective of 300 to 325 wolves; [5] modifies the geographic boundaries in which the experimental population is managed; modifies the management regulations that govern the initial release, translocation, removal, and take of Mexican gray wolves; and authorizes the issuance of a permit under ESA Section 10(a)(1)(A) [6] for the management of Mexican gray wolves inside and outside of the MWEPA. 80 Fed. Reg. 2512. The MWEPA is expanded under the revised rule, stretching from the western border of Arizona to the eastern border of New Mexico, and extending south from I-40 to the U.S.-Mexico border. *Id.* at 2519. The BRWRA is eliminated and replaced by three zones, each with distinct protocols for the release, translocation, and occupancy of Mexican gray wolves. *Id.* at 2520. The revised rule also takes a phased approach to translocations, occupancy, and initial releases in the area west of Arizona State Highway 87, where elk herds are smaller in number and more isolated. *Id.* Finally, FWS revised the regulations for the take of Mexican wolves on Federal and non-Federal land within the entire MWEPA. *Id.* at 2525, 2557; *see* 50 CFR § 17.84.

5 The parties dispute whether the "population objective" is a population cap. (*See* doc. 82, p. 9; doc. 118, p. 9.)

6 Under ESA Section 10(a)(1)(A), the Secretary of the Interior may issue a permit authorizing the capture or killing of an endangered species. *See* 16 U.S.C. § 1539(a).

Plaintiffs WildEarth Guardians, New Mexico Wilderness Alliance, and Friends of Animals filed this action on July 2, 2015, challenging the 2015 Section 10(j) rule and the associated 10(a)(1)(A) recovery permit, as well as the adequacy of the Final Environmental Impact Statement (FEIS) and the Record of Decision (ROD) underlying the 2015 rule. (Doc. 1.) [7] In their five-count Complaint, Plaintiffs allege (1) violations of the Endangered Species Act (ESA) and the Administrative Procedure Act (APA) for failure to make a determination on the essential nature of the Mexican gray wolf experimental population, failure to utilize best available science, and failure to provide for the conservation of the species; and (2) violations of the National Environmental Policy Act (NEPA) and the APA for failure to consider a reasonable range of alternatives in the FEIS and the ROD, and failure to prepare a supplemental NEPA analysis. (*Id.* at 17-23.) Plaintiffs ask the Court to declare that the revised Section 10(j) rule, Section 10(a)(1)(A) recovery permit, FEIS, and ROD violate the law, and set aside and remand the challenged portions of those agency actions. (*Id.* at 24.)

7 Plaintiffs' Complaint at Doc. 1 is filed in case No. CV-15-00285-TUC-JGZ.

Plaintiffs bring the present suit on behalf of their organizational, staff, and members' interests. (*Id.* at 4-6.) With over 66,000 members, Plaintiff WildEarth Guardians is a non-profit organization that is dedicated to protecting and restoring wildlife, wild places, and wild rivers in the American West. WildEarth Guardians' staff and members reside in Arizona and New Mexico and engage in recreational pursuits such as hiking and wildlife-watching in the BRWRA and the MWEPA. WildEarth Guardians asserts that it "has a procedural interest in ensuring that all [FWS] activities comply with all applicable federal statutes and regulations," and that it "has advocated for the restoration of the Mexican gray wolf to its historic range." (*Id.* at 4-5.)

Plaintiff New Mexico Wilderness Alliance (NMWA) is a non-profit organization dedicated to the protection and restoration of New Mexico's wildlife and wilderness areas. NMWA has 4,000 members, many of whom reside in Arizona or New Mexico and explore and use the Greater Gila area to recreate and experience the wolves firsthand. NMWA has worked on

issues affecting the Mexican gray wolf, including advocating for wolf conservation, commenting on administrative actions affecting Mexican gray wolf recovery, and participating in the land use planning process for forestlands inhabited by the Mexican gray wolf. Finally, NMWA organizes backpacking trips and hikes in the Greater Gila area for its members. (*Id.* at 5-6.)

***3** Plaintiff Friends of Animals (FoA) is a non-profit organization with over 200,000 members worldwide, which seeks to free animals from cruelty and exploitation and promote a respectful view of animals. FoA has published articles in its quarterly journal and online on topics pertaining to wolves, and has taken various legal actions with regards to gray wolf populations throughout the United States. FoA co-sponsored a Citizen's Wolf Hearing in Denver, Colorado, to give citizens an opportunity to voice their opinion of FWS's rules regarding gray wolves, including Mexican gray wolves. Many of FoA's members are interested in protecting, studying, and observing wolves in the wild. (*Id.* at 6.)

Plaintiffs collectively assert that their members, staff, and supporters live and recreate in the MWEPA and the BRWRA, and use those areas to search for wolf presence and to observe and study the Mexican gray wolf in the wild. (*Id.* at 7.) Plaintiffs assert that their members, staff, and supporters derive aesthetic, recreational, scientific, and other benefits from these activities and from working to protect and restore Mexican gray wolves in Arizona and New Mexico, and that they have an interest in knowing Mexican gray wolves are present in the wild. (*Id.* at 8.)

STANDARD OF REVIEW

A. Rule 12(b)(1)

"Unless the jurisdictional issue is inextricable from the merits of a case, the court may determine jurisdiction on a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure." *Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008) (citing *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987)); *see Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001) *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010). Federal courts are courts of limited jurisdiction, and can only hear those cases authorized by the Constitution and by statute; namely, cases involving diversity of citizenship, a federal question, or cases to which the United States is a party. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (internal citations omitted). Accordingly, on a motion to dismiss for lack of subject matter jurisdiction, the plaintiff must demonstrate that subject matter jurisdiction exists to defeat dismissal. *See A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citing *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989)). [8]

8 Jurisdictional attacks under Rule 12(b)(1) can be either facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "The factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *San Luis Unit Food Producers v. United States*, 772 F. Supp. 2d 1210, 1219 (E.D. Cal. 2011), *aff'd*, 709 F.3d 798 (9th Cir. 2013). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039. In the case of a factual attack "the district court may review evidence beyond the complaint" and "need not presume the truthfulness of the plaintiff's allegations." *Id.*; *Savage v. Glendale Union High School, Dist. No. 2015, Maricopa Cty.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). The Court finds that Arizona's jurisdictional challenge is a facial attack. Arizona does not dispute the truth of the matters alleged in the Complaint, and the Court will accept those allegations as true in resolving the present Motion. For the sake of providing the background information relevant to this Order, the Court takes judicial notice of the public documents referenced by the parties in their filings. *See California Sportfishing Protection Alliance v. All Star Auto Wrecking, Inc.*, 860 F. Supp. 2d 1144, 1148 (E.D. Cal. 2012). However, the Court notes that the terms of the revised rule are contested by the parties, and indeed go to the very heart of this litigation. The Court does not intend any facts presented herein to be construed

as substantive findings on the merits of Plaintiffs' present action.

B. Rule 12(b)(6)

***4** To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and internal quotations omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citations and internal quotations omitted). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563 (abrogating a literal reading of *Conley*, 355 U.S. at 45-46). Dismissal is appropriate under Rule 12(b)(6) if the facts alleged do not state a claim that is "plausible on its face." *Id.* at 570. When assessing the sufficiency of the complaint, all factual allegations are taken as true and construed in the light most favorable to the nonmoving party, *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th Cir. 1994), and all reasonable inferences are to be drawn in favor of that party as well. *Jacobsen v. Hughes Aircraft*, 105 F.3d 1288, 1296 (9th Cir. 1997).

"In deciding whether to dismiss a claim under Rule 12(b)(6), the Court is generally limited to reviewing only the complaint, but it may take judicial notice of public records outside the pleadings, review materials which are properly submitted as part of the complaint, and review documents that are incorporated by reference in the complaint if no party questions their authenticity." *Padres Hacia Una Vida Mejor v. Jackson*, 922 F. Supp. 2d 1057, at *3 (E.D. Cal. Feb. 5, 2013) (citing *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)); *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

DISCUSSION

I. Constitutional Standing Requirements

Under Article III of the United States Constitution, a dispute is only properly resolved through the judicial process where the plaintiff has standing to bring suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). "To satisfy the case or controversy requirement of Article III, which is the irreducible constitutional minimum of standing, a plaintiff must, generally speaking, demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision," *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (internal quotations omitted), or, as these elements are more commonly known: injury in fact, causation, and redressability.[9] *See Hall v. Norton*, 266 F.3d 969, 975 (9th Cir. 2001).

9 Arizona only challenges Plaintiffs' constitutional standing. Accordingly, the Court will not address the prudential requirements of standing.

In order to adequately state the element of injury in fact, a plaintiff must show that he has suffered an injury that is (1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The injury asserted must be linked to a "cognizable interest." *Id.* In the environmental context, "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Defenders of Wildlife*, 504 U.S. at 562-63 (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)); *see City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (procedural violation).

Having identified a cognizable interest, a plaintiff seeking to show injury in fact must also show that he is himself among the injured. *Defenders of Wildlife*, 504 U.S. at 562-63; *Laidlaw*, 528 U.S. at 181 ("The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff."); *accord Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) ("a free-floating assertion of a procedural violation, without a concrete link to the interest protected by the procedural rules, does not constitute an injury in fact"). Thus, courts have held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183; *accord Covington v. Jefferson Cty.*, 358 F.3d 626, 639 (9th Cir. 2004). Similarly, in the NEPA context a concrete injury exists when there is a " 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact," *i.e.*, when the plaintiff

uses the area affected by the challenged activity. *Ashley Creek Phosphate Co.*, 420 F.3d at 938 ("plaintiffs who use the area threatened by a proposed action or who own land near the site of a proposed action have little difficulty establishing a concrete interest"); *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001).

***5** A plaintiff has demonstrated the element of causation where he alleges "a causal connection between the injury and the conduct complained of," which is to say that the injury is "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Defenders of Wildlife*, 504 U.S. at 560 (changes in original) (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Finally, the plaintiff has proven the element of redressability where he has shown that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 180-81. [10]

10 The standing analysis is not fundamentally altered when the plaintiff asserts a procedural, rather than a substantive injury. *City of Sausalito*, 386 F.3d at 1197; *Cantrell*, 241 F.3d at 679. However, in the case of a plaintiff alleging a procedural violation, the plaintiff can establish standing "without meeting all the normal standards for redressability and immediacy." *Hall*, 266 F.3d at 975. Thus, the plaintiff need only show that it is "reasonably probable" that the challenged action will threaten his concrete interests. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003).

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181. If the organization's members meet the three-part test for constitutional standing, the organization has standing to represent the members' interests. *Nuclear Info. and Res. Serv. v. Nuclear Regulatory Comm.*, 457 F.3d 941, 950 (9th Cir. 2006).

"The purpose of the standing doctrine is to ensure that the plaintiff has a concrete dispute with the defendant, not that the plaintiff will ultimately prevail against the defendant." *Hall*, 266 F.3d at 976-77; *accord Covington*, 358 F.3d at 639 ("the relevant inquiry here is not whether there has been a breach of RCRA ..., but whether [defendants'] actions have caused 'reasonable concern' of injury to the [plaintiffs]."). Accordingly, the party invoking jurisdiction bears the burden of proving the elements of standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' " *Id.* (internal citations omitted).

II. Plaintiffs have demonstrated standing on their own institutional behalf and on behalf of their members.

A. Injury in Fact, Causation, and Redressability

Plaintiffs have shown a concrete and particularized injury in fact. First, Plaintiffs NMWA, WildEarth Guardians, and FoA have a "cognizable interest" in the conservation and recovery of the Mexican gray wolf. All three Plaintiff organizations have asserted a valid recreational, aesthetic, and scientific interest in observing and studying the Mexican gray wolf in the wild. Such interests are clearly "cognizable" for the purposes of establishing injury in the environmental context, for both the substantive and the procedural violations alleged by Plaintiffs in the Complaint. *Lujan*, 504 U.S. at 562-63 ("the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing").

***6** Further, at least two of the Plaintiffs have established the requisite geographic nexus to the area affected by the challenged activity in order to prove that they are themselves among the injured. Plaintiffs NMWA and WildEarth Guardians have alleged that their members, staff, and supporters live and recreate in the MWEPA and the BRWRA, and use those areas to search for wolf presence and for observing and studying the Mexican gray wolf in the wild. NMWA organizes backpacking trips and hikes for its members in areas affected by the challenged agency action, and has participated in the administrative process for Mexican gray wolf recovery. These allegations establish the requisite geographic nexus to the challenged action that is necessary to establish injury for Plaintiffs' substantive and procedural claims. The Court notes that although FoA has failed to allege that its members live or recreate in the affected areas, "the

presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006). Accordingly, the Court finds that Plaintiffs have adequately shown that their injury is concrete and particularized, and that they are "are persons for whom the aesthetic and recreational values of the area will be lessened." *Laidlaw*, 528 U.S. at 183.

B. Organizational Standing

Plaintiffs bring the present action on their own institutional behalf and on behalf of their members. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181. The geographical nexus, as well as the recreational and aesthetic interests which establish injury in fact in this case, apply equally to Plaintiff organizations and their members. Plaintiffs are non-profit organizations, active in the conservation and recovery of the Mexican gray wolf, and the asserted interests here are clearly germane to the organizations' purpose. Neither the claim asserted nor the relief requested requires the participation of individual members.

The Court rejects Arizona's argument that Plaintiffs lack standing to sue on behalf of their members because Plaintiffs failed to attach supporting affidavits or specifically identify which members are injured. Affidavits are not required to support otherwise sufficient allegations of standing at the pleading stage of the litigation. *Defenders of Wildlife*, 504 U.S. at 561. As explained by the Supreme Court:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.... In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must set forth by affidavit or other evidence specific facts, ... which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Id. (internal citations and quotation marks omitted). [11] The Court notes, however, that Plaintiffs attached to the recently filed Motion for Summary Judgment six affidavits from their members, which are sufficient to establish their members' interest in the present litigation. *See Defenders of Wildlife v. Hall*, 807 F. Supp. 2d 972, 981 (D. Mont. 2011) (accepting affidavits of members filed with the court subsequent to the complaint). Accordingly, the Court finds that Plaintiffs have met the requirements for bringing suit on behalf of their members.

11 Arizona cites *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), for the proposition that the failure to attach affidavits or identify with specificity which members will suffer harm is grounds for dismissal. *Summers* is inapposite. In *Summers*, the Court rejected the Plaintiffs' "late filed affidavits," reasoning that Fed. R. Civ. P. 15(d) would not permit amendment "after the trial is over, judgment has been entered, and a notice of appeal has been filed." *Id.* at 500.

C. Arizona's argument under *Nuclear Information and Resource Service*

***7** Arizona moves to dismiss the Complaint under Fed. R. Civ. P 12(b)(1) for lack of subject matter jurisdiction on the grounds that Plaintiffs lack Article III standing. (Doc. 82, p. 12.) Specifically, Arizona argues that Plaintiffs cannot demonstrate injury in fact because the revised rule and permit are more beneficial to Mexican gray wolf recovery than the rule and permit they replace. Relying on *Nuclear Information and Resource Service v. Nuclear Regulatory Commission*, 457 F.3d 941 (9th Cir. 2006), Arizona contends that Plaintiffs must show that their aesthetic and recreational values are lessened by the existing rule. (*Id.* at 13.) Pointing to specific management provisions, Arizona contends that a comprehensive evaluation of the 2015 rule shows that Mexican gray wolf conservation is enhanced, and Plaintiffs therefore cannot show injury. (*Id.* at 13-15.)

In an Order dated March 31, 2016, in consolidated case No. CV-15-00019-TUC-JGZ, this Court rejected Arizona's argument that plaintiffs Center for Biological Diversity and Defenders of Wildlife could not prove injury in fact because the 2015 revised Section 10(j) rule is on the whole more beneficial to Mexican gray wolf recovery than the rule it replaces. (Doc. 122.) For the reasons stated in its March 31, 2016 Order, the Court rejects Arizona's argument as lacking in legal merit. Moreover, adopting Arizona's argument would require inquiry into the merits of Plaintiffs' claims that is inappropriate at this stage of the proceedings. *Roberts*, 812 F.2d at 1177 ("The relatively expansive standards of a 12(b)(1) motion are not appropriate for determining jurisdiction in a case ..., where issues of jurisdiction and substance are intertwined.").

III. Plaintiffs have adequately stated a claim in Count 1.

In Count 1 of their First Claim for Relief, Plaintiffs assert that FWS failed to make a determination of whether the experimental population of Mexican gray wolves is "essential" to the continued existence of the subspecies in the wild, as that term is defined in Section 10(j) of the ESA. According to Plaintiffs, the revised 2015 rule carried over the "nonessential" designation of the 1998 rule, without analysis or opportunity for public comment. Plaintiffs assert that the failure to make a determination on the essential nature of the population is a violation of (1) Section 10 of the ESA, 16 U.S.C. § 1539; (2) the ESA's implementing regulations, 50 C.F.R. § 17.81; (3) the APA, 5 U.S.C. § 706(2)(A), as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; and (4) the APA, 5 U.S.C. § 706(1), as an agency action unlawfully withheld or unreasonably delayed. (Doc. 1, p. 18; *see* doc. 118, p. 15.)

Arizona moves to dismiss Plaintiffs' claim under 5 U.S.C. § 706(1) for agency action unlawfully withheld or unreasonably delayed. Arizona argues that Plaintiffs have failed to identify an action that Defendants are legally required to take, and that Plaintiffs have therefore failed to state a claim for failure to act. (Doc. 82, p. 17.) According to Arizona, FWS was not required to reconsider its determination that the experimental population of wolves was "nonessential" because this determination is only legally required at the time of the initial release. Arizona contends that neither the revised rule, nor the relisting of the Mexican gray wolf as an endangered subspecies created a duty to revise FWS's original essentiality determination. (*Id.* at 17-18.)

Plaintiffs argue that FWS had a duty to reconsider its initial determination on the essential nature of the experimental population prior to issuing the revised rule, and that the failure to do so constituted an agency action "unlawfully withheld" under 5 U.S.C. § 706(1). Plaintiffs contend that the duty to make a new essentiality determination attaches anytime FWS issues a new experimental population rule for Mexican wolves. (*Id.*) Plaintiffs argue that the 1998 determination is no longer based on the best available science, and note that since the 1998 rulemaking, the gray wolf was delisted as an endangered species under the ESA, and the Mexican gray wolf was accordingly reclassified as an endangered subspecies, creating an additional basis for reconsidering the previous essentiality determination.

***8** A claim for failure to act under 5 U.S.C. § 706(1) can only proceed where the plaintiff asserts that "an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness Ass'n*, 542 U.S. 55, 64 (2004). The agency's duty to perform the action must be nondiscretionary. *Id.*

Section 10(j) of the ESA states: "Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species." 16 U.S.C. § 1539(j)(2)(B). The Ninth Circuit has found that "Section 10(j) requires two specific findings for regulations pertaining to experimental populations: (1) that the establishment of such a population will further the species' conservation; and (2) that the population is either essential or nonessential to the species' conservation." *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998). [12]

12 The parties dispute the significance of language found in the legislative history of the 1982 ESA Amendments. This authority, however, is not dispositive on the precise issue before this Court.

Arizona concedes that FWS had a nondiscretionary duty to make an essentiality determination prior to the experimental population's initial release in 1998, but argues that the requirement to make a new essentiality determination following the wolf's change in classification "appears nowhere in statute, regulation or any other legal requirement." (Doc. 82, p. 17.) Yet, Arizona provides no authority for the proposition it asks the Court to adopt: that

the duty to make an essentiality determination is discretionary where, as here, an existing 10(j) rule has been revised and the species has been reclassified.

The Court declines to dismiss Plaintiffs' claims in Count One under Section 706(1) based upon the limited briefing on the present Motion. While it may be true that Plaintiffs' claim is not viable under both § 706(1) and § 706(2)(A), without the full record before it, the Court is unable to determine whether the unique facts of this case would affect FWS's duty to make a new essentiality determination. In short, Plaintiffs have pled sufficient facts to state a claim that is at the very least "plausible on its face" under either 5 U.S.C. § 706(1) or § 706(2)(A), and it is unnecessary to ask Plaintiffs to prove the facts supporting each of those claims at this stage in the litigation. [13] *Twombly*, 550 U.S. at 570.

[13] The Court notes that the facts underlying this issue are more fully presented in Plaintiffs' Motion for Summary Judgment and Arizona's Cross Motion for Summary Judgment. (Docs. 111, 112, 141, 142.)

Accordingly, IT IS ORDERED that Arizona's Motion to Dismiss (doc. 97) is DENIED.

Dated this 16th day of May, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 3919464