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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DEFENDERS OF WILDLIFE,

Plaintiff,

vs.

SALLY JEWELL, Secretary, U.S.
Department of the Interior, in her
official capacity; DANIEL M. ASHE,
Director, U.S. Fish and Wildlife
Service, in his official capacity,

Defendants,

and

CV 14-246-M-DLC

(Consolidated with Case Nos.
14-247-M-DLC and 14-250-M-DLC)

**DEFENDANT-INTERVENORS
AMERICAN PETROLEUM
INSTITUTE, MONTANA
PETROLEUM ASSOCIATION,
AND WESTERN ENERGY
ALLIANCE'S REPLY BRIEF IN
SUPPORT OF CROSS-MOTION FOR
SUMMARY JUDGMENT**

IDAHO FARM BUREAU
FEDERATION; WYOMING FARM
BUREAU; MONTANA FARM
BUREAU FEDERATION;
WASHINGTON FARM BUREAU;
IDAHO STATE SNOWMOBILE
ASSOCIATION; COLORADO
SNOWMOBILE ASSOCIATION;
COLORADO OFF-HIGHWAY
VEHICLE COALITION; AMERICAN
PETROLEUM INSTITUTE;
MONTANA PETROLEUM
ASSOCIATION; WESTERN ENERGY
ALLIANCE; GOVERNOR C.L.
“BUTCH” OTTER; STATE OF
MONTANA; MONTANA FISH,
WILDLIFE AND PARKS; and STATE
OF WYOMING,

Defendant-Intervenors.

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I. INTRODUCTION¹.

Notwithstanding the amount of briefing in this action, few issues remain in dispute. Plaintiffs acknowledge that U.S. Fish & Wildlife Service (“FWS” or “the Service”) considered every study Plaintiffs characterize as “the best available.” They do not identify a single study overlooked by FWS. Plaintiffs admit that FWS sought out and considered input from other federal agencies, state conservation partners, and subject matter experts. *See* Plaintiff WildEarth Guardians’ Response, Doc. 90 in Case No. 14-246, at 6–7 (“WEG Response”); *see also* Defenders of Wildlife Response, Doc. 92 in Case No. 14-246 (“DOW Response”). Plaintiffs do not dispute that FWS responded to public comments and specifically admit that FWS considered comments from states—as they must under Section 6 of the Endangered Species Act (“ESA”) and Section 553 of the Administrative Procedure Act (“APA”). WEG Response at 6–7.

Plaintiffs do not allege that FWS failed to evaluate threats to the wolverine under the ESA’s five-factor analysis or potential cumulative threats from a combination of factors. Nor do Plaintiffs dispute that the decision to withdraw the proposed listing, while not unanimously supported, was the product of internal scrutiny and that the withdrawal decision was ultimately supported by three

¹ This Reply in Support of Energy Industry Intervenors’ Cross-Motion for Summary Judgment responds to Plaintiffs in 14-246, 14-247, and 14-250.

regional offices and FWS headquarters. WEG Response at 6–8; DOW Response at 11–13.

Plaintiffs simply dispute the Service’s conclusion. Absent any assertion of an overlooked study, an omitted statutory requirement, or a single fact or expert that was not considered by FWS, all that remains for this Court to decide is whether FWS’s determination “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007). The Service’s determination is not implausible. It is reasonable and entitled to deference.

II. THE SERVICE’S DETERMINATION IN CONTEXT.

The determination at issue here is whether wolverines in the United States meet the ESA’s definition of a “threatened species.” A “threatened species” is one which is likely to be placed on the brink of extinction within the foreseeable future throughout all or a significant portion of its range. *See* Energy Industry Intervenors’ Memorandum in Support of Cross-Motion for Summary Judgment, Doc. 82 in Case No. 14-246, at 20 (“Energy Intervenors’ MSJ”). As such, absent a demonstration that future extinction throughout all or a significant portion of its range is both *likely and foreseeable*, FWS is statutorily prohibited from listing wolverines as “threatened.”

FWS cannot list a species because it is viewed as important, iconic, or deserving of conservation. Nor can FWS list species based on a finding that they are being harmed, may be harmed in the future, or that certain threats are adversely impacting their abundance. *See Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009) (citing *Cook Inlet Beluga Whale v. Daley*, 156 F. Supp. 2d 16, 21–22 (D.D.C. 2001) (holding that the ESA does not require listing “simply because the agency is unable to rule out factors that could contribute to a population decline”).

Listing status is measured by the prospect that the species will cease to exist. Assessing the prospect that a species will cease to exist is necessarily imprecise, but the question the ESA requires the Service to answer is unambiguous: Is this species at risk of *extinction* today, or is a risk of *extinction* likely to arise in the foreseeable future?

Here, FWS examined a species that had experienced steady expansion in abundance and range throughout the previous century—an expansion that all available data suggests is continuing. *See* Energy Industry Intervenors’ MSJ at 5; *see infra* III.B. In order to determine that the wolverine was threatened, FWS could not simply identify a factor or factors that threatened to impede or restrain the species’ upward trajectory—FWS had to conclude that these factors could reverse

that trajectory to such an extent that it was likely to place wolverines on the brink of extinction in the foreseeable future.

To reach that conclusion, the Service utilized a process that considered all threats regardless of how remote. It examined every study and opinion identified by Plaintiffs, and several studies and opinions Plaintiffs urged FWS to disregard—the ESA does not permit FWS the freedom to let ideology drive conclusions and conclusions to drive facts. *See infra* IV.A.

After extensive consideration, FWS issued a detailed determination explaining that it could not conclude that the increasingly abundant wolverine was likely to be pushed to the brink of extinction in the foreseeable future. That judgment is reasonably based on the best available science and the ESA's listing criteria, and it is entitled to deference.

III. THE SERVICE'S INTERPRETATION OF THE POTENTIAL GENETIC THREAT IS REASONABLE. PLAINTIFFS' INTERPRETATIONS ARE NOT.

Plaintiffs acknowledge that FWS examined the potential threat posed by wolverines' low population size individually and in conjunction with other threats, and that FWS published those findings in its final determination. *See* WEG Response at E, F; DOW Response at I. All that remains for this Court to decide is whether FWS's analysis "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Trout Unlimited*, 645 F.

Supp. 2d at 947. The Service's interpretation of the potential genetic threat is plausible.

A. FWS Reasonably Considered the Absence of Observed Effects from Low Genetic Diversity.

Plaintiffs argue that FWS impermissibly erred in basing its finding that low genetic diversity was not likely to place wolverines on the brink of extinction within the foreseeable future on the lack of observed adverse effects. WEG Response at 13–14; DOW Response at 2. According to Plaintiffs, once FWS acknowledged that wolverines experience low genetic diversity or were vulnerable to loss of genetic diversity in the future, its inquiry should have terminated and a threatened listing should have been promulgated. WEG Response at 13–14; DOW Response at 2. Plaintiffs, however, fail to understand that low genetic diversity is not a threat and does not become so until it results in inbreeding depression—and only then if the species experiences a loss of biological fitness that reduces its viability. LIT-385. Not all species with low genetic diversity decline—many thrive. LIT-387. Absent any observation of reduced biological fitness, FWS could not credibly conclude that low genetic diversity made it likely that wolverines would be on the brink of extinction within the foreseeable future.

Wolverines' low genetic diversity is an artifact of the genetic bottleneck caused by being founded by a discrete number of individuals. FR-22. Even if

wolverines' effective populations have not yet exceeded the "rule-of-thumb," that does not make extinction likely or foreseeable. In fact, FWS recognized that the potential risks from low genetic diversity are far from proximate. FR-22. FWS cited to a study of houseflies wherein the effective population of one cohort was held constant and another population was started from very few founders (like the wolverine). LIT-3106. The population with the static effective population went extinct between 37 and 64 generations from inception. LIT-3111. Given the longer generations of wolverines [LIT-8937], this amounts to a risk of extinction arising 126 to 218 years in the future—*and only if no new connectivity is established and effective population never changes*. While the founder population initially experienced low genetic diversity, and even genetic depression, they never went extinct. LIT-3111. The study was terminated after 68 generations (231 years as applied to the wolverine). LIT-3111.

FWS reasonably concluded that wolverine extinction was not likely or foreseeable absent any observed adverse impacts. That conclusion is entitled to deference.

B. FWS Reasonably Concluded that Actual Population Size Would Increase Effective Population Size.

Small effective population sizes are caused, in large part, by small actual population sizes, and therefore increases in actual populations ameliorate the potential adverse impacts of low effective population sizes. FR-22. Plaintiffs do not dispute this reality. Instead, Plaintiffs dispute as “unsupported” that wolverine populations were increasing. DOW Response at 2; WEG Response at 15. Plaintiffs are wrong.

FWS explains that the wolverine’s repopulation of the United States after extirpation supported its conclusion that populations were increasing and that its consideration of dispersal as an indicator of an increasing population was supported by Aubrey (2007) and Inman (2013). While true, we further note that Dr. McKelvey—whose scholarship Plaintiffs cite extensively—stated that “[i]n the western U.S., . . . the population has been steadily expanding. . . .” PI-1370.

The Proposed Listing, which Plaintiffs supported, also determined that wolverine populations were rebounding. PR-749. Further, contrary to Plaintiff DOW’s assertions, the Science Panel expressed optimism for wolverines in the near future because of “recent population performance.” SUP-28.

Indeed, even though numerous differences of opinion were present in this rulemaking, no one appears to disagree that wolverine populations are increasing.² Not even Plaintiff DOW—their population estimates suggest that FWS may have underestimated wolverine populations by as much as 500. LIT-4512.

The Service’s conclusions about population increases ameliorating potential adverse impacts from small effective population size are reasonable, supported, and in fact, uncontested.

C. FWS Reasonably Considered the Potential Impact of Habitat Capacity Constraints on Genetic Diversity.

Plaintiff DOW argues that, even if wolverines are not threatened by inbreeding depression now, they remain at risk from long-term genetic depression due to limited habitat capacity. DOW Memorandum in Support of Motion for Summary Judgment, Doc. 63 in Case No. 14-246, at 14–15 (“DOW MSJ”). Energy Intervenors responded that the calculation Plaintiff DOW used to support its argument had no scientific merit because it measured the relationship between two data points that have no relationship to each other—Schwartz (2009)’s estimated effective population and the difference between Inman (2013)’s current

² Plaintiff WEG disputes the population increase only by arguing that Energy Intervenors’ cited population estimate (200-350) is incorrect. WEG Response at 14. Plaintiff WEG is wrong. Dr. Inman estimated 200-350. LIT-1426. He only acknowledged that it did not disprove Dr. Sartorius’s “working hypothesis of 250-300.” LIT-1425.

population and maximum capacity estimates for the northern Rockies. Energy Industry Intervenors' MSJ at 36; DOW MSJ at 14–15.

Schwartz (2009) based its estimate on genetic data and connectivity as described by the manuscript that became Copeland (2010).³ LIT-3163. Inman (2013) based his population and capacity estimates on the availability of multiple habitat features. LIT-1653. Because Schwartz (2009)'s effective population estimate has no relationship to Inman (2013)'s population estimate for the northern Rockies, or its estimated maximum capacity, Plaintiff DOW's calculation has zero biological value and does not undermine the Service's determination that sufficient capacity exists to provide for genetic diversity.

Plaintiff DOW does not defend its calculation on reply, but inexplicably suggests that its flaws provide evidence that "FWS failed to grapple with this issue." DOW Response at 5. Plaintiff WEG, on the other hand, argues that FWS significantly underestimated available habitat capacity based on Cegelski (2006) (capacity of ~1,800 – 2,800). WEG Response at 15; LIT-673. Perhaps, but that means the Service's consideration of population growth and capacity is very conservative—not implausible.

³ Plaintiff DOW asserted that Schwartz (2009) was not based on Copeland (2010). DOW Response at 5. They are correct only to the extent that Copeland (2010) was in manuscript form at the time. LIT-3163.

IV. THE SERVICE'S CLIMATE CHANGE CONCLUSIONS ARE REASONABLE AND ENTITLED TO DEFERENCE.

FWS evaluated each climate change study suggested by Plaintiffs and additional relevant information that Plaintiffs argue it should have ignored. FWS provided a reasoned and well-explained analysis of the alleged potential threat to wolverines from climate change that deserves deference.

A. Plaintiffs Persistently Misconstrue the “Best Available Science” Standard.

Because FWS considered every study that Plaintiffs identify as “best available science” (in particular, Copeland (2010) and McKelvey (2011)), Plaintiffs resort to misconstruing the “best available science” standard as a tool that FWS should have employed to ignore relevant information. Plaintiff WEG suggests that FWS disregarded “the best available science and the opinions of their own scientists or scientific advisors . . .” [WEG Response at 8] because it considered a report from its Regional Director for Science Applications, Dr. Steven Torbit (a scientist). WEG Response at 7. According to Plaintiff WEG, FWS should have ignored Dr. Torbit’s report, drafted after conferring with the government’s expert agency on climate modeling, because it was a “personal communication,” not peer reviewed, and because it was not “examined by the Service’s qualified experts” (*i.e.*, the Proposed Rule’s drafters with whom Plaintiff agrees). *Id.* Plaintiff WEG similarly accuses FWS of disregarding its own

“scientists or scientific advisors” by considering input from Regional Director Walsh, a wildlife biologist. *Id.* According to Plaintiff WEG, Regional Director Walsh’s detailed 17-page analysis was just her “personal opinion.” *Id.*

Plaintiff DOW seemingly concurs with Plaintiff WEG’s belief that the “best available science” standard commands deference to some, but not all, FWS experts. According to Plaintiff DOW, the Pacific Regional Director’s concurrence with the proposed withdrawal decision should be afforded no deference because it accepted the reasoning articulated by the Mountain-Prairie Regional Director. DOW Response at 12. In other words, Plaintiff DOW believes FWS erred in considering the Pacific Regional Director’s concurrence *because it was a concurrence.*

Paradoxically, Plaintiff DOW also believes that FWS erred by considering a concurring opinion that did not track closely enough with the analysis under review. Plaintiff DOW dismisses the Pacific Southwest Director’s concurrence as a “personal view” that “does not reflect even the position of FWS itself.” *Id.* at 13.

Plaintiffs fundamentally err in portraying the “best available science” standard as an exclusionary standard—a means of rejecting relevant information or discontinuing inquiries lest some unhelpful dissenting opinion come to light. The “best available science” standard is, in fact, the absolute converse of Plaintiffs’

portrayal—it is violated when FWS fails to consider information. *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1081 (9th Cir. 2006) (“Without any evidence in the record that FWS ignored relevant information, we hold that FWS satisfied its duty to base its listing determination on the best available data.”).

At base, Plaintiffs seek a weighing of the science that comports with their views and goals. They ask this Court to supplant the Service’s technical determination because FWS did not rank and grade each study and opinion as Plaintiffs did. Neither the ESA nor the APA permit such second-guessing. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658–59 (9th Cir. 2009) (“We grant considerable discretion to agencies on matters requiring a high level of technical expertise. Though a party may cite studies that support a conclusion different from the one the [agency] reached, it is not our role to weigh competing scientific analyses”); *Ground Zero Center for Non-Violent Action v. U.S. Dep’t of Navy*, 383 F.3d 1082, 1090 (9th Cir. 2004) (“Agencies are normally entitled to rely upon the reasonable views of their experts over the views of other experts”); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333, 1336–37 (9th Cir. 1992) (“To set aside [FWS’s] determination in this case would require us to decide that the view of Greenpeace’s experts have more merit than those of [FWS’s] experts, a position we are unqualified to take”).

B. Plaintiffs Acknowledge That Copeland (2010) Identified a Proxy, But Fail to Understand What a Proxy Is.

Plaintiffs attempt to construe Copeland (2010) as both an approximation of some underlying bioclimatic feature and the bioclimatic feature itself. When Plaintiffs defend the relatively arbitrary and highly nuanced habitat feature used as an indicator of wolverine presence (snow on May 15th at least once every seven years), they characterize Copeland (2010) as merely a proxy that describes the current and historical distribution of wolverines. WEG Response at 10; DOW Response at 8. When Plaintiffs defend McKelvey (2011), they characterize Copeland (2010) as pinpointing a precise habitat feature that, if lost or substantially reduced, would place wolverines on the brink of extinction within the foreseeable future. WEG Memorandum in Support of Motion for Summary Judgment at 21 (WEG MSJ); DOW MSJ at 18.

Copeland (2010), however, cannot be credibly construed as both the essential feature and the proxy for an essential feature. Accordingly, pinning down precisely what Copeland (2010) represents is important to this action. If Copeland (2010) provides a proxy that describes current wolverine distribution, and not a specific biological requirement, than how can McKelvey (2011)'s modeling of the potential reduction of *the proxy* suggest that wolverines are likely to be at the brink of extinction within the foreseeable future? If the feature identified in Copeland

(2010) (snow on May 15th at least once every seven years) is viewed as essential to wolverine habitat, then is there a credible biological basis for this?

1. The Service's Interpretations of Copeland (2010) and McKelvey (2011) are Reasonable. Plaintiffs' Interpretations are Not.

Copeland (2010) was designed to identify a single variable that defines wolverine distribution. PI-507. The single variable that Copeland (2010) hypothesized could define wolverine distribution was the persistence of spring snow for denning. LIT-982.

While Dr. Copeland chose to define wolverine distribution based on a hypothesized biological need, according to Dr. Copeland, “[t]he model is about distribution more so than biology. It only suggests that if you look in this area, there is a 98% probability that you are looking at wolverine denning habitat.” PI-507. “The model only represents our best guess at the wolverine’s world-wide distribution.” PI-1381.

This “best guess” at worldwide distribution was developed by defining “persistent spring snow” in a way that causes as many known den sites to fall within the model as possible without actually capturing 100% of all den sites. PI-1380, PI-506. If the model captured all sites, then it risked being over-inclusive, and therefore unhelpful in defining wolverine habitat. PI-1380. For instance, if

wolverine distribution was defined as areas that typically contain snow cover in February, when wolverines give birth, then it would have included huge areas wolverines have never occupied.

In order to make the model inclusive of known dens, but not too inclusive, Copeland (2010) defined areas “persistent spring snow” very specifically as areas with snow cover on May 15th at least once every seven years. PI-1378. PI-1380 – PI-1381; PI-1006. Nothing in the record indicates how Copeland (2010) arrived at the threshold frequency of “once every seven years” to define “persistent spring snow,” but we know that Copeland (2010) tested and rejected the “inclusiveness” of other dates other than May 15th. PI-1374; PI-1378; PI-1381. According to Dr. Copeland, “the dates we used were simply a component of the model development process.” PI-506.

Copeland (2010) drew a line around known wolverine denning sites and then defined “persistent spring snow” so that the line closely matched the line around the known sites. In other words, Copeland (2010) defined “persistent spring snow” as the type of snow in which wolverine dens are most frequently found. The oddly specific and nuanced definition of areas with persistent spring snow as those with snow cover on May 15th at least once every seven years was created to draw the most precise and useful line around known wolverine distribution. It “defined

where wolverine habitat is not *what* wolverine habitat is.” PI-1379. And, because den occurrence, and not an analysis of obligate snow conditions, drove the definition of “persistent spring snow,” FWS rationally concluded that Copeland (2010) defined wolverine distribution very well, but that it did not provide the mechanism that drives wolverines to select areas that maintain snow cover into spring. FR-7. This rational determination does not conflict with the oft-cited “97% accuracy” of Copeland (2010), because that statistic speaks to Copeland (2010)’s ability to define wolverine distribution through a single variable—it does not suggest there is a biological basis for an obligate relationship with “areas with snow on May 15th at least once every seven years.

Of course, the single variable structure of Copeland (2010) was based on a hypothesis that wolverines require persistent spring snow, so it is impossible to entirely separate the biology from the model, but Copeland (2010) did not define “persistent spring snow” in a way that sought to identify the obligate relationship or the precise needs that persistent spring snow served. Copeland (2010) defined “persistent spring snow” as the springtime snow found around most wolverine dens—snow on May 15th at least once every seven years. Copeland (2010)

correlated wolverine denning with this type of snow, but it did not show that this type of snow caused wolverines to select dens in it.⁴

FWS rationally determined that Copeland (2010) successfully defined persistent spring snow in a way that rather precisely bounded known denning sites and favorably viewed McKelvey (2011) as a sophisticated analysis of potential climatological impacts to those known denning sites. FR-5362. But because Copeland (2010) defined only where wolverines live, and not what wolverines need to live, FWS rationally determined that McKelvey (2011)'s modeling the potential loss of areas with snow cover on May 15th at least once every seven years did not provide evidence that wolverines will be at risk of extinction within the foreseeable future. FR-5362. There is no conflict between the Service's recognition that McKelvey (2011)'s modeling was sophisticated and its

⁴ According to Dr. Copeland, "as far as the May 15 date not having biological support, it really doesn't need to for the model development." PI-1381. As he admonished Dr. Magoun when she pressed Dr. Copeland for the basis for May 15th, "What you need to do is try and separate the model from the biology." PI-1383. Dr. Copeland further suggests that the selection of May 15th served both to calibrate the inclusiveness of the model to known habitat and a biological function: ". . . May 15th not only worked well for the modeling but it also has a biological tie to the animal as representing the end of denning. This is a bit fortunate but it is as much coincidence as anything." PI-1378. As Dr. Copeland explained elsewhere, "[t]he beginning and ending dates have no specific link to wolverine ecology other than they were meant to be inclusive of when we would expect the cessation of denning." PI-1006. "The 14th or 15th of May date was a bit arbitrary but I think it generally matches the time of den abandonment." PI-1005.

determination that it did not demonstrate a likelihood that wolverines would be on the brink of extinction in the foreseeable future. McKelvey (2011) is a sophisticated model that projects changes to a habitat feature found where wolverines den—it did not model the decline of a feature without which wolverines would be placed on the brink of extinction within the foreseeable future.

Plaintiffs suggest that FWS, in issuing its final listing determination, disputed that wolverines are a snow-dependent species, that they always initiate dens in snow, that all dens are in some way associated with snow, or even that there is evidence of an obligate relationship with deep spring snow. *See* DOW Response at 9; WEG Response at 11; DOW MSJ at III.A.1. The Service, however, did not dispute any of these issues nor did it base its final decision on a contrary view of these issues—these are not in dispute now.⁵ FR-16. FWS simply adopted a reasonable interpretation of two studies with which Plaintiffs disagreed, but the Service’s interpretation is rational, fully explained, consistent with the ESA, and correct. It is entitled to deference.

⁵ Although Plaintiff DOW is correct that the dissenting peer reviewers and some FWS biologists questioned the obligatory nature of the relationship with spring snow. DOW Response at 9; PI-1556 – PI-1560.

V. CONCLUSION

For the forgoing reasons, Energy Industry Intervenors respectfully request that this Court grant their Cross-Motion for Summary Judgment, and deny Plaintiffs' Motions for Summary Judgment.

DATED this 20th day of November, 2015.

s/ Randy J. Cox
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