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10  
11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 \_\_\_\_\_ )  
CENTER FOR BIOLOGICAL )  
14 DIVERSITY, *et al.* )

15 Plaintiffs, )

16 v. )

17 UNITED STATES FISH AND )  
18 WILDLIFE SERVICE, *et al.*, )

19 Defendants )

20 and )

21 SISKIYOU COUNTY *et al.*, )  
22 )

23 Defendant Intervenors )  
24 \_\_\_\_\_ )

No. 3:15-cv-05754-JST

**FEDERAL DEFENDANTS' CROSS  
MOTION FOR SUMMARY JUDGMENT  
AND OPPOSITION TO PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

Hearing: January 26, 2017

Time: 2:00 p.m.

Judge: Hon. Jon S. Tigar

Place: Courtroom 9

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1 **NOTICE OF MOTION**

2 Please take notice that on January 26, 2017, at 2:00 p.m., or as soon thereafter as counsel  
3 may be heard, before the Honorable Jon S. Tigar, at the United States District Court for the  
4 Northern District of California located at 450 Golden Gate Avenue, San Francisco, California,  
5 the United States Fish and Wildlife Service (“Service”), S.M.R. Jewell, in her official capacity as  
6 the United States Secretary of the Interior, and Daniel M. Ashe, in his official capacity as the  
7 Director of the United States Fish and Wildlife Service, (collectively “Federal Defendants”) will,  
8 and hereby do, cross-move for summary judgment in the above-captioned case, pursuant to Rule  
9 56 of the Federal Rules of Civil Procedure. Federal Defendants’ motion for summary judgment  
10 is based on the points and authorities set forth below and the administrative record, which was  
11 certified by Federal Defendants on June 7, 2016 (ECF No. 52).

12 **INTRODUCTION**

13 Plaintiffs challenge a determination by the Service that listing the coastal distinct  
14 population segment (“DPS”) of Pacific Marten (hereinafter referred to as the “coastal marten”)  
15 as “endangered” or “threatened” under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531  
16 *et seq.*, is not warranted. 80 Fed. Reg. 18,742 (Apr. 7, 2015) (hereinafter referred to as the  
17 “Finding”). The Service concluded, based on the best available scientific and commercial data  
18 available, that past threats of timber harvest and over trapping have largely been ameliorated, and  
19 there is no evidence to suggest that current stressors are resulting in population declines, such  
20 that the coastal marten is in danger of extinction or may become endangered in the foreseeable  
21 future.

22 The Service further found that there was no empirical evidence that coastal marten were  
23 in danger of extinction as a result of small or isolated population effects. Although reduced in  
24 abundance relative to historical numbers, there is no empirical evidence that any current  
25 populations of coastal marten are in decline or that the potential stressors are severe enough to  
26 put the coastal marten in danger of extinction or likely to become so. Moreover the Service  
27 reasonably concluded based on the best available data that the populations are not isolated to  
28 such an extent that the species is in danger of extinction, as the data on the dispersal capabilities

1 of martens and habitat modeling between the three populations suggest the potential for  
2 interchange of individuals. Finally, in analyzing whether the coastal marten was in danger of  
3 extinction or likely to become so in the foreseeable future, as the Service explained, the degree of  
4 exposure varied from population to population based on the type of potential threat involved and  
5 that would have only a low-level impact on the coastal marten population or its habitat. Thus the  
6 Service rationally concluded that potential stressors were not geographically concentrated. As an  
7 expert agency charged by Congress with implementing the ESA, the Service's exercise of  
8 judgment in a technical area within its special area of expertise is entitled to substantial  
9 deference. Here, Plaintiffs have not met their burden to show that the agency's action is so  
10 implausible that it could not be ascribed to a difference in view or the product of agency  
11 expertise. Instead, Plaintiffs merely ask this Court to substitute their judgment and views for that  
12 of the agency. Plaintiffs' theory of the case is contrary to the fundamental premise of  
13 administrative law that reviewing courts are at their most deferential when, as in this case, an  
14 agency is making predictions within the area of its special expertise, at the frontiers of science.  
15 Any scientific and technological uncertainty entitles an agency to greater deference, not less.

16 While Plaintiffs clearly would have preferred a different outcome, it is the Service, as the  
17 expert agency responsible for making listing decision under the ESA, that Congress has charged  
18 with weighing the available evidence and making reasonable predictions based on that evidence  
19 to determine if a species meets the statutory definition of a threatened or endangered species. A  
20 reviewing Court is not empowered to substitute a plaintiff's preferred conclusion for that reached  
21 by the Service. As such, the Service's rational listing decision should be upheld.

## 22 **STATUTORY BACKGROUND**

23 Section 4 of the ESA directs the Secretary of the Interior<sup>1</sup> to determine which species<sup>2</sup>  
24 should be listed as endangered or threatened under the Act, based on the following factors:

25 \_\_\_\_\_  
26 <sup>1</sup> Depending on the species involved, "Secretary" in the ESA refers to either the Secretary of the  
27 Interior or Commerce. 16 U.S.C. § 1532(15). The coastal marten falls under the jurisdiction of  
28 the Department of the Interior. The Secretary has delegated her responsibilities to the Service.

<sup>2</sup> The ESA defines "species" as "any subspecies of fish or wildlife or plants, and any distinct  
population segment of any species of vertebrate fish or wildlife which interbreeds when mature."  
16 U.S.C. § 1532(16).

- 1 (A) the present or threatened destruction, modification, or curtailment of its  
2 habitat or range;
- 3 (B) overutilization for commercial, recreational, scientific, or educational  
4 purposes;
- 5 (C) disease or predation;
- 6 (D) the inadequacy of existing regulatory mechanisms; or
- 7 (E) other natural or manmade factors affecting its continued existence.

8 16 U.S.C. § 1533(a)(1); *see also id.* § 1532(6), (20) (definitions of endangered and threatened  
9 species). Listing determinations must be made “solely on the basis of the best scientific and  
10 commercial data available ... after conducting a review of the status of the species and after  
11 taking into account those efforts, if any, being made by any State or foreign nation ... to protect  
12 such species ...” *Id.* § 1533 (b)(1)(A).

13 Interested persons may petition the Service to list species under the Act. *Id.* §  
14 1533(b)(3)(A). “To the maximum extent practicable,” the Service must, within 90 days of  
15 receiving a petition, determine whether it presents “substantial scientific or commercial  
16 information indicating that the petitioned action may be warranted.” *Id.* This is referred to as a  
17 “90-day finding.” If the Service makes a “positive” 90-day finding, it begins a “review of the  
18 status of the species concerned” and must make a second finding (referred to as the “12-month  
19 finding”) that the petitioned action: (a) is not warranted; (b) is warranted, and promptly publish a  
20 proposed rule to list; or (c) is warranted, but precluded by higher priority pending proposals, and  
21 expeditious progress is being made to list, delist, or reclassify species. *Id.* § 1533(b)(3)(B); 50  
22 C.F.R. § 424.14. If the listing of a species is “warranted but precluded,” the species is  
23 designated a “candidate” for listing, and the Service must annually review the petition until it  
24 determines listing is either warranted or not warranted. *Id.* § 1533(b)(3)(C)(i).

### 25 **FACTUAL BACKGROUND**

26 The coastal marten is a small brown mammal in the weasel family, with large triangular  
27 ears and a long bushy tail. MAR020893. Coastal martens prefer old-growth conifer-dominated  
28 forests, but may also be found in coastal serpentine and coastal dune forest. MAR022027-28.

1 Due to lack of surveys for coastal martens, little information was available at the time the  
2 Service published the Finding regarding current distribution. What is known is that there are  
3 three populations in coastal northern California and coastal southern and coastal central Oregon,  
4 with population areas ranging from 812 square kilometers (coastal northern California) to  
5 approximately 4,700 square kilometers (coastal southern Oregon). MAR022029, 31-32.  
6 Historically, martens were distributed throughout coastal coniferous forests in northern  
7 California and Oregon. MAR022029. Historical abundance of coastal martens is unknown, but  
8 coastal martens likely never occurred in high densities. MAR022029. Widespread logging and  
9 unregulated trapping in the 1900s reduced the distribution and abundance of coastal marten  
10 populations. MAR022029. A marked decline in the number of coastal marten harvested led to  
11 the closure of marten trapping in California after 1946. MAR022029.

12 On April 7, 2015, the Service issued its 12-month finding on a petition to list the coastal  
13 marten<sup>3</sup> as an endangered or threatened species.<sup>4</sup> 80 Fed. Reg. 18,742. After a detailed and  
14 careful evaluation of a range of potential stressors to coastal habitat and coastal marten  
15 populations, the Service determined that the marten did not warrant listing under the ESA.  
16 MAR022049. Critical to the Service's Finding was that past trapping and logging threats had  
17 largely been ameliorated. First, trapping is illegal in California and trapping effort in Oregon is  
18 minimal. MAR022047-48. Second, much of the coastal marten's remaining suitable habitat is on  
19 Federal land, which are managed to retain more structural features that are necessary components  
20 of marten habitat. MAR022047. In addition, most of the Federal lands that provide suitable  
21

22 \_\_\_\_\_  
23 <sup>3</sup> The petition requested that the Service consider for listing the previously classified Humboldt  
24 marten (*Martes Americana humboldtensis*), the (now-recognized) subspecies of Humboldt  
25 marten (*M. caurina humboldtensis*), or the Humboldt marten DPS of the Pacific marten (*M.*  
*caurina*). MAR022022. In responding, the Service recognized a coastal DPS of the Pacific  
26 marten, which includes coastal Oregon populations of marten and the current classification of  
27 Humboldt marten. *Id.*

28 <sup>4</sup> On January 12, 2012, the Service published a 90-day finding that Plaintiffs' petition presented  
substantial information that listing may be warranted. 77 Fed. Reg. 1,900. In response, the  
Service initiated a status review of the species, which culminated in the 12-month Finding.  
MAR022022. For purposes of the 90-day finding, the common name Humboldt marten referred  
to then classified American marten (*M. americana*) populations in coastal northern California  
and coastal Oregon. *Id.*



1 habitat are in Federal Reserves that are managed to maintain and develop late-successional  
2 habitat characteristics that are beneficial for martens. *Id.*

3 Specifically, much of the land in Federal ownership is governed by the Northwest Forest  
4 Plan (“NWFP”), a 100-year strategy intended to provide the basis for conservation of the  
5 northern spotted owl and other species associated with late –successional and old growth forests.  
6 MAR022040. This regional plan provides for retention and recruitment of older forests, and for  
7 spatial distribution of this type of habitat that will benefit late-successional, forest-dependent  
8 species, like the coastal marten. *Id.* Thus, the Service expected the amount of suitable habitat  
9 available for coastal martens to increase in the foreseeable future. MAR022047. The Service also  
10 found that, in addition to historic threats being abated, current stressors, including wildfire,  
11 climate change, vegetation management, development, disease, predation, collision with  
12 vehicles, and exposure to toxicants, are not expected to have significant impacts to coastal  
13 marten habitat or result in population-level declines. MAR022046-47; 49. In reaching this  
14 conclusion, the Service also considered whether small and isolated population effects could be  
15 considered threats to the coastal marten. MAR022043-44. Ultimately, the Service found that  
16 coastal marten populations were not isolated to such a degree that small or isolated population  
17 effects would be realized. MAR022043-44. As such, the Service determined that the marten is  
18 not in danger of extinction not likely to go extinct or likely to become in danger of extinction in  
19 the foreseeable future.<sup>5</sup> *Id.*

20 Although the Service determined that the coastal marten did not warrant listing under the  
21 ESA, ongoing conservation efforts for the marten continue. The Humboldt Marten Conservation  
22 Group was formed in 2011 with the primary goal of developing a conservation assessment and  
23 strategy for what is now the coastal marten. MAR022046.

24  
25 \_\_\_\_\_  
26 <sup>5</sup> Although the Service determined that the coastal marten did not warrant listing under the ESA,  
27 ongoing conservation efforts for the marten continue. The Humboldt Marten Conservation Group  
28 was formed in 2011 with the primary goal of developing a conservation assessment and strategy  
for the then-described Humboldt marten subspecies in coastal northern California. MAR022046.  
The Service is also continuing surveys to better refine its understanding of marten distribution  
and abundance in coastal Oregon. MAR014434-42.

1 **STANDARD OF REVIEW**

2 The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 702, 706(2)(A), provides the  
3 waiver of sovereign immunity as well as the scope and standard of review for this action.  
4 *Bennett v. Spear*, 520 U.S. 154, 173-74 (1997); *San Luis & Delta–Mendota Water Auth. v.*  
5 *Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Although a reviewing court’s inquiry in an APA case  
6 “must be thorough, the standard of review is highly deferential; the agency’s decision is ‘entitled  
7 to a presumption of regularity,’ and [the reviewing court] may not substitute [its] judgment for  
8 that of the agency.” *Id.* at 601 (citation omitted).

9 The court is to be “most deferential” when, like here, “the agency is making predictions,  
10 within its area of special expertise, at the frontiers of science.” *Lands Council v. McNair*, 537  
11 F.3d 981, 993 (9th Cir. 2008) (*en banc*) (citation omitted). A reviewing court may reverse a  
12 decision as arbitrary and capricious under the APA “only if the agency relied on factors  
13 Congress did not intend it to consider, entirely failed to consider an important aspect of the  
14 problem, or offered an explanation that runs counter to the evidence before the agency or is so  
15 implausible that it could not be ascribed to a difference in view or the product of agency  
16 expertise.” *Id.* at 997 (citation omitted).

17 **ARGUMENT**

18 **I. The Service Reasonably Determined Not to List the Coastal Marten as Endangered**  
19 **or Threatened.**

20 The Service’s determination that the coastal marten is neither in danger of extinction nor  
21 likely to become so in the foreseeable future complies with all requirements of the ESA and is  
22 entirely reasonable. 16 U.S.C. § 1532(6), (20); MAR022049. In reaching its conclusion, the  
23 Service thoroughly and objectively examined all available scientific and commercial information  
24 as applied to the statutory listing factors. MAR022034-49. Finding that historical threats had  
25 largely been ameliorated, and that there was minimal evidence that current stressors were having  
26 population-level impacts, the Service determined that the coastal marten does not meet the  
27 statutory definition of a threatened or endangered species. The Service’s expert judgment is  
28 entitled to deference and should be upheld. *Jewell*, 747 F.3d at 601.

1           The Service first determined that the coastal marten is not a threatened or endangered  
2 species under listing factor A (16 U.S.C. § 1533(a)(1)) – “the present or threatened destruction,  
3 modification, or curtailment of its habitat or range”– because of the substantial amount of marten  
4 habitat that is currently protected and will be in the future. Historically, habitat loss from logging  
5 was one of the primary threats to the species, resulting in reduction of both amount and  
6 distribution of suitable coastal marten habitat. MAR022029, MAR022036. Despite some  
7 ongoing logging-related habitat loss, the Service determined that vegetation management  
8 activities were a low-level stressor to the species and that the majority of suitable habitat for  
9 coastal marten is currently secure and expected to increase in the future. MAR02236. In reaching  
10 this conclusion, the Service made two principle findings. First, the Service determined that the  
11 majority of suitable habitat is on federally owned land – (71 percent in coastal central Oregon, 90  
12 percent in coastal southern Oregon, and 77 percent in coastal northern California). MAR022036-  
13 37. Second, much of the marten’s suitable habitat falls within the NWFP Federal reserve lands,  
14 which are managed to maintain and develop late-successional forest characteristics that martens  
15 prefer. MAR022036-37. As a result, much of the currently suitable marten habitat is not only  
16 expected to remain secure in the foreseeable future, but also that additional marten habitat is  
17 expected to develop in the future. MAR022037. Moreover, the Service considered the  
18 maintenance of suitable habitat on federal and state lands to be “the key element to support the  
19 long-term viability of coastal marten populations.” MAR022037.

20           The Service also examined other human and natural stressors with the potential to affect  
21 coastal marten habitat, such as development, wildfire, and climate change. As with vegetation  
22 management, the Service concluded that none of these stressors threatened the survival of the  
23 species now or in the foreseeable future. MAR022034-38. Potential development is expected on  
24 private lands that afford the coastal marten little suitable habitat. MAR022037. In Oregon, the  
25 greatest rates of development-related habitat loss occurred prior to implementation of county  
26 land-use plans and planning laws, which limited development to areas already urbanized rather  
27 than more rural areas where the coastal marten is found. MAR022037. Therefore, the Service  
28

1 found that because of these existing land use planning regulations, any future development is not  
2 expected to have more than a low-level impact on existing marten habitat. MAR022038.

3 Similarly, the Service concluded that neither wildfires nor climate change threatened the  
4 viability of coastal marten populations now or in the foreseeable future. MAR022034-36.

5 Wildfires are a naturally occurring phenomenon, which in coastal marten habitat, have  
6 historically not resulted in drastically altered vegetative structure. MAR022047. The Service  
7 determined that wildfires did not rise to the level of a threat based on the continued presence of  
8 moderate and high-quality habitat following past fires as well as the mitigating effects of moist  
9 habitat conditions, which are characteristic of coastal areas within the marten's range.

10 MAR022035. Impacts to coastal marten habitat from climate change ranged from negative to  
11 neutral to potentially beneficial. MAR022036. For example, in areas with stable or increasing  
12 precipitation, warming temperatures and decreased snowpack could result in increased  
13 availability of habitat and prey for coastal martens at higher elevations and during the winter  
14 months. *Id.* However, the Service concluded that it was not clear how or when change in  
15 vegetation composition would affect the distribution of suitable marten habitat, or how any such  
16 changes in distribution would affect coastal marten populations, because existing climate models  
17 were unable to estimate the local-level changes to plant species composition and forest type.  
18 MAR022036. The Service thus determined that there was not reliable information to conclude  
19 that climate change would cause the coastal marten to be in danger of extinction now or in the  
20 foreseeable future, but stated that the Service would continue to seek information concerning  
21 how climate change may affect coastal marten habitat. *Id.*

22 While the loss of historic habitat had been a primary threat to the coastal marten, the  
23 Service also examined whether any other potential threats under the remaining statutory listing  
24 factors, either alone or in combination, would qualify the marten as a threatened or endangered  
25 species. MAR022038-49. Marten experts also attribute the historic decline in marten populations  
26 to unregulated fur trapping. MAR022038. The Service addressed this primary threat under listing  
27 factor B – “Overutilization for Commercial, Recreational, Scientific, or Educational Purposes.”  
28 16 U.S.C. § 1533(a)(1), MAR022038. Presently, there is no legal fur trapping of martens in

1 California and fur-trapping efforts in Oregon for marten are minimal. MAR022038. Although  
2 population-level impacts are difficult to estimate because of the lack of population size estimates  
3 in Oregon, there is no evidence that fur trapping is continuing to cause population declines. *Id.*  
4 Thus, the Service concluded that present trapping did not put the coastal marten in danger of  
5 extinction or make it likely to become so in the foreseeable future. *Id.* As to Factor C, the Service  
6 found no information that either disease or predation are threats to the coastal marten.  
7 MAR022038-40. The Service found that no outbreaks of diseases have been detected in coastal  
8 marten populations, and there is no evidence to suggest that disease has affected coastal marten  
9 at any time in the past. MAR022038-39. The Service also found that predation has a low-level  
10 impact on marten populations, but that the estimated predation rate is expected to be sustainable  
11 when compared with annual juvenile marten survival rates. MAR022039-40.

12 The Service’s analysis of Factor D: “The Inadequacy of Existing Regulatory  
13 Mechanisms,” 16 U.S.C. § 1533(a)(1), underscores the importance of existing land-use plans,  
14 particularly the NWFP, to benefit coastal marten through the maintenance and recruitment of  
15 late-successional and old-growth forest habitat. MAR022041. The Service determined that there  
16 was no evidence to indicate that existing regulatory mechanisms were inadequate to address  
17 impacts to coastal marten because through existing federal regulatory mechanisms, large-scale  
18 habitat loss has been abated. MAR022041. Additionally, much of the land in federal ownership  
19 across the marten’s range is managed to benefit late-successional forest species, such as the  
20 marten. MAR022040. Similarly, management of state lands for old-growth forest throughout the  
21 coastal marten’s range may also facilitate coastal marten movements across the landscape and  
22 provide future suitable habitat. MAR022041

23 As to Factor E, other “natural or manmade factors,” the Service found that neither  
24 collisions with vehicles nor potential exposure to toxicants are threats that warranted listing.  
25 MAR022041-43. Known mortality due to collisions historically has been low and there is no  
26 data to suggest that there will be any significant increases in traffic or highways in coastal marten  
27 habitat. MAR0022041-41, 48. Little information exists regarding the degree of marten exposure  
28 or response to anticoagulant rodenticides (“AR”) and other pesticides, including whether

1 exposure could result in elevated mortality rates. MAR022042. Although use of ARs is  
2 documented throughout the marten's range, only one record of a positive exposure exists within  
3 the coastal marten's range. MAR022043. Given the available information on levels of known  
4 marten exposure to ARs, and the lack of evidence that ARs are having a population-level effect,  
5 the Service concluded that exposure to toxicants does not warrant listing the coastal marten as  
6 threatened or endangered. *Id.*

7 Finally, the Service evaluated whether coastal marten populations are small and isolated  
8 in such a way that these populations could be considered more susceptible to the previously  
9 identified stressors. MAR022043-44, 48. The best available data suggests that coastal marten  
10 populations are likely reduced in abundance or distribution from the historic impacts of trapping  
11 and logging, but that there is currently no empirical evidence to suggest that the current coastal  
12 marten populations are in decline. MAR022044, 49. Finding that many of the past threats have  
13 been largely ameliorated, the Service concluded that there is no evidence to suggest that current  
14 stressors are resulting in population-level declines, such that a listing as threatened or endangered is  
15 warranted. MAR022049. Moreover, the Service concluded that although the three marten  
16 populations are geographically separated, they are not isolated to the extent that negative  
17 population effects would be realized. MAR022044. In addition, the disjunct nature of the three  
18 coastal marten populations overall places the DPS at a diminished risk of extinction because it is  
19 unlikely that any one stressor could put all three populations at risk simultaneously. *Id.* The  
20 Service's expert judgment that the coastal marten does not warrant listing is fully explained,  
21 supported by the record, and entitled to deference. *Jewell*, 747 F.3d at 601.

## 22 **II. Plaintiffs Have Not Shown That the Service's Decision Is Arbitrary and Capricious.**

23 As explained above, the Service thoroughly evaluated each of the statutory listing factors  
24 and reasonably concluded that the coastal marten does not meet the definition of either a  
25 threatened or endangered species. Plaintiffs fail to acknowledge the majority of the Service's  
26 analysis, instead challenging only a portion of the Service's analysis under Factor E.

27 Specifically, Plaintiffs take issue with the Service's conclusion that small or isolated population  
28 size effects do not place the species at risk of extinction. Pls. Br. at 12-16. But contrary to

1 Plaintiffs’ assertions, the Service’s factual conclusions about the population trends for each of  
2 the three populations and their dispersal capabilities, as well as the Service’s ultimate finding,  
3 that “small or isolated population size effects do not rise to the level of a threat” (MAR022048)  
4 are well supported by the record as a whole and consistent with the best scientific and  
5 commercial data available.

6 The ESA’s best available data requirement “merely prohibits [an agency] from  
7 disregarding available scientific evidence that is in some way better than the evidence [it] relies  
8 on.” *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir. 2006). Plaintiffs point to  
9 no evidence that is in some way better than what the Service relied on. Instead, Plaintiffs review  
10 the very same evidence the Service considered and ask this Court to substitute their weighing of  
11 the evidence for that of the agency’s. In making this argument, Plaintiffs point to perceived  
12 differences between the Service’s Species Report and the Finding.<sup>6</sup> Pls. Br. 12-16. As a matter of  
13 law, the question is not whether the Species Report in and of itself supports the Service’s not-  
14 warranted determination, but rather, whether the agency’s decision is supported by the record as  
15 a whole. See *San Luis & Delta-Mendota Water Auth. v. Salazar*, 666 F. Supp. 2d 1137, 1158-59  
16 (E.D. Cal. 2009) (agency’s action may be upheld if its reasoning can be discerned on the basis of  
17 the entire record). The record as a whole contains more than adequate support for the Service’s  
18 not warranted finding. In making its determination, the Service exercised scientific expertise  
19 where the best available information was either inconclusive or unavailable. In doing so, the  
20 Service considered the best available scientific information, which is all that the ESA requires.  
21 16 U.S.C. § 1533(b)(1)(A).

22 At their core, Plaintiffs’ claims are nothing more than a policy disagreement with the  
23 Service’s reasoned weighing of the evidence. While Plaintiffs would have preferred a different  
24 outcome, it is the Service, as the expert agency responsible for making listing decisions under the  
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26 <sup>6</sup> Where there may be differences between the Service’s interpretation of the best available data  
27 on these issues between the draft Species Report and the Finding, the Service compiled as  
28 Appendix A to the final Species Report, substantive changes, corrections, and clarifications  
made to the Species Report that explain and reflect the agency’s current view of the best  
available data on these issues. MAR021028.

1 ESA, that Congress has charged with weighing the available evidence and making reasoned  
2 predictions to determine if a species is endangered or likely to become an endangered species in  
3 the foreseeable future. The Supreme Court has advised that reviewing courts are to be their  
4 “most deferential” when the agency is “making predictions, within its area of special expertise, at  
5 the frontiers of science.” *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103  
6 (1983). Thus, a reviewing court is not empowered to substitute a plaintiff’s preferred conclusion  
7 for that reached by the Service. *Lands Council* 537 F.3d at 988.

8 **A. There Is No Empirical Evidence That Coastal Marten Populations Are**  
9 **Declining Throughout Their Range And The Service Reasonably Concluded**  
10 **That Population Size Effects Do Not Cause The Species To Be Endangered or**  
11 **Threatened.**

12 The Service’s conclusions about coastal marten population size and trends accurately  
13 reflect the record as a whole. There is no dispute that the best available data suggest that coastal  
14 marten distribution and abundance has decreased relative to historic numbers<sup>7</sup> dating back to the  
15 early 1900s. MAR022043; MAR022029. But “there is no empirical evidence that any current  
16 populations of coastal marten are in decline.” MAR022044. Further, although the abundance of  
17 coastal martens in the single coastal northern California population is most likely low, as  
18 Plaintiffs concede (Pls. Br. at 14) the “abundance and trend of [the two] coastal marten  
19 populations in coastal Oregon is unknown.” MAR022043; MAR020928.

20 Plaintiffs argue that this lack of information about population abundance and trends  
21 compels a finding that both Oregon populations are small and declining and that the California  
22 population is similarly in decline. Pls. Br. at 13. Although absolute certainty is not required  
23 under the ESA (*see e.g., Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 61 (D.C. Cir.  
24 2000)), the Service cannot, as Plaintiffs suggest, simply speculate about population size and  
25 trends in the absence of information. *Bennett*, 520 U.S. at 176; *W. Watersheds Project v. Ashe*,  
26 948 F. Supp. 2d 1166, 1178 (D. Idaho 2013) (the Service cannot base a listing decision on  
27 speculation and surmise). Moreover, it is the Service’s responsibility as the expert agency

28 <sup>7</sup> Historical abundance of coastal martens is unknown, but, like most mammalian carnivores,  
coastal martens likely never occurred in high densities. MAR022029.



1 charged with implementing the ESA to interpret the evidence in the record, particularly where  
2 that evidence is mixed or inconclusive. *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d  
3 1531, 1539-40 (9th Cir. 1993) (courts will defer to the agency’s reasonable interpretation of  
4 evidence); *Nat. Res. Def. Council v. EPA*, 902 F.2d 962, 968 (D.C. Cir. 1990) (courts are to defer  
5 to “the agency’s interpretation of equivocal evidence, so long as it is reasonable”).

6 Abundance and trend estimates for the two coastal Oregon populations are unavailable,  
7 largely due to lack of survey data. MAR022044; MAR036509. Although recently-initiated  
8 surveys in coastal southern and coastal central Oregon have detected presence of coastal marten,  
9 there is simply not sufficient information to determine either population size or trends.  
10 MAR022044. Plaintiffs cite to the Species Report to support their argument that the Service  
11 should have inferred that the Oregon populations were small and declining. Br. at 14. First,  
12 Plaintiffs’ arguments conflate historic trends with current population trends. Second, as a  
13 member of the core team noted, the Species Report did not always accurately capture the  
14 underlying best available data, as the underlying studies do not characterize the populations as  
15 “small and in decline.” MAR014018-19 (“The species experts do not...describe the Oregon  
16 populations as small or in decline. Therefore, I do not believe that we have any information to  
17 suggest that populations of coastal martens in Oregon are necessarily small in size or currently  
18 experiencing population declines”); MAR036508-9. Similarly, the Species Report inaccurately  
19 interprets the underlying studies with respect to inferred population numbers based on roadkill  
20 data. MAR014019. As Plaintiffs point out (Pls. Br. at 14), the Species Report, concludes that low  
21 numbers of coastal martens hit by vehicles along Highway 101 in California and Oregon suggest  
22 low population numbers throughout the species’ range, but the underlying studies that the  
23 Species Report relies on reference roadkill data to suggest low numbers of martens in northern  
24 Oregon and southern Washington, not in central or southern Oregon or California. MAR014019;  
25 MAR036509-10. In fact, the best available data indicates that martens are likely most common in  
26 coastal Oregon. MAR014019; MAR036510.

27 With respect to the California population, although the best available data indicates that  
28 the population is small, recent surveys suggest that the population is not currently declining.

1 MAR022043. As the Service acknowledged, the coastal northern California population declined  
2 between 2000 and 2008. *Id.* Between 2008 and 2012, the population census numbers remained  
3 unchanged, suggesting simply, “no further changes in marten population abundance.” *Id.*  
4 Plaintiffs argue that because the California population declined between 2000 and 2008, the  
5 Service should have inferred that the population was still in decline, despite 2012 and 2008  
6 numbers remaining constant. Br. at 13. But, there is no evidence to support this logical leap and  
7 thus the Service reasonably concluded that the California population “appears to have remained  
8 the same.” MAR022044. Plaintiffs’ reliance on *Tucson Herpetological Society v. Salazar*, 566  
9 F.3d 870, 879 (9th Cir. 2009), is inapposite. Br. at 15. Unlike defendants in *Tucson*, here the  
10 Service is not equating absence of decline with persistence, but merely interpreting the studies in  
11 the record for what they actually represent, which is that there is no empirical evidence of current  
12 population declines. MAR022044. Interpreting the record evidence to infer that lack of data  
13 equates to probable decline in a species is exactly the sort of speculation that courts have  
14 recognized is not justified. *Bennett*, 520 U.S. at 176 (“[T]he ESA [is] not be implemented  
15 haphazardly, on the basis of speculation or surmise.”); *W. Watersheds Project*, 948 F. Supp. 2d  
16 at 1166.

17 Finally, even if all three coastal marten populations were small, that alone does not mean  
18 the species warrants listing absent stressors that put those populations in danger of extinction or  
19 likely to become so. Smaller populations are at a greater risk of extinction when their size  
20 increases the likelihood that stressors will reduce population numbers even more. MAR022043;  
21 MAR020933. In fact, contrary to Plaintiff’s characterization, the Species Report did not  
22 conclude that small population size alone put the species at risk of extinction. Pls. Br. at 13.  
23 Rather the report merely stated that “small and isolated populations are more vulnerable to  
24 extirpation and extinction from [identified] stressors” (MAR021001) and that “small and isolated  
25 population impacts *have the potential* to affect coastal marten population viability,”  
26 (MAR020934) (emphasis added) not that those stressors will affect future viability. For the  
27 coastal marten, even presuming that the populations are not large, the Service reasonably  
28 determined that each of the potential stressors identified under the listing factors, individually

1 and in combination, are all low-level in nature. MAR022034-47,49; MAR020990-98; *Supra* § I.  
2 Stated another way, even assuming hypothetically that all three coastal marten populations are  
3 small, the potential stressors were not severe enough to put the coastal marten in danger of  
4 extinction or likely to become so. At bottom Plaintiffs disagree with the Service’s interpretation  
5 of the evidence, but that is not a proper reason for the Court to overturn the Service’s well-  
6 reasoned decision. *Lands Council*, 537 F.3d at 993.

7 **B. The Service’s Expert Judgment That Interchange Is Possible Such That**  
8 **Isolated Population Effects Do Not Rise To The Level Of A Threat Should Be**  
9 **Upheld.**

10 Although the Service considers the three known populations of coastal marten to be  
11 disjunct, the Service reasonably concluded based on the best available data that the populations  
12 are not isolated to such an extent that the species is in danger of extinction. MAR022044. The  
13 Service reached this conclusion after a robust process, which included debate amongst Service  
14 biologists about the underlying science. *See e.g.* MAR018139. It is precisely these types of  
15 situations where a court should be especially deferential to the expert judgment of the agency.  
16 *Cent. Ariz. Water*, 990 F.2d at 1540 (courts should not interfere with reasonable interpretations  
17 of equivocal evidence); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) (because the  
18 agency is expected to have expertise in its area, a certain degree of deference is due, particularly  
19 on issue about which experts disagree). When the evidence is mixed, the Service is the expert  
20 finder-of-fact and is permitted to draw reasonable conclusions about “equivocal evidence.” *Cent.*  
21 *Ariz. Water*, 990 F.2d at 1540; *Animal Legal Def. Fund v. Glickman*, 204 F.3d 229, 235 (D.C.  
22 Cir. 2000). The Service’s determination that the marten populations are not isolated to such a  
23 degree that the populations are at risk of extinction or likely to become endangered in the  
24 foreseeable future is reasonable and deserves deference.

25 First, the data on the dispersal capabilities of martens and habitat modeling between the  
26 three populations suggest the potential for interchange of individuals. MAR022043-44. Plaintiffs  
27 rely on the fact that the three populations are separated by a distance 2-4 times greater than the  
28

1 mean or average distance that juvenile<sup>8</sup> martens disperse when seeking out new habitat to  
2 support the opposite conclusion. MAR020933. Plaintiffs also cite the statement of a core team  
3 biologist, serving as primary author of the Species report, that “despite the presence of suitable  
4 habitat in the intervening area,” dispersal between the three populations was possible but  
5 unlikely. MAR018131. However, as another core team biologist noted during development of  
6 the Finding, “the *maximum* known dispersal distance of a juvenile marten is 43 miles,” well  
7 within the range between the three populations. MAR018132; *see also* MAR021028;  
8 MAR022027; MAR031979 (documenting movements of adult martens up to 93 miles). The  
9 Service reasonably relied on the evidence in the record to conclude that the best available science  
10 indicates that martens can move relatively long distances and thus can move between the three  
11 existing populations. MAR021028; MAR022044.

12 Second, suitable habitat is available to facilitate movement between the populations.  
13 MAR022043-44. The Service acknowledged that “suitable habitat was more limited” between  
14 the Oregon populations, but concluded that there was sufficient connectivity between patches of  
15 habitat to allow for dispersal. *Id.* As a Service biologist pointed out, limited habitat is not the  
16 same as no available habitat. MAR018132. And the habitat suitability model shows that there is  
17 some habitat available to facilitate movement between the populations. MAR020917. Moreover,  
18 even if the habitat is lower quality than what is required to establish a home range, this habitat  
19 can play an important role by providing corridors between dispersing individuals. MAR022044;  
20 MAR019241. Plaintiffs’ reference to Figure 8.3 (Pls. Br. at 16) only serves to underscore that  
21 dispersal habitat is available through habitat owned by the Bureau of Land Management  
22 (“BLM”). MAR018132 (“Figure 8.3 [of the Species Report, MAR020924] additionally shows  
23 areas of BLM checkerboard ownership between the [Oregon populations], which although not  
24 ideal, should provide some connectivity potential for movement”). Third, individual martens  
25 have been observed between the known populations in areas where surveys have been limited.

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27 <sup>8</sup> Although both juvenile and adult martens may disperse based on a variety of social or habitat-  
28 related factors, overall the prevalence of adults leaving their established home ranges is generally  
low. MAR020900.

1 MAR022043-44. That martens have been detected between the coastal northern California and  
2 the coastal southern Oregon population, supports the Service’s determination that movement  
3 between populations is possible. MAR022043.

4 Fourth, the best available data indicate that relatively few migrants can create enough  
5 gene flow in marten populations to significantly reduce the negative effects that might otherwise  
6 result from isolation. MAR022044. Even in fragmented landscapes with populations separated  
7 by several hundred kilometers, marten populations have little genetic differentiation, which may  
8 be indicative of the marten’s dispersal capacity and suggests that genetic interchange need only  
9 occur occasionally through a few long-distance successful dispersers. MAR022044;  
10 MAR018132; MAR022658, 663. Finally, the disjunct nature of the existing marten populations  
11 may place the DPS at a diminished risk of extinction from small population size effects because  
12 it would be unlikely for any one stressor to simultaneously affect all three populations.

13 MAR022044. Because Plaintiffs fall short of showing the Service’s determination lacks a  
14 rational basis, the Service is entitled to summary judgment on Plaintiffs’ claims. *Cent. Ariz.*  
15 *Water*, 990 F.2d at 1540.

### 16 **III. The Service Properly Applied Its SPR Policy.**

17 The Service may list an entire species as threatened or endangered if a species is found to  
18 be endangered or threatened throughout a significant portion of its range. 16 U.S.C. § 1532(6),  
19 (20). As set forth in the Service’s “Policy Interpreting the Phrase ‘Significant Portion of its  
20 Range,” (“SPR Policy”) (79 Fed. Reg. 37,578 (July 1, 2014)), determining whether a species is  
21 endangered or threatened throughout a significant portion of its range is a multistep process that  
22 is undertaken where a species has first been determined not to be endangered or threatened  
23 throughout all of its range. MAR022050. First, the Service identifies any portions of the species’  
24 range that warrant further consideration. *Id.* This threshold determination requires the Service to  
25 determine if there is substantial information both that portions of the range are significant<sup>9</sup> and  
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27 <sup>9</sup> Whether a portion of the species’ range is significant depends on whether the portion’s  
28 contribution to the viability of the species, based on conservation biology principles, is so  
important that, without the members of that portion, the species would be in danger of extinction

1 that the species is in danger of extinction in those portions or likely to become so within the  
2 foreseeable future. *Id.* Answering these questions in the affirmative does not mean that the  
3 species should be listed, but rather is a threshold question to determining if further analysis is  
4 warranted. If the Service determines that there are portions of the species' range that may be both  
5 significant and endangered or threatened, the Service then conducts a further and more detailed  
6 analysis to determine if in fact those standards are met. *Id.* In that fuller analysis, to determine if  
7 a species is endangered or threatened in the SPR, the Service applies the same standards and  
8 methodology as applied when determining if the species as a whole should be listed. *Id.*

9 A key part of determining whether this more detailed SPR analysis is required is  
10 determining whether the overall threats to the species are geographically concentrated in some  
11 way, as no portion of the range is likely to warrant further consideration if threats are acting  
12 relatively uniformly throughout a species' range. *Id.* In analyzing this threshold question, the  
13 Service properly concluded that no portion of the coastal marten's range warranted further  
14 consideration under the SPR Policy because "overall the level of stressors is not geographically  
15 concentrated in one portion of the coastal marten's range, and that the stressors that have the  
16 potential to impact coastal martens are relatively consistent across its range." MAR022051. The  
17 Service's expert conclusion is rational, supported by the record, and should be granted deference.  
18 *Jewell*, 747 F.3d at 601.

19 In considering whether the potential stressors facing the coastal marten might be different  
20 in any of the three locations where coastal martens are found, the Service determined that the  
21 most likely potential differences would be associated with fur trapping, wildfire, climate change,  
22 development and vegetation management, and toxicant exposure. MAR022050. The Service  
23 found that each of these potential threats affected all three marten populations to varying  
24 degrees, but that none of these potential threats were geographically concentrated. MAR022050-  
25 51. Contrary to Plaintiffs' argument (Pls. Br. at 17), the stressors were not concentrated in  
26 coastal northern California. Instead, as the Service explained, the degree of exposure varied from

27 \_\_\_\_\_  
28 or likely to become so in the foreseeable future throughout all of the species' range. 79 Fed. Reg.  
at 37,587.

1 population to population based on the type of potential threat involved. MAR022050-51. And,  
2 for each of the five potential stressors identified, the Service concluded that each of these would  
3 have only a low-level impact on the coastal marten population or its habitat. MAR022051;  
4 MAR020990-98. That is, although superficially some stressors had the potential to impact  
5 operate geographically, the impact of the stressors were so small that there were no relevant  
6 concentration of threats.

7 Plaintiffs selectively focus on only three of the potential stressors considered by the  
8 Service – wildfire, climate change, and exposure to toxicants – to argue that potential threats are  
9 “in fact geographically concentrated in the California portion of the coastal marten’s range.” Pls.  
10 Br. at 17. This argument is belied both by the text of the Finding and by the Species Report and  
11 data underlying it. First, , although Plaintiffs cast the impacts of wildfire and climate change as  
12 being limited to the coastal northern California population (Pls.’ Br. at 17-18), the Service  
13 identified wildfire and climate change to have similar impacts in both California and coastal  
14 southern Oregon. MAR022050-51; MAR020957; MAR020993-95. In addition, moist forest  
15 conditions occur throughout all of the marten’s range, which has a mitigating effect on the  
16 potential severity of wildfires. MAR022051. Also throughout the coastal marten’s range,  
17 including coastal southern Oregon and coastal northern California, widespread suitable habitat  
18 has remained post-fire. *Id.* Thus, the Service determined that wildfires are a low-level threat,  
19 which are not geographically concentrated in coastal northern California. Similarly, the Service  
20 described potential impacts from climate change, namely changes in habitat availability, as being  
21 “slightly greater within the coastal southern Oregon and coastal northern California populations.”  
22 MAR022051, MAR020996. However, as the Service explained, most climate models predict  
23 similar shifts in vegetation type over time throughout the marten’s range, including coastal  
24 central Oregon. MAR022051. Additionally, suitable habitat is expected to remain throughout the  
25 coastal marten’s entire range. *Id.* Thus, the Service reasonably concluded that potential impacts  
26 from climate change are not geographically concentrated in coastal northern California.

27 Second, the Service provided a reasoned explanation for why exposure to toxicants, the  
28 only stressor with the potential to have differing impacts only in the coastal northern California

1 location, was neither geographically concentrated nor a serious threat. MAR022051. As  
2 explained in the Finding, although marijuana grow sites “may possibly occur to a greater extent  
3 in coastal northern California,” anticoagulant rodenticides are used at grow sites throughout the  
4 coastal marten’s range. *Id.* The incidence of toxicant exposure and the potential population-level  
5 effects from toxicants are unknown and to date only one record of positive exposure exists  
6 within the coastal marten’s range. *Id.* Given that there is no data indicating toxicants are having  
7 population-level effects in any portion of the coastal marten’s range, the Service reasonably  
8 determined that exposure to toxicants is not concentrated in any one portion of the range.

9 Although Plaintiffs cast the Service’s determination as “conclusory,” (Pls. Br. at 18), the  
10 Service in fact provided a well-reasoned explanation for why the “the stressors that have the  
11 potential to impact coastal martens are relatively consistent across its range.” MAR022051. At  
12 bottom, Plaintiffs’ SPR argument amounts to a differing interpretation of the record evidence,  
13 which is not a proper basis for overturning the Service’s determination. *Lands Council* 537 F.3d  
14 at 988.

## 15 CONCLUSION

16 The Service’s determination that the coastal marten does not meet the definition of an  
17 “endangered species” or a “threatened species” is fully explained, supported by the  
18 administrative record, and entitled to deference by this Court. Plaintiffs have not shown that the  
19 Service misapplied the ESA listing standards, nor have they shown the Service’s application of  
20 the SPR Policy was arbitrary or capricious. Instead, Plaintiffs ask this Court to adopt their  
21 interpretation of the evidence and substitute its judgment for that of the agency, which is not  
22 permitted under the applicable standard of review. For the foregoing reasons, the Court should  
23 grant summary judgment for Federal Defendants.

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25 Respectfully submitted this 16th day of October, 2016.

26  
27 JOHN C. CRUDEN,  
Assistant Attorney General  
28 Environment & Natural Resources Division



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*Attorneys for Defendants*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that, this 16th day of October, 2016, I electronically filed the foregoing  
3 documents with the Clerk of the Court via CM/ECF system, which will send notification of such  
4 to the attorneys of record.

5 /s/ Nicole M. Smith  
6 NICOLE M. SMITH

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