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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

WILDEARTH GUARDIANS, et al., Plaintiffs, v. SALLY JEWELL, in her official capacity as Secretary of the Department of the Interior, et al., Defendants.	No. 9:14-cv-00250-DLC **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs' response brief boils the case down to two primary issues: (1) Whether the McKelvey et al. (2011) study ("McKelvey (2011)") compelled the U.S. Fish and Wildlife Service ("FWS") to list the distinct population segment ("DPS")[1] of wolverines within the conterminous United States ("wolverine") as a threatened species, or whether the scientific data left room for FWS reasonably to conclude that listing was not warranted at this time; and (2) Whether wolverine's small effective population size alone necessitated listing. Doc. 76 ("Defs.' Br.") 10–19. FWS carefully considered McKelvey (2011), and though it found the study to be "the most sophisticated analysis of impacts of climate change at a scale specific to the range of the wolverine," it also concluded that it did not provide an adequate basis for listing wolverine as threatened, given the significant uncertainty surrounding climate change's impact on the species. This finding is supported by McKelvey (2011) itself: "Although wolverine distribution is closely tied to persistent spring snow cover (Copeland et al. 2010), we do not know how fine-scale changes in snow patterns within wolverine home ranges

[1] Defendant-intervenors Idaho Farm Bureau, et al., argue that FWS may not list a DPS of a subspecies. Doc. 77. Federal Defendants do not agree and do not join or support that argument.

may affect population persistence." LIT-02581. As to the second issue, FWS acknowledged wolverine's population numbers, but reasonably concluded that listing was not warranted because there is no evidence that wolverine is actually harmed by its small effective population size. Defs.' Br. 29–34. Plaintiffs' remaining minor arguments fare no better.

I. FWS's decision was reasonable and entitled to deference.

Plaintiffs start with a discussion of the standard of review, and claim FWS's withdrawal of the proposed rule to list the wolverine as threatened ("Withdrawal") is not entitled to deference because "it conflicts with the published studies and the findings of its qualified experts." Doc. 84 ("Pls.' Resp.") 1–2. This is not the case. The Withdrawal was based on FWS's thorough review of the best available scientific and commercial data, including analysis by FWS's experts. *See* Defs.' Br. 9–50. As such, it is entitled to deference. *Id.* 7–9.

II. FWS thoroughly considered the potential effects of climate change, and reasonably concluded that listing was not warranted.

FWS's Factor A analysis was reasonable and neither arbitrary nor

capricious. Defs.' Br. 10–28. Plaintiffs' arguments to the contrary, Pls.' Resp. 2–10, are meritless.

Contrary to Plaintiffs' argument, Pls.' Resp. 2, FWS did not "disregard[] 'superior' data or information that is 'better than' the information it relie[d] on." *See, e.g.*, Defs.' Br. 11–17.

a. FWS reasonably weighed the findings of McKelvey (2011).

Plaintiffs' arguments leave no room for FWS to weigh the available science, apply its expertise, and make educated predictions in the face of considerable complexity and scientific uncertainty. They read McKelvey (2011) as providing an adequate basis for listing wolverine as a threatened species and thus assert that because FWS "does not dispute that McKelvey (2011) is the best available science," listing must follow. Pls.' Resp. 3. But this approach misreads the deferential standard of review under the Administrative Procedure Act and disregards the privileged position held by FWS as the agency tasked by Congress with administering the Endangered Species Act ("Act"). First, FWS must base its listing determinations on "the best scientific and commercial data available" after conducting a review of the status of the species and taking into account any State, local, or foreign efforts to

protect the species. 16 U.S.C. § 1533(b)(1)(A). In most cases, and certainly here, the best data is not a single study. Rather, FWS must consider all of the available reliable evidence—of which McKelvey (2011) is only a part—and may not ignore superior data, which FWS did not do. In the Withdrawal, "FWS properly considered the findings in McKelvey, and came to the conclusion that the best available scientific data were still too uncertain to provide a reasonable basis for a reliable determination." Defs.' Br. 10–28. Plaintiffs' response fails to refute that reasonable conclusion.

b. McKelvey (2011) does not provide a sufficient basis for listing.

Plaintiffs restate their argument that FWS improperly set the bar too high by requiring "definitive conclusions." Pls.' Resp. 4–6. Federal Defendants explained why this was not so, Defs.' Br. 17–20, and nothing Plaintiffs offer in their response refutes Federal Defendants' argument.

Plaintiffs' reliance on *Brower v. Evans*, 257 F.3d 1058, 1071 (9th Cir. 2001), is inapposite. *Brower* involved claims made under other statutes and, in large part, turned on the Secretary's failure to obtain and

consider stress-study data that he was statutorily required to include in the challenged finding. *See* 257 F.3d at 1060–64. The three ESA cases discussed in *Brower* do not support Plaintiffs' argument either. *Conner v. Burford* was a case brought under Section 7 of the Act, which held it was inappropriate for FWS to consult only on a lease sale while deferring consultation on the effects of the oil and gas activities likely to occur after the sale. *See* 848 F.2d 1441, 1452 (9th Cir. 1988). *Greenpeace v. National Marine Fisheries Service* is another Section 7 case, in which the court deferred to the agency and noted that "an agency must have discretion to rely on the reasonable opinions of its own qualified experts." 55 F. Supp. 2d 1248, 1261 (W.D. Wash. 1999) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)). And while the court in *Defenders of Wildlife v. Babbitt*, which Plaintiffs cite independently, set aside a decision by FWS not to list the Canada lynx, it was because in that case the Acting Director of FWS rejected the recommendation of the Region Six Regional Director *explicitly* because the recommendation "did not provide any *conclusive evidence* of the biological vulnerability or real threats to the species in the contiguous

48 states." 958 F. Supp. 670, 679 (D.D.C. 1997). That is not what occurred here. Defs.' Br. 10–19.

Plaintiffs' continued insistence that FWS demands a "smoking gun" for wolverine remains misplaced. Defs.' Br. 10–19. FWS does not require evidence equivalent to "drowning bears and bears stranded on land due to retreating ice." Pls.' Resp. 6. It does not demand visual proof of struggle. Rather, FWS made a reasoned scientific judgment call in the face of equivocal record evidence. That the Plaintiffs, or even the Court, might have made the opposite choice is not a basis for overturning the agency's decision. FWS found the scale of climate change modeling then available was simply not adequate for it to conclude that wolverine was likely to become an endangered species within the foreseeable future. FWS further observed that "[n]ewer modeling techniques suggest that higher elevations could maintain more snow than previously thought and possibly even receive more snow than historical records show due to climate change." FR-00013. The record shows that this data is far from impossible to obtain—Dr. Torbit informed FWS that Dr. Ray indicated that those "more fine-

scaled analyses" could be performed "over the course of a few months if necessary." FR-05453.

c. Whether there is any "published evidence" that undermines McKelvey (2011) is irrelevant.

FWS found McKelvey (2011) to be "the most sophisticated analysis of impacts of climate change at a scale specific to the range of the wolverine." Plaintiffs' suggestion that certain earlier studies support McKelvey (2011), Pls.' Resp. 6, is irrelevant. What is relevant is that FWS found McKelvey (2011) superior to those studies, and that McKelvey (2011) still did not provide an adequate basis for listing wolverine as threatened. Defs.' Br. 10–19.

Plaintiffs argued that "[n]o new scientific papers, data, or analyses were completed to call the Service's rationale for listing into question." Pls. Br. 24. Federal Defendants refuted that plainly false claim. Defs.' Br. 27. Plaintiffs now complain that there was "no explanation as to" the relevance of the cited studies and analysis, and claim that "[a]ll of the papers cited comport with McKelvey (2011)." Pls.' Resp. 7. But this assertion is also false. Of the 11 studies referenced in Federal Defendants' brief, three are specifically cited in the Withdrawal, which

discusses their relevance to the determination, and the other eight were considered. *See, e.g.*, FR-00013 (citing Franklin (2012) and Potter (2013) in support of FWS's finding that models finer than that used in McKelvey (2011) may be needed to gauge habitat loss); FR-00014 (citing Inman (2013) in support of FWS's finding that factors beyond those included by Copeland et al. (2010) should be incorporated into predictive models to accurately describe wolverine habitat because these factors appear to also influence primary wolverine habitat use).[2]

Further, Plaintiffs' characterization and dismissal of the Walsh Memorandum is baseless. Pls.' Resp. 7. Plaintiffs' argument that the Torbit analysis is not "the best available science" because it "was made behind closed doors, never subjected to peer-review, and never discussed with the wolverine biologists charged with making the listing decision," Pls.' Resp. 7–8, also fails.[3] Their citation to an unreported memorandum opinion from the District of Idaho is unavailing. The

[2] The index to the LIT prefix portion of the record indicates that all included documents were either cited or considered.

[3] The field biologists are not charged with making the decision, nor even the recommendation. The only person "charged with making the listing decision" is the Director of FWS. The Director received a recommendation from the Regional Director.

report in *Western Watersheds Project v. Kempthorne* that Plaintiffs refer to as an "internal report," Pls.' Resp. 8, was no such thing—it was a report produced by a private institute and agencies of the state of Idaho.[4] The report here was produced by Dr. Torbit, FWS Region 6 Assistant Regional Director for Science Applications, who consulted with Dr. Ray of the National Oceanic and Atmospheric Administration's Earth Systems Research Laboratory. FR-05361. It is well established that "an agency must have discretion to rely on the reasonable opinions of its own qualified experts." *Marsh*, 490 U.S. at 378. Further, the "best available scientific data" requirement does not displace the ability for experts within the agency to interpret and weigh the evidence. Plaintiffs have not identified any better science that FWS did not consider—they only disagree with FWS's interpretation and weighing of the evidence. FWS considered all the data, but drew a different conclusion than Plaintiffs wanted. In cases of such disagreement, FWS's determination is entitled to deference. *See, e.g.*, *Trout Unlimited v. Lohn*, 559 F.3d 946, 956 (9th Cir. 2009).

[4] Available at: http://appliedeco.org/wp-content/uploads/Menke-and-Kaye_-lepa-98-04-final.pdf (last visited November 6, 2015).

It is of no significance that part of Torbit's analysis was consideration of a study concerning snowpack on the upper Colorado River basin. After noting that "large uncertainty" "exists in predicting changes in precipitation patterns with the existing climate data and climate models" and "great difficulty still exists in predicting changes in precipitation with the climate models, especially compared to the more confident predictions for temperature," Torbit ultimately concluded that "the modelling efforts that support the listing recommendation are not at a sufficiently reduced scale to clearly articulate the impact to existing or potential wolverine habitat, based on persistent snow-cover." FR-05452 to -05453. Torbit's conclusion is consistent with McKelvey (2011)'s finding that "we do not know how fine-scale changes in snow patterns within wolverine home ranges may affect population persistence." FR-05453. These conclusions concern the reliability of models predicting changes in precipitation due to climate change—they are not an attempt to quantify snowpack loss in any specific area.

The suggestion that Walsh "had already decided not to list the wolverine" before she received Torbit's analysis is unsupported. Pls.' Resp. 8. Plaintiffs' citation to a partial draft of a memorandum,

attached to an e-mail dated the same day as Torbit's report, does not indicate that a decision had been made at that time. FR-05535; FR-05452.

d. The peer review did not "validate" McKelvey (2011).

Plaintiffs restate their argument that the peer review process "validated the underlying rationale for listing," Pls.' Resp. 8–10. Federal Defendants explained why this was not so, Defs.' Br. 21–26, and nothing Plaintiffs offer in their response refutes Federal Defendants' argument.

First, Plaintiffs note that Squires, with McKelvey and Copeland in agreement, found that "'[t]he basic conclusion that wolverine may be detrimentally impacted by climate change is consistent with best available science.'" Pls.' Resp. 9. Even assuming this conclusion is reliable, establishing that wolverine "may be detrimentally impacted," is not the standard FWS must apply. *See, e.g.*, Defs.' Br. 16–17. Listing decisions are based on the application of ESA Section 4(a)(1)(A)'s five factors to the statutory definitions of "endangered" and "threatened" species. 16 U.S.C. § 1532 (6), (20).

Plaintiffs mischaracterize the record when they accuse Federal Defendants' counsel of "confusing the concerns raised about the May 15 snow model with snow." Pls.' Resp. 9. The record shows that Magoun and Inman were not "confused" about the distinction between the "May 15 snow model" and snow. Pls.' Resp. 9. A thorough review of the e-mail exchanges cited by Federal Defendants between Magoun and McKelvey and Copeland, PI-001363 to PI-001386, indicates that Magoun understood this distinction well. *See, e.g.*, PI-001366, -001368, -001377. It is, in fact, Copeland and McKelvey that, in defense of their studies, appear to alternate between defending the model as nothing more than simply a good estimate of wolverine habitat (a "proxy for wolverine habitat"), and arguing that May 15 is a legitimate date for the end of the period when wolverines require deep snow. *Compare* FR-13428 (McKelvey suggests that it is misguided to view the model as indicative of snow dependency until May 15, and that "[a]ll that the model 'means' is that 500m pixels classified as being snow covered through May 15 contain >97% of all known den locations worldwide" and that "[e]xactly what that translates to on the ground . . . is anyone's guess") *with* PI-001367 (McKelvey states that while one could make a "perfectly valid

case" that the exact start and stop dates would be arbitrary and irrelevant, he is "not going to do [that], because [he] think[s] that the data in Copeland et al. are actually telling us something meaningful about the nature of the relationship between wolverine den choices and snow" and that "[he] think[s] that the location of den sites in areas much snowier than would be strictly necessary to provide natal den requirements likely indicates broader dependencies on snow covered landscapes that extend beyond the denning period.") *and with* PI-001378 (Copeland states that May 15 "was not a random choice," "[w]e were thinking denning and I wanted to be sure we defined the distribution of snow at least to the end of the denning period."). Plaintiffs do the same thing, first arguing that Federal Defendants are confusing the model with a need for snow until any particular point, and then pivoting to a discussion of wolverine's dependence on spring snow and how that indicates the model is reliable. Pls.' Resp. 9.

Further, and more importantly, Plaintiffs offer no explanation for how this alleged "confusion" would have altered the result in any way. The Withdrawal found that wolverines are dependent on deep snow

that lasts until some point in the spring. FR-00013. Every quotation Plaintiffs offer from the record is consistent with that conclusion.

III. FWS thoroughly considered wolverine's small population size and genetic diversity, and reasonably concluded that listing was not warranted.

Plaintiffs restate their argument that wolverines are "threatened by a small population size." Pls.' Resp. 10–12. Federal Defendants explained why this was not so, Defs.' Br. 29–34, and nothing Plaintiffs offer in their response refutes Federal Defendants' argument.

Plaintiffs rely entirely on statements that wolverines in the conterminous 48 states already show signs of "low genetic diversity," Pls.' Resp. 11, and that studies suggest that breeding population numbers must be higher to avoid a loss of genetic diversity, *id.*, but this is not enough. FWS concluded that although wolverine's effective population sizes are very low, there is currently no evidence of adverse effects attributable to lower genetic diversity, FR-00022, and it lacks "reliable information to conclude if and when [negative effects] would occur." FR-00005; *see also* Defs.' Br. 39–45. Thus, FWS could not conclude that wolverine is "likely to become an endangered species in the foreseeable future" as a result of small population size. This finding

is determinative, and Plaintiffs have not offered any evidence or persuasive argument to the contrary.[5]

IV. FWS thoroughly considered the synergistic interactions between factors, and reasonably concluded that listing was not warranted.

Plaintiffs restate their argument that FWS erred by finding that "no cumulative threat to wolverines exists." Pls.' Resp. 12. Federal Defendants explained why this was not so, Defs.' Br. 34–35, and nothing Plaintiffs offer in their response refutes Federal Defendants' argument. *See also* FR-00023; PR-00781 to -00782. Indeed, Plaintiffs concede that the Finding addresses all threats and includes a discussion of "synergistic interactions between threat factors" and recognizes that multiple stressors have the potential to adversely affect wolverine, but finds that wolverine is currently not a threatened species as a result of cumulative threats. Pls.' Resp. 12–13.

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[5] Plaintiffs' reliance on Cegelski (2006), Pls.' Resp. 11, is misplaced. That study discussed that in the absence of gene flow, hundreds of breeding pairs would be necessary to "maintain at least 95% of the variation in the next 100 generations." LIT-00674. It did not find that those numbers were minimums needed to maintain diversity adequate for the populations to persevere. It also found that "while some migration is occurring among populations, it *may* not be large enough to counter the effects of isolation and genetic drift." *Id.* (emphasis added). This does not contradict FWS's conclusion.

V. FWS thoroughly considered the adequacy of existing regulatory mechanisms, and reasonably concluded that listing was not warranted.

Plaintiffs restate their argument that FWS erred by finding that the adequacy of existing regulatory mechanisms did not warrant listing. Pls.' Resp. 13–15. Federal Defendants explained why this was not so, Defs.' Br. 28–29, and nothing Plaintiffs offer in their response refutes Federal Defendants' argument.

Plaintiffs argue that Federal Defendants' position is that Factor D is at play only when listing is warranted under another factor. Pls.' Resp. 13–15. This black and white line drawing does not accurately represent the statute or FWS's position; as with other listing factors, it is possible that a listing could be warranted under Factor D alone. But here, FWS reasonably found that there were no threats that required mitigation through regulatory mechanisms. Defs.' Br. 28. Further bolstering its Factor D conclusion, FWS did assess existing regulatory mechanisms for wolverine and concluded that they were not inadequate. *Id.* Plaintiffs' claim that FWS found that wolverine is under threat by climate change, small population size, and synergistic effects is erroneous. FR-00019 ("[W]e do not have the sufficient information to

make a reliable prediction about how wolverines are likely to respond to impacts to habitat that may result from climate change and whether such habitat changes will pose a threat in the future," further the best available data "does not indicate that other potential stressors such as land management, recreation, infrastructure development, and transportation corridors pose a threat to the DPS."); FR-00023 ("Small population size and resulting inbreeding depression are *potential, though as-yet undocumented*, threats to wolverines in the contiguous United States." (emphasis added)); FR-00023 ("[W]e do not find any combination of factors to be a threat at this time.").

VI. The joint policy on the phrase "significant portion of its range" is reasonable and entitled to deference, both on its face and as applied to the wolverine decision.

Plaintiffs restate their argument that the joint policy interpreting the phrase "significant portion of its range" ("SPR") is unlawful, and that FWS erred in its application to the wolverine decision. Pls.' Resp. 15–18. Federal Defendants explained why this was not so, Defs.' Br. 35–49, and nothing Plaintiffs offer in their response refutes Federal Defendants' argument.

Plaintiffs first argue that the standard to apply here is not, as Federal Defendants posit, the "no set of circumstances" test, but rather whether the agency's action was arbitrary or capricious. Pls.' Resp. 15. That is not the law. Defs.' Br. 36. *Reno v. Flores* is on point—it held that for cases where there is a facial challenge to the consistency of an agency's regulations with the authorizing statute, Plaintiffs "must establish that no set of circumstances exist under which the [regulation] would be valid." 507 U.S. 292, 301 (1993) (citation omitted). Plaintiffs' reliance on *Bosworth* and *Schafer*, Pls.' Resp. 15, is misplaced, as both involved agency action other than interpretation of an ambiguous phrase of the authorizing statute. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007) (challenge to a specific "categorical exclusion" under the National Environmental Policy Act that did not involve a facial challenge to an interpretation of ambiguous statutory terms); *Friends of Columbia Gorge v. Schafer*, 624 F. Supp. 2d 1253, 1262 (D. Or. 2008) (challenge to a revision to a management plan issued under the Scenic Area Act that did not involve a facial challenge to an interpretation of ambiguous statutory terms).

Plaintiffs next press their argument that legislative history that post-dates the phrase at issue is still somehow instructive. Pls.' Resp. 16. As Federal Defendants' explained, "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." Defs.' Br. 45. Plaintiffs claim that with this statement made five years after the operative language was enacted, "Congress was speaking to the use of 'range' generally and not solely to the 1978 amendments." Pls.' Resp. 16. First, Congress does not speak through House committee reports. Second, the statement offered by a House committee in 1978 can offer no insight into the intent of Congress when it passed the Act five years prior.

As to Plaintiffs' third response, Pls.' Resp. 17, Federal Defendants did explain why the fact that the word curtailment has two different meanings is "of any import." Defs.' Br. 46. Curtailment can be read to mean the act of curtailing, or the state of being curtailed. Thus, Plaintiffs' statement that "the 'range' of a species could only be presently 'curtail[ed]' if it had lost some of its historic range," Pls.' Resp. 17, is false. If curtailment is read to mean the act of curtailing, rather than the state of being curtailed, it could be a matter of the present

curtailing of range, rather than that previous range had been curtailed. It is instructive that Plaintiffs had to change the tense of the word, *id.*, to make their point. Nevertheless, even if Plaintiffs' reading is correct, it is not determinative.

Lastly, contrary to Plaintiffs' claim, Federal Defendants did respond to their arguments about FWS's application of the Policy to the wolverine decision, Defs.' Br. 48–49, and Plaintiffs offer no argument in response. Federal Defendants also, contrary to Plaintiffs' claim, explained why loss of wolverine's historic range does not qualify as a significant portion of wolverine range, and why the trapping of wolverine and loss of habitat due to climate change are not threats to a significant portion of the wolverine range.[6] *Id.*

[6] FWS concluded that trapping and climate change were not "geographically concentrated." Defs.' Br. 48. Further, under the Policy, portions of wolverine's range are not "significant" unless they contain essential *populations*—areas that no longer contain essential populations, such as lost historic range, are not "significant." *Id.* at 49. This is logical. If lost historic range could be an SPR, there would be no animals within that SPR to protect or designate as "endangered" or "threatened"—the only status that could be applied to that SPR would be "extinct."

CONCLUSION

For the foregoing reasons, and the reasons provided in the memorandum in support of the motion, Doc. 76, Federal Defendants' motion should be granted.

Respectfully submitted this 6th day of November, 2015.

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