

1 Dennis L. Porter (SBN 67176)
2 Attorney at Law
3 8120 36th Avenue
4 Sacramento, California 95824-2304
5 Telephone: (916) 381-8300
6 Fax: (916) 381-8726
7 dlporter2@yahoo.com

8 Lawson E. Fite (Ore. Bar #055573), *Pro Hac Vice*
9 American Forest Resource Council
10 5100 S.W. Macadam, Suite 350
11 Portland, Oregon 97239
12 Telephone: (503) 222-9505
13 Fax: (503) 222-3255
14 lfite@amforest.org

15 Attorneys for Defendant-Intervenors
16 [Additional Counsel Listed in Signature Block]

17 UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

20 CENTER FOR BIOLOGICAL DIVERSITY, *et*
21 *al.*,

22 Plaintiffs,

23 v.

24 U.S. FISH & WILDLIFE SERVICE, *et al.*,

25 Defendants,

and

SISKIYOU COUNTY, a political subdivision of
the State of California, DOUGLAS COUNTY, a
political subdivision of the State of Oregon,
AMERICAN FOREST RESOURCE COUNCIL,
an Oregon nonprofit corporation, NATIONAL
ASSOCIATION OF HOME BUILDERS, a
District of Columbia nonprofit corporation,
CALIFORNIA FORESTRY ASSOCIATION, a
California nonprofit corporation, OREGON
FOREST & INDUSTRIES COUNCIL, an Oregon
nonprofit corporation and DOUGLAS TIMBER
OPERATORS, an Oregon nonprofit corporation,

Defendant-Intervenors.

No. 3:15-cv-05754-JST

**DEFENDANT-INTERVENORS' NOTICE
OF MOTION AND CROSS-MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM IN SUPPORT OF CROSS-
MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFFS'
MOTION (Dkt. 54)**

Date: January 26, 2017

Time: 2:00 p.m.

Courtroom: 9, 19th Floor (San Francisco)

Hon. Jon S. Tigar

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1 NOTICE

2 TO THIS HONORABLE COURT AND COUNSEL FOR THE PARTIES:

3 PLEASE TAKE NOTICE, pursuant to Civil L.R. 7-2 and 56-1, that on January 26, 2017,
4 at 2:00 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable
5 Jon S. Tigar, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA
6 94102, defendant-intervenors Siskiyou County, Douglas County, Oregon, American Forest
7 Resource Council, National Association of Home Builders, California Forestry Association,
8 Oregon Forest & Industries Council, and Douglas Timber Operators, by counsel, will and hereby
9 do move the Court for summary judgment.

10 MOTION

11 Pursuant to Fed. R. Civ. P. 56(a) and Civil L.R. 56, defendant-intervenors Siskiyou
12 County, Douglas County, American Forest Resource Council, National Association of Home
13 Builders, California Forestry Association, Oregon Forest & Industries Council, and Douglas
14 Timber Operators respectfully move the Court for summary judgment. Summary judgment is
15 appropriate because the Fish & Wildlife Service reviewed the best available science and
16 reasonably determined that the coastal distinct population segment of Pacific marten (coastal
17 marten) is not a threatened or endangered species. As a technical determination at the frontiers
18 of science, this determination is subject to substantial deference from the Court.

19 This motion is supported by the accompanying Memorandum, the administrative record
20 lodged by the United States Fish & Wildlife Service, Dkt. 52-4, the Court file herein, and such
21 oral argument as the Court may entertain.

22 WHEREFORE, Siskiyou County *et al.* request the Court grant the motion, and thereby
23 enter summary judgement in favor of all defendants.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Defendant-intervenors Siskiyou County, Douglas County, American Forest Resource
4 Council, National Association of Home Builders, California Forestry Association, Oregon Forest
5 & Industries Association, and Douglas Timber Operators (collectively Siskiyou County) request
6 the Court enter summary judgment in their favor pursuant to L.R. 56 and Fed. R. Civ. P. 56(a).
7 The Court should also grant summary judgment in favor of Federal Defendants U.S. Fish and
8 Wildlife Service, Sally Jewell, and Daniel Ashe (collectively Service). Dkt. 57. The Court
9 should deny the summary-judgment motion, Dkt. 54 (Pls.' MSJ), by plaintiffs Center for
10 Biological Diversity and Environmental Protection Information Center.

11 The Court should uphold the Service's finding that the coastal marten should not be listed
12 as a threatened or endangered species. The Service considered all relevant and available data
13 and reached a reasoned conclusion that the species, while it should be closely monitored, is not
14 presently, or likely in the foreseeable future, to be in danger of extinction. It based this
15 conclusion on two key components. First, the vast majority of marten habitat is under restrictive
16 federal, state and private land management regimes that ameliorate or buffer against potential
17 threats. Second, the evidence of current population status, while scanty, does not indicate the
18 species is currently in decline. The Service, therefore, concluded listing is not warranted.

19 Plaintiffs attack the consistency and reliability of the Service's ultimate finding, alleging
20 the finding was imposed by Service leadership, contradicts population data, and ignores
21 concentrations of threats to the species. In each case, the record does not support plaintiffs'
22 argument. The finding was the product of a sometimes-contentious but rigorous process
23 involving scientific judgments. The Service considered the data which plaintiffs rely on, but
24

1 found, in context, that data was not dispositive. Plaintiffs would have this Court second-guess
2 the Service’s determination, which the Court is not empowered to do. Accordingly, the Court
3 should affirm the Service’s finding that listing the coastal marten is not warranted.

4 **II. BACKGROUND**

5 **A. Legal Background**

6 The Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44, was enacted in 1973 “to
7 provide a means whereby the ecosystems upon which endangered species and threatened species
8 depend may be conserved, [and] to provide a program for the conservation of such endangered
9 species and threatened species . . .” *Id.* § 1531(b). ESA section 4 directs the Service to
10 determine which species should be listed as endangered or threatened. *Id.* § 1533(a)(1). An
11 endangered species is “in danger of extinction throughout all or a significant portion of its range”
12 while a threatened species is “likely to become an endangered species within the foreseeable
13 future throughout all or a significant portion of its range.” *Id.* §§ 1532(6), (20).

14 The ESA requires the Service to determine if a species is endangered or threatened based
15 on one or more of the following five listing factors:

- 16 (A) the present or threatened destruction, modification, or curtailment of its
habitat or range;
- 17 (B) overutilization for commercial, recreational, scientific, or educational
purposes;
- 18 (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- 19 (E) other natural or manmade factors affecting its continued existence.

20 *Id.* § 1533(a)(1). The Service must make its decision whether to list a species “solely on the
21 basis of the best scientific and commercial data available . . . after conducting a review of the
22 status of the species. . .” *Id.* § 1533(b)(1)(A).

23 The Service may also list as endangered or threatened, and therefore entitled to various
24

1 ESA protections, “any distinct population segment of any species of vertebrate fish or wildlife
2 which interbreeds when mature.” 16 U.S.C. § 1532(16). The term “distinct population segment”
3 (DPS) is not statutorily defined. The Service issued a policy statement setting forth its
4 interpretation of the phrase. 61 Fed. Reg. 4,722-25 (Feb. 7, 1996); see *Trout Unlimited v. Lohn*,
5 559 F.3d 946, 950 (9th Cir. 2009). The policy establishes that for a population to be a DPS, it
6 must be both “discrete” and “significant.” MAR022024.

7 Once a species is listed it is afforded certain legal protections. For example, the ESA
8 prohibits any illegal or unauthorized “taking” of an endangered or threatened fish or wildlife
9 species. 16 U.S.C. § 1538(a)(1)(B). In addition, a federal agency must consult with the Service
10 whenever any action by the agency “may affect” a listed species, to ensure that the action “is not
11 likely to jeopardize the continued existence of any endangered species or threatened species or
12 result in the destruction or adverse modification” of designated critical habitat. *Id.* § 1536(a)(2);
13 50 C.F.R. § 402.14. The consultation process can unduly burden government activity if species
14 are listed or evaluated without firm scientific foundation. “The obvious purpose of the
15 requirement that each agency ‘use the best scientific and commercial data available’ is to ensure
16 that the ESA not be implemented haphazardly, on the basis of speculation or surmise.” *Bennett*
17 *v. Spear*, 520 U.S. 154, 176 (1997). This requirement “no doubt serves to advance the ESA’s
18 overall goal of species preservation,” but “another objective (if not indeed the primary one) is to
19 avoid needless economic dislocation produced by agency officials zealously but unintelligently
20 pursuing their environmental objectives.” *Id.* at 176-77.

21 A species may be listed on the initiative of the Service or in response to a petition. 16
22 U.S.C. §§ 1533(a)(1), 1533(b)(3). After receiving a petition to list a species, the Service must
23 determine “whether the petition presents substantial scientific or commercial information
24

1 indicating that the petitioned action may be warranted.” *Id.* § 1533(b)(3)(A). This initial finding
2 is termed a “90-day finding.” MAR001942. A “positive” 90-day finding leads to a review of the
3 status of the species and a determination whether listing the species is warranted, called a “12-
4 month finding.” 16 U.S.C. § 1533(b)(3)(B); MAR001942-43, 022022.

5 It is the 12-month finding that is the subject of this Court’s review. 16 U.S.C.
6 § 1533(b)(3)(C)(ii) (stating that “any *finding* described in subparagraph (B)(i) . . . shall be
7 subject to judicial review.”) (emphasis added). Thus, the rationale in the finding, not the
8 Species Report or any draft, is relevant here. *See Nat’l Ass’n of Home Builders v. Defs. of*
9 *Wildlife*, 551 U.S. 644, 659 (2007) (holding that “[t]he federal courts ordinarily are empowered
10 to review only an agency’s *final* action”); *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160,
11 1169 (9th Cir. 2010). Thus, even where an initial draft recommends granting a listing petition,
12 “the Service may change its mind after internal deliberation.” *Nw. Ecosystem All. v. U.S. Fish &*
13 *Wildlife Serv.*, 475 F.3d 1136, 1145 (9th Cir. 2007). The only question before the Court “is
14 whether the Service, in reaching its ultimate finding, ‘considered the relevant factors and
15 articulated a rational connection between the facts found and the choices made.’” *Id.* (upholding
16 decision not to list Washington population of western gray squirrels) (quoting *Home Builders*,
17 551 U.S. at 841).

18 **B. Facts and Proceedings**

19 **1. The Northwest Forest Plan restricts management and provides for** 20 **abundant habitat throughout coastal marten’s range.**

21 The majority of the land where the coastal marten lives is managed subject to the
22 Northwest Forest Plan (NWFP); thus the NWFP is a key factor in the Service’s “Factor D”
23 analysis of existing regulatory mechanisms. MAR022040-41, 022048. The NWFP was
24 developed in response to the listing of the northern spotted owl as a threatened species in 1990.

1 Issued in 1994, the plan attempted to balance conservation of the owl and many other species
2 with sustainable forest management. Of the 24-million-acre land base, over 20 million acres
3 were placed into reserves. These included about 7.5 million acres of “Late Successional
4 Reserves” and “Managed Late Successional Areas” where timber harvest is highly restricted.
5 MAR033966-67. The Service noted that 71-90% of suitable habitat for the marten populations is
6 in such reserves. MAR020966. The NWFP reduced allowable timber harvest in the affected
7 forests by over three-quarters, from 4.5 billion board feet annually to 1.1 billion board feet.
8 MAR020974, 033986.

9 Moreover, actual timber harvest under the NWFP has been far less than planned. *Id.*
10 It is no secret that harvest restrictions under the NWFP have caused significant economic pain
11 and dislocation in the communities where intervenors live and work. These substantial sacrifices
12 have provided the coastal marten with an abundance of habitat, which the Service recognized in
13 its decision. In fact, a listing of the marten could be counterproductive for habitat conservation.
14 One of the most significant threats to habitat managed under the NWFP is wildfire.

15 MAR020974. A decision to list marten could make active forest management more difficult and
16 impede necessary fuels reduction (fire prevention via thinning and other methods) in the forest,
17 which science indicates can benefit forest species like fisher, a marten relative. MAR030937;
18 MAR014945 (“Agencies are taking steps to address the threat [of fire] through active forest
19 management”). The Service correctly recognized that regulations under the NWFP are more
20 than adequate to address potential threats to coastal marten.

21 The NWFP is not the only existing mechanism for marten management. The Humboldt
22 Marten Conservation Group (HMCG), a consortium of state, federal, local and tribal
23 governments working with private industry, has been developing a conservation strategy for
24

1 martens in northern California and Oregon. MAR004916, 035753-68, 013205-013309. The
2 conservation strategy was developed with participation by Keith Slauson and William Zielinski,
3 prominent scientists on forest carnivores including coastal marten. MAR013205. The strategy
4 includes conservation measures designed to address each identified stressor to coastal marten.
5 MAR013283-86. Additionally, nearly 375,000 acres in northwest California are covered by the
6 Habitat Conservation Plan (HCP) for the northern spotted owl implemented on the California
7 timberlands of Green Diamond Resource Company. MAR031289. The plan emphasizes habitat
8 management in concert with owl nest site protection and designation of no-harvest zones,
9 echoing some of the features of the NWFP. MAR031298. The Green Diamond timberlands
10 covered by the habitat conservation plan are one of the few places where marten are found on
11 private land. *Id.* Additional private conservation efforts that are underway focus on fisher and
12 marten, in connection with Green Diamond's efforts to prepare a multi-species HCP.
13 MAR004916.

14 **2. The Service comprehensively reviewed the coastal marten's status**
15 **and potential threats.**

16 The Pacific marten, *Martes caurina*, is a woodland carnivore that inhabits the western
17 United States west of the crest of the Rocky Mountains. MAR022022. The Pacific marten
18 populations in coastal Oregon and California were believed to inhabit late successional forests,
19 and were previously classified as a subspecies called the Humboldt or pine marten.
20 MAR022022-23, 022027-28. Plaintiffs submitted a petition to list the Oregon and California
21 marten populations as an endangered or threatened species. MAR022022. The Service issued a
22 positive "90-day finding" on the petition and initiated a status review. MAR001942.

23 After reviewing the status of the species, the Service changed the entity being analyzed
24 and then determined that entity did not warrant ESA listing. The Service concluded "the original

1 designation of two separate marten subspecies occurring in coastal northern California and
2 coastal Oregon is likely invalid.” MAR022023. The Service designated these populations as the
3 coastal distinct population segment of the Pacific marten—or the “coastal marten.”
4 MAR022026.

5 The coastal marten currently inhabits areas in western and southwestern Oregon and
6 northwest California, which the Service designated “extant population areas.” MAR020924.
7 The current range of the species includes portions of six National Forests, Oregon’s Elliott State
8 Forest, and five separate Bureau of Land Management districts. Nearly 90% of the current range
9 of the California population is in federal or tribal ownership. MAR020925.

10 The NWFP and other restrictive regulations played a significant role in the Service’s
11 review and finding. The Species Report analyzed all current regulatory mechanisms in detail.
12 MAR020968-86. It noted that the three marten populations “occur predominantly on Forest
13 Service lands” or on Bureau of Land Management lands. MAR020968. These are lands subject
14 to the NWFP. MAR033971-72. The Six Rivers National Forest Plan contains additional binding
15 standards and guidelines to “minimize disturbance and habitat alteration in the vicinity of known
16 active [coastal] marten dens . . .” MAR020971. Region 5 of the Forest Service, including
17 California, treats marten as a sensitive species, requiring managers to avoid trends toward listing.
18 MAR 020971. The NWFP’s implementation analysis determined “marten habitat would likely
19 be sufficient to support martens throughout the NWFP area. . .” MAR020973.

20 The Species Report classified stress to these populations from vegetation management
21 on federal lands as low throughout the coastal marten range. MAR020969. Much of the
22 marten’s habitat is in federal ownership subject to the NWFP. MAR020966. Of the federal
23 ownership, federal “reserves” where timber harvest is severely restricted account for 71 to 90%

1 of the area. MAR020966. These include late-successional reserves, where no harvest of trees
2 over 80 years old is allowed, MAR033968, and riparian reserves, MAR033969-70.

3 While the Service was conducting its review, others were conducting on-the-ground
4 research. Green Diamond Resource Co. (a member of defendant-intervenors OFIC and
5 CalForests and the HMCG) highlighted this data in a comment letter to the Service.

6 MAR004909-18. This research showed that martens are using young, managed forests,
7 indicating martens may not be dependent on old growth forests as previously hypothesized.

8 MAR004914-15. Green Diamond found “habitat may not be a limiting factor and the range of
9 the marten is expanding. . . .” MAR004916. Green Diamond also provided survey data showing
10 martens have expanded into private land since previous surveys in 1994. MAR004914. The
11 data also showed new and previously unsuspected marten locations. MAR004915. This lead to
12 the reasonable suggestion that gaps in marten occupancy may be caused by sampling gaps rather
13 than actual species absence from the landscape. *Id.* The Service also obtained unpublished
14 survey data for both California and Oregon supporting the conclusion that data do not show a
15 decline. MAR022044.

16 The Forest Service also provided data to the Service regarding old growth habitat in the
17 marten population areas. This indicated the largest source of habitat disturbance was wildfire,
18 not vegetation management, and that old-growth habitat had increased in the North and Central
19 Oregon coast population areas, with modest decreases in the Southern Oregon and Northwest
20 California population areas. MAR004944-46. The Forest Service stated “[l]arge wildfires . . .
21 likely account for most of these losses” MAR004944. It also provided information on the
22 habitat protections in the NWFP, including placement of the marten on sensitive species lists
23 which apply to all forest management projects. MAR004925.

1 At the conclusion of the review process, the Service’s biologists had “split opinions” as
2 to whether the coastal marten warranted listing. MAR013520. The Service’s Pacific Southwest
3 Regional Director, Ren Lohofener, was asked to resolve these opinions to make a final
4 recommendation to the Director of the Service. *Id.* Mr. Lohofener concluded, “If populations
5 were not possibly disjunct and believed to be small, there would be *no question* that none of the
6 threats reviewed would either individually or cumulatively threaten the DPS with
7 endangerment.” MAR013522 (emphasis added). This is a “secretive species with habitat in
8 difficult topography. . . .” MAR013521. In light of the “low to moderate” threat from wildfire
9 and the “greatly reduced” threats from timber harvest, he concluded that listing was not
10 warranted, but that “this is a DPS that we need to monitor closely.” MAR013522. As stated in
11 the memorandum, disjunct populations “increase[] susceptibility to threats.” *Id.* However, none
12 of the threats to the coastal marten was determined to be substantial enough to invoke that
13 increased susceptibility.

14 As part of this process, the Pacific Northwest Region, via Acting Director Richard
15 Hannan, submitted a memorandum to Mr. Lohofener. MAR014943-48. Mr. Hannan’s
16 memorandum noted that much of the species’ range “is challenging topographically and has not
17 been well surveyed, particularly in Oregon.” MAR014944. Additionally, it found “no empirical
18 evidence that any populations of coastal marten are in decline” and indicated “[h]abitat modeling
19 efforts show relatively high amounts of suitable habitat to be currently available throughout the
20 range of the coastal marten. . . .” MAR014945 (citing habitat suitability figures from the Species
21 Report, MAR020927). And “with such a high proportion of suitable marten habitat on Federal
22 lands and in reserved status, vegetation management as a current stressor on the [species] is
23 *likely minimal.*” MAR014945 (emphasis added). Based on the region’s experience with the
24

1 NWFP, it expected suitable habitat to increase. *Id.* Thus, Mr. Hannan concluded, “the primary
2 threats that were known to affect coastal marten populations in the past have been largely
3 addressed,” and “a ‘not warranted’ finding is appropriate at this time.” MAR014947.

4 With input from Mr. Lohofener, Gary Frazier, the Service’s Assistant Director,
5 Ecological Services wrote a memorandum to Service Director Ashe explaining the not-warranted
6 finding. MAR01867-76. “The primary stressors that led to past reductions in marten
7 distribution or abundance have been largely ameliorated.” MAR018768. This memorandum
8 noted that the NWFP’s restrictions “result[] in maintenance and development of coastal marten
9 habitat.” *Id.* It further pointed out partnerships with industry in advancing conservation of the
10 species. MAR018769.

11 The Service’s finding, published in the *Federal Register* in April 2015, recognized that
12 the species has a relatively small population. MAR022043-44. The Service examined each
13 potential threat to the species, including climate change, trapping, poisoning from illegal
14 marijuana operations, and vegetation management. MAR022033-46. The Service concluded
15 “overall potential impacts from vegetation management do not rise to the level of a threat.” *Id.*
16 MAR022047. It found no evidence that current stressors are resulting in population declines,
17 and found that significant amounts of habitat are and will remain available to coastal marten. *Id.*

18 The Service further analyzed whether the coastal marten was endangered or threatened
19 over a significant portion of its range. The Service concluded the stressors on the species were
20 not geographically concentrated, such that listing would not be justified on the basis of a portion
21 of the species’ range. MAR022051.

22 Plaintiffs filed this action in December 2015, seeking to set aside the not-warranted
23 finding on coastal marten. Dkt. 1 at 12-13 ¶¶ A-F. Plaintiffs also alleged the Service’s

1 “significant portion of the range” (SPR) policy violates the ESA. *Id.* ¶¶ 46-49. This Court
2 granted Siskiyou County leave to intervene on April 8, 2016. Dkt. 49. Shortly before briefing
3 began, plaintiffs dismissed, without prejudice, their claims regarding the SPR Policy. Dkt. 53.

4 **III. LEGAL STANDARDS**

5 Summary judgment is proper if there is no genuine issue as to any material fact and the
6 moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). Here the Court
7 reviews the agency action on the basis of the administrative record, and “judgment on the
8 administrative record is a form of summary judgment.” *Or. Natural Desert Ass’n v. Bureau of*
9 *Land Mgmt.*, 625 F.3d 1092, 1108 (9th Cir. 2010) (citations omitted). In record review,
10 “summary judgment is an appropriate mechanism for deciding the legal question of whether the
11 agency could reasonably have found the facts as it did” based on the administrative record. *City*
12 *& County of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) (quoting
13 *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985)).

14 The arbitrary and capricious standard of review under the Administrative Procedure Act,
15 5 U.S.C. § 706(2)(A), applies to plaintiffs’ claims. *Nw. Ecosystem All. v. U.S. Fish & Wildlife*
16 *Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007). Under this standard, a court should not substitute its
17 judgment for that of the agency. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)(*en*
18 *banc*), *overruled on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20
19 (2008). Rather, an agency action may only be reversed as arbitrary and capricious “if the agency
20 relied on factors Congress did not intend it to consider, entirely failed to consider an important
21 aspect of the problem, or offered an explanation that runs counter to the evidence before the
22 agency or is so implausible that it could not be ascribed to a difference in view or the product of
23 agency expertise.” *Id.* (internal quotations and citations omitted). In sum, an agency acts

1 arbitrarily and capriciously “only when the record plainly demonstrates that the [agency] made a
2 clear error in judgment. . . .” *Id.* at 994.

3 “There is a strong presumption in favor of upholding decisions by the [Service] in view
4 of its expertise in the area of wildlife conservation and management.” *Def’s. of Wildlife v. U.S.*
5 *Fish & Wildlife*, 797 F. Supp. 2d 949, 962 (D. Ariz. 2011). Of particular relevance to this case,
6 the Ninth Circuit applies a particularly deferential standard to ESA listing decisions. “Assessing
7 a species’ likelihood of extinction involves a great deal of predictive judgment. Such judgments
8 are entitled to particularly deferential review.” *Trout Unlimited*, 559 F.3d at 959.

9 **IV. ARGUMENT**

10 **A. The Service did not “overrule” its field biologists.**

11 Plaintiffs’ brief rests in significant part on the contention that field biologists uniformly
12 favored listing the marten and were “summarily” overruled in “abrupt” fashion by higher-up
13 officials. Pls.’ MSJ at 9. If true, the allegation does not invalidate the finding. *Nw. Ecosystem*
14 *All.*, 475 F.3d at 1145. But the record does not bear out plaintiffs’ account. The two Service
15 regions involved in the decision, Region 1 (Pacific Northwest) and Region 8 (Pacific Southwest),
16 engaged in careful deliberation and consideration of the relevant evidence. When fully
17 considered, the record reveals some disagreement in these deliberations, not a top down forced
18 decision to list.

19 Plaintiffs’ opening premise, that line biologists “voted overwhelmingly in favor of
20 listing,” is not accurate. Pls.’ MSJ at 9 (citing MAR010150-51). As subsequent correspondence
21 in the record showed, the record of the core team meeting made the recommendations “sound
22 more clearcut than they were.” MAR010165. In particular, these notes “created the impression
23 that there had been a ‘vote’ on the status of the marten, and failed to capture what Region 1
24

1 members believed to be considerable uncertainty in the preliminary recommendations made at
2 that time.” MAR013500. Notably, at the time of the initial meeting in November 2014, the team
3 had “not much information” on the restrictions contained in the NWFP. MAR010149.

4 Team members’ concerns continued through January 2015 when “differences of opinion”
5 were recognized. MAR013046. Upon seeing a document assuming a “warranted” decision,
6 MAR011303, the Oregon office, with efforts led by a Ph.D. endangered species biologist,
7 believed that the “full range of options” had not been presented. MAR011307-08. As expressed
8 by Oregon staff, these included statements that “I recognize that although I am personally
9 concerned about the conservation status of coastal martens, the ‘warranted’ recommendation I
10 made was based more on my emotional response, and at this point in time I do not believe it can
11 be soundly supported by data.” MAR013325. Another biologist said, “[I]t’s not about certainty,
12 but it is about connecting the dots, and in my mind there are too many assumptions that could
13 reasonably be argued not to be true.” MAR013354. This had been an ongoing issue throughout
14 the assessment. MAR005483 (noting that initial assessment contained “several places where we
15 really don’t have the data to give the scores that were provided”). The Service’s Species Report
16 contemplated listing in part because the Service “[p]resumed” that two of the populations were in
17 decline. MAR020930. As Pacific NW Region staff pointed this out, presumption was not
18 supportable. MAR014019-20. This intra-agency disagreement set the stage for a
19 recommendation by the California regional director, Mr. Lohofener. His recommendation took
20 into account the positions of Service field staff in both regions, as did the Service’s ultimate
21 decision. The Service’s Washington D.C. office was briefed on what was known about small
22 isolated population effects and the restrictions incorporated by the NWFP. MAR019960,
23 019963.

1 Thus, this is not a case where an agency’s higher-ups made summary decisions that went
2 against the flow of their line staff recommendations, nor is it one, as with the wolverine, where
3 the record reveals “immense political pressure” that might explain a change in course. *Defs. of*
4 *Wildlife v. Jewell*, ___ F. Supp. 3d ___, No. 14-247-M-DLC, 2016 WL 1363865, at *19 (D.
5 Mont. Apr. 4, 2016). Instead the record reveals a team of scientists and staffers working together
6 to reach a conclusion based on the best available scientific and commercial data. Consistent with
7 the ESA’s direction, the Service made its finding based on this data rather than on subjective
8 emotions. Thus, to the extent the ultimate conclusion does not track the Species Report exactly,
9 there is no error. As the Ninth Circuit has held, “FWS is not required to accept the *Status*
10 *Review’s* conclusion, but rather simply must use the *Status Review’s* data in reaching its listing
11 decision.” *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006). There is no
12 question the Service did so.

13 **B. The Service’s conclusion was reasonable in light of the data regarding**
14 **marten population trends and the considerable restrictions on active**
15 **management in the species’ range.**

16 Setting procedural issues aside, plaintiffs allege that the Service’s final decision is not
17 consistent with the best available data, because, plaintiffs claim, the best scientific and
18 commercial data indicate that all three marten populations are declining and functionally isolated
19 and these factors warranted a listing. Pls.’ MSJ at 12-16. Plaintiffs’ arguments fail, as the
20 Service’s determinations are supported by the record. The Service did not ignore or fail to
21 consider any relevant scientific data or information in evaluating marten populations. Rather, the
22 Service reviewed and considered the same data on which plaintiffs rely. Where the Service
23 reached a conclusion contrary to plaintiffs’ characterization of the data, it sufficiently explained
24 why it reached that conclusion. The Service’s conclusions are entitled to deference.

1 Once the Service has made a reasoned scientific judgment based on the best available
2 science, the Court’s review is at an end. A court “is not to ‘act as a panel of scientists that . . .
3 chooses among scientific studies . . .’” *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668
4 F.3d 1067, 1075 (9th Cir. 2011) (quoting *McNair*, 537 F.3d at 988). Therefore, “[w]hen
5 specialists express conflicting views, an agency must have discretion to rely on the reasonable
6 opinions of its own qualified experts even if, as an original matter, a court might find contrary
7 views more persuasive.” *Id.* Of particular relevance here, “Deciding whether an inference is
8 warranted involves the exercise of scientific judgment.” *Palouse Prairie Found. v. Salazar*, No.
9 CV-08-032-FVS, 2009 WL 415596, at *6 (E.D. Wash. Feb. 12, 2009), *aff’d*, 383 F. App’x 669
10 (9th Cir. 2010); *see also W. Watersheds Project v. Ashe*, 948 F. Supp. 2d 1166, 1190 (D. Idaho
11 2013) (“To the extent Plaintiff asks this Court to find that the Service drew improper conclusions
12 from the scientific information it considered, the Court declines to do so.”) Thus,
13 notwithstanding plaintiffs’ inferences of population declines and functional isolated populations
14 from available data and information, the Service’s job is to exercise its own scientific judgment
15 about whether such inferences are scientifically valid or not. So long as the Service considered
16 the available data and explained its conclusion with reference to that data, its determination
17 should be upheld.

18 With respect to small population effects, the Service recognized that small and isolated
19 populations, in the abstract, may be more vulnerable to stressors and thus at greater risk of
20 extinction. MAR022043. The Service found no direct evidence that populations “are in
21 decline.” MAR022044. It based this conclusion on its interpretation of Zielinski’s survey data,
22 including information showing stable marten populations between 2008 and 2012. *Id.* As noted
23 in the 2008 survey data, the estimates provided “should be interpreted as a minimum estimate for
24

1 several reasons,” including the limit of the survey to units previously surveyed. MAR031833.
2 Zielinski was not the only population study. As the data published by Hamm *et al.* showed,
3 “Marten are persisting [on private lands] in areas where we initially detected them in 2004”
4 MAR026484. The Service also had access to recent unpublished data regarding marten
5 detections from Zielinski and Moriarty. MAR022043-44 (citing MAR031734-35 and
6 MAR029763-88). Based on the totality of the scientific data and information available, the
7 Service reasonably concluded that the data do not show populations are currently in decline..

8 Although plaintiffs disagree with the Service’s ultimate conclusion, they do not show, as
9 they must, that the Service “ignore[d] available biological information.” *Kern Cty. Farm*
10 *Bureau*, 450 F.3d at 1080-81. Nor is this a case where the Service relied on undeveloped,
11 unclear or ambiguous data or information to conclude that the species is stable or increasing. *Cf.*
12 *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009). Rather, the Service
13 merely concluded, within the realm of its expertise, that the best available scientific data and
14 information does not support an inference that the species is declining. These are precisely the
15 kinds of circumstances “a reviewing court must generally be at its most deferential.” *Balt. Gas*
16 *& Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

17 Similarly, as to plaintiffs’ “functional isolation” argument, the Service considered the
18 best available scientific data and rationally concluded that available evidence does not support
19 finding that isolation effects are a threat to the species. It recognized that the distance between
20 the populations “exceeds the mean maximum juvenile dispersal distance for martens in general.”
21 MAR02044. However, it found the distance between populations was within the maximum
22 observed dispersal capacity. *Id.* The Service examined genetic evidence regarding marten
23 populations, finding that genetic differentiation to date did not indicate functional isolation. *Id.*

1 As the Service pointed out, only occasional dispersal is sufficient to avoid isolation effects. *Id.*
2 This judgment, made by a Service biologist, MAR 018293-94, was reasonable and supported by
3 scientific data. The Service “support[ed] its conclusions with studies that the agency deems
4 reliable.” *N. Plains Res. Council*, 668 F.3d at 1075.

5 Moreover, the Service’s conclusion on small and isolated population effects was
6 backstopped by its analysis of existing regulatory mechanisms. It concluded “habitat recruitment
7 through management of Federal lands under the NWFP should contribute to improved
8 connectivity.” MAR022044. The Service found future loss, fragmentation, or degradation of
9 habitat governed by these restrictive plans “is expected to be low.” MAR022040. Thus, this
10 case is markedly different from the wolverine decision, where the Service failed entirely to
11 analyze or explain why small population size was not a threat to the wolverine. *Def. of Wildlife*,
12 2016 WL 1363865, at *25. Similarly, this case is distinguishable from the flat-tailed horned
13 lizard decision, *Tucson Herpetological Soc’y*, 566 F.3d at 878, where the Service relied “solely”
14 on its conclusion of population stability. Here, by contrast, the Service explained why it believed
15 each potential stressor was not a significant threat to the species or was addressed by existing
16 regulations.

17 In a similar case, *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1031 (9th
18 Cir. 2011), the Ninth Circuit, reversing the district court, found that conservation strategies
19 embedded in binding land management plans are “highly significant” where much of the species’
20 range is governed by such plans. *Servheen* affirmed the Service’s finding that regulatory
21 mechanisms were adequate to protect the greater Yellowstone ecosystem grizzly bear post-
22 delisting. Both the NWFP and the Green Diamond HCP are binding and it was reasonable for
23 the Service to rely on the conservation measures embedded in these land management plans.

1 The Service also relied on the Park Service’s management plan for Redwood National and State
2 Parks, which contain some marten habitat. MAR035912-MAR036015.

3 **C. The Service correctly concluded the coastal marten is not endangered or**
4 **threatened over a significant portion of its range.**

5 The Species Report addressed and classified the threats to each marten population.
6 MAR020696-703. Some threats (development, predation, disease, and collision with vehicles)
7 are low across all populations. *Id.* Others (trapping and vegetation management) are highest in
8 Central Coastal Oregon. *Id.* Exposure to toxicants is the highest risk in Northern Coastal
9 California. *Id.* And Southern Coastal Oregon faces the highest number of stressors above the
10 low level. *Id.*; MAR013352-53. Thus, the Service’s 12-month finding concluded that the overall
11 threats to the species are not geographically concentrated, so listing based on threats to a
12 significant portion of the range was not warranted. MAR022051.

13 Plaintiffs take issue with this finding, alleging that threats are concentrated in the
14 California portion of the range. Pls.’ MSJ at 17-18. Plaintiffs rely on a statement from the
15 Species Report regarding particular threats from fire, climate change, and illegal marijuana
16 cultivation. MAR021000-01. However, as shown above, these threats are counterbalanced by
17 less impact due to reduced vegetation management and a trapping ban in California. Moreover,
18 the Service specifically examined fire, climate change, and marijuana cultivation effects in the
19 finding. MAR022051. For fire, it determined the range of the species is within a fog-influenced
20 zone that is likely to have lower-severity fire impact. *Id.* For climate change, it found vegetation
21 shifts would occur approximately equally across the range, and could not be predicted with any
22 degree of certainty. *Id.* For illegal marijuana cultivation impacts, the Service noted that only
23 one record of an exposure to anticoagulant rodenticides exists and that recreational marijuana
24 was recently legalized in Oregon but not California. MAR022051. The Species Report noted

1 this is a “potential risk” and there is “minimal data available” on impacts from rodenticides.
2 MAR020951. Thus the Service considered each threat and reasonably concluded that overall
3 threats were not geographically concentrated, and that concentrated threats were not significant
4 enough, to justify listing the marten under the ESA.

5 **V. CONCLUSION**

6 The Service’s decision was reasonable and supported by the record. The Court should
7 grant Siskiyou County’s cross-motion for summary judgment, grant the Service’s motion, and
8 deny plaintiffs’ motion.

9 DATED this 17th day of October, 2016.

10 /s/ Dennis L. Porter
11 Dennis L. Porter (SBN 67176)
12 Attorney at Law
13 8120 36th Avenue
14 Sacramento, California 95824-2304
15 Telephone: (916) 381-8300
16 Fax: (916) 381-8726
17 dlporter2@yahoo.com

18 /s/ Lawson E. Fite
19 Lawson E. Fite (Ore. Bar #055573)
20 *Pro Hac Vice*
21 American Forest Resource Council
22 5100 S.W. Macadam, Suite 350
23 Portland, Oregon 97239
24 Telephone: (503) 222-9505
lfite@amforest.org

Attorneys for Defendant-Intervenors

Brian L. Morris (SBN 222650)
County Counsel
County of Siskiyou
P.O. Box 659
205 Lane Street
Yreka, CA 96097
Telephone: (530) 842-8100

1 Fax: (530) 842-7032
2 bmorris@co.siskiyou.ca.us

3 Attorney for Siskiyou County

4 Dominic M. Carollo (Ore. Bar #093057)
5 *Pro Hac Vice*

6 Yockim Carollo LLP

7 430 SE Main St

8 PO Box 2456

9 Roseburg OR 97470

10 Telephone: (541) 957-5900

11 Fax: (541) 957-5923

12 dcarollo@yockimlaw.com

13 Special Counsel for Douglas County, Oregon

14 *Of counsel:*

15 Thomas A. Ward

16 Jeff Augello

17 National Association of Home Builders

18 1201 15th Street NW, 8th Floor

19 Washington, DC 20005

1 **CERTIFICATE OF SERVICE**

2 I, Lawson E. Fite, hereby certify that I, on October 17, 2016, I caused the foregoing to be
3 served upon counsel of record through the Court's electronic service system.

4 Dated: October 17, 2016

/s/ Lawson E. Fite
Lawson E. Fite