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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al*, Plaintiffs, v. UNITED STATES FISH AND WILDLIFE SERVICE, *et al*., Defendants, AMERICAN FOREST RESOURCE COUNCIL, *et al.*, Defendant-Intervenors.	No. 3:16-cv-06040-WHA **FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** Hearing: May 3, 2018 Time: 8:00 a.m. Judge: Hon. William H. Alsup Place: Courtroom 12

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NOTICE OF MOTION

Please take notice that Federal Defendants, United States Fish and Wildlife Service ("Service"), Ryan K. Zinke, in his official capacity as the United States Secretary of the Interior, and Greg Sheehan, in his official capacity as Principal Deputy Director of the United States Fish and Wildlife Service, hereby cross-move for summary judgement in the above-captioned case, pursuant to Rules 56 of the Local and Federal Rules of Civil Procedure. Federal Defendants' motion is based on the points and authorities set forth below and the administrative record, which was certified by Federal Defendants on July 31, 2017 (ECF No. 45). Federal Defendants' motion will be heard on May 3, 2018, at 8:00 a.m. before the Honorable William H. Alsup at the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California.

INTRODUCTION

The Service's decision to withdraw the proposed listing of the West Coast distinct population segment ("DPS") of fisher (hereinafter referred to as the "fisher") as "threatened" under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, is well founded. 81 Fed. Reg. 22,710 (Apr. 18, 2016) (hereinafter referred to as the "final listing determination"). As part of its exhaustive and deliberate review of the best available data, the Service concluded that past threats of timber harvest and over-trapping have largely been ameliorated, and there is no evidence to suggest that current stressors are resulting in population declines or further reduction in distribution, such that the fisher is in danger of extinction or may become so in the foreseeable future.

The Service thoroughly evaluated potential stressors, individually and cumulatively, on the fisher population in the context of the five factors that must be considered for listing under the ESA. In doing so, after proposing the fisher for listing under the ESA, the Service re-evaluated the best available information, including new information elicited from the public and scientific peer reviewers. Based on this analysis, the Service determined that wildfire, vegetation management, toxicants, and small population size were not causing population-level threats, such that the species warranted listing under the ESA. As part of that analysis, the Service considered

all of the population trend data available, and noted that the best available information indicated that the populations were either stable or not in decline. The Service also reaffirmed its finding in the proposed rule, that climate change was not a threat to fisher populations either now or in the foreseeable future.

Plaintiffs object to the Service's reliance on population trend data in concluding that the fisher is not endangered or likely to become so in the foreseeable future. But Plaintiffs present no information that is in some way better than the data that the Service relied on. Nor have Plaintiffs met their burden to show that the agency's action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Instead, Plaintiffs ask this Court to substitute their judgment and views for that of the Service. Plaintiffs' theory of the case is contrary to the fundamental premise of administrative law that reviewing courts are at their most deferential when, as in this case, an agency is making predictions within the area of its special expertise, at the frontiers of science. Any scientific and technological uncertainty entitles an agency to greater deference, not less.

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

STATUTORY BACKGROUND

Section 4 of the ESA directs the Secretary of the Interior[1] to determine which species should be listed as endangered or threatened under the Act, based on the following factors:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;

[1] Depending on the species involved, "Secretary" in the ESA refers to either the Secretary of the Interior or Commerce. 16 U.S.C. § 1532(15). The fisher falls under the jurisdiction of Interior. The Secretary has delegated his responsibilities to the Service.

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

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

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

If the Service issues a "warranted" 12-month finding, it must promptly publish in the Federal Register "a general notice and the complete text of a proposed regulation to implement" the listing, 16 U.S.C. § 1533(b)(3)(B)(ii), (5)(A)(i), and provide for a public comment period of 60 days. 50 C.F.R. § 424.16(c)(2). The Service must thereafter make a final listing determination within 12 months, *id.* § 1533(b)(6)(A), or 18 months if there is "substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the

determination," *id*. § 1533(b)(6)(B)(i), (iii). A final listing determination can be either: (1) a final regulation to implement the proposed rule; or (2) withdrawal of the proposed rule because the Service determines that the species is not endangered or threatened, *id*. § 1533(b)(6)(A)(i).

FACTUAL AND PROCEDURAL BACKGROUND

I. Pacific Fisher

The fisher (*Pekania pennanti*) is a medium-sized mammal in the weasel family. AR 000684. Fishers are found only in North America and reside in coniferous and mixed conifer hardwood forests. *Id*. Fisher habitat necessary for resting and denning is created and maintained in forests through ecological processes such as fire, insect-related tree mortality, disease, and decay. *Id.*

In 2014 the Service concluded that the population of fishers which have historically occurred throughout western Washington, western Oregon, and California qualified as a distinct population segment.[2] *Id*. The west coast DPS of fisher occurs in five populations – two original native populations, the Northern California-Southwestern Oregon population ("NCSO") and the Southern Sierra Nevada population in California ("SSN"), as well as three reintroduced populations, the Northern Sierra Nevada population in California ("NSN"), the Southern Oregon Cascade population ("SOC"), and the Olympic Peninsula population ("ONP") in Washington. AR 000684. Pacific fishers are genetically distinct from fishers found in the remainder of North America and the Service concluded that loss of the DPS as a whole would result in a significant gap in the fisher's range, moving the southernmost boundary of the species north by nearly 1,600 kilometers. AR 000681.

II. Listing Petitions and Candidate Species

The fisher has been petitioned for listing under the ESA on three occasions. On June 5, 1990, the Service received a petition to list the Pacific fisher as endangered. AR 000680. The Service concluded the listing was "not warranted" on January 11, 1991. *Id.* The Service received

[2] The term "species" in the ESA includes "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). Thus, the west coast DPS of fisher is a listable entity under the Act.

a second listing petition on December 29, 1994, to list two fisher populations (Pacific fisher and fisher in Idaho, Montana, and Wyoming) as threatened. *Id*. Again, the Service concluded that the petition did not present substantial information that the species warranted listing. *Id.* On December 5, 2005, the Service received Plaintiffs' petition to list the Pacific fisher as endangered. *Id.* The Service published a 12-month finding ("2004 finding") on April 8, 2004 (69 Fed. Reg. 18,770 (Apr. 8, 2004); AR 000007-30), that the west coast DPS of fisher warranted listing but was precluded by higher-priority actions, and added the species to the candidate list.[3] On April 8, 2010, Plaintiffs challenged the Service's alleged lack of expeditious progress on the Pacific fisher's listing. AR 000680. This challenge was resolved by stipulated dismissal on October 5, 2011, in the context of a larger multi-district litigation settlement agreement requiring the Service to issue a proposed rule or "not warranted" finding for the fisher by the end of fiscal year 2014. *Id*.

III. Proposed Rule

On October 7, 2014, the Service proposed to list the fisher as a threatened species ("proposed rule"). 79 Fed. Reg. 60,419 (Oct. 7, 2014); AR 000676. In the proposed rule, the Service identified possible threats to the fisher as "habitat loss from wildfire and vegetation management; toxicants (including anti-coagulant rodenticides); and the cumulative and synergistic effects of these and other stressors acting on small populations." AR 000677. The Service also solicited detailed comments from the public and peer reviewers on "particularly complex issues with regard to the status of the species and identification of potential distinct population segments" on 20 categories of information. AR 000677-79.

The comment period for submission of information originally expired on January 5, 2015. AR 000676. In order to ensure the public had an adequate opportunity to review and comment upon the proposed rule, the Service extended the comment period for an additional 30 days, to February 4, 2015. AR 000702. On April 14, 2015, the Service re-opened the comment

[3] Candidate species are those species for which there is sufficient information to support a listing proposal, but for which development of a listing regulation is precluded by higher priority listing activities. 16 U.S.C. § 1533(b)(3)(B)(iii).

period for another 30 days, to May 14, 2015, to allow it to solicit and consider additional information that would help it clarify issues relevant to its final listing determination. AR 000703. The Service also announced a six-month extension for publication of the final listing determination based upon substantial disagreement regarding available information related to toxicants and rodenticides (including law enforcement information and trend data) and related to surveyed versus unsurveyed areas (including data on negative survey results) to help assess distribution and population trends, in order to solicit additional information concerning these matters. AR 000703. During the comment periods, the Service received more than 460 public comment letters. AR 153844. In addition, a substantial amount of information was received from peer reviewers, including previously existing information of which the Service was not aware when it published the proposed rule. *Id*. The Service incorporated this information, along with recently published journal articles and unpublished reports, in the final Species Report and considered all of the best available information in its final listing determination. *Id*.

IV. Final Listing Determination

On April 18, 2016, the Service published its final listing determination withdrawing the proposed rule. 81 Fed. Reg. 22,710; AR 153821. In relevant part, the Service concluded that the best available data indicate that "the stressors potentially impacting the proposed DPS and its habitat are not of sufficient magnitude, scope, or imminence to indicate that the DPS is in danger of extinction, or likely to become so within the foreseeable future." *Id*. The Service explained that its final listing determination differed from the proposed rule because the Service had reconsidered the information available to it prior to the proposed listing, as well as new information received from the public and peer reviewers. AR 153824. The Service noted that, in light of the best available information available at the time of the final listing determination, the identified stressors could no longer be considered such threats to the fisher, either now or in the foreseeable future, as to warrant listing. AR 153825.

In considering the stressors facing the fisher, the Service noted that its quantification approach in the proposed rule required the Service to make assumptions or extrapolate impacts in an attempt to quantify stressors in areas where stressor-specific information was not available.

AR 153824. The Service noted that extrapolation may have created a false sense of precision with respect to the scientific accuracy underlying assessment of impacts, causing the Service to adopt a qualitative approach to describe stressors in the final Species Report. *Id*. Moreover, the Service recognized that there had been a significant amount of varied scientific, Service, other agency, and public opinion regarding the status of the fisher both prior to the proposed rule and following its issuance. AR 153824. While recognizing that fishers within the west coast states have been exposed to multiple stressors, and that stressors may be impacting some individual fishers or habitat, the Service concluded that the best available evidence did not show that the stressors are functioning as operative threats on the fisher's habitat, populations, or the proposed DPS as a whole to the degree considered at the time of the proposal. *Id.*

STANDARD OF REVIEW

Judicial review of the Service's final listing determination is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706. The APA sets a narrow and deferential standard of review, limited to whether the Service acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Although a reviewing court's inquiry in an APA case "must be thorough, the standard of review is highly deferential; the agency's decision is 'entitled to a presumption of regularity,' and [the reviewing court] may not substitute [its] judgment for that of the agency." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (citations omitted).

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

ARGUMENT

I. The Service Reasonably Concluded that the Fisher Is Not Likely to Become Endangered Within The Foreseeable Future Throughout All or A Significant Portion of its Range.

The Service's determination that the fisher is neither in danger of extinction nor likely to become so in the foreseeable future complies with all requirements of the ESA and is entirely reasonable. 16 U.S.C. § 1532(6), (20); AR 153843. In reaching its conclusion, the Service thoroughly and objectively examined all available scientific and commercial information as applied to the statutory listing factors. AR 153828-843. Based on information and comments received from peer reviewers and the public, the Service re-evaluated its analysis and carefully considered each of the identified stressors, individually and cumulatively, that could impact fishers. AR 153824. After careful consideration, the Service concluded that the identified stressors were not of such imminence, intensity, or magnitude that they are currently threats to the population as a whole, or in a significant portion of the fisher's range. AR 153825. The Service also concluded that, in the foreseeable future, it is likely that fishers will continue to maintain their populations in the face of these stressors, consistent with evidence that fishers have been able to do so in the recent past. *Id*. Thus, the Service determined that the fisher does not meet the statutory definition of a threatened or endangered species. *Id.* The Service's expert judgment is entitled to deference and should be upheld. *Jewell*, 747 F.3d at 601.

A. The Service Evaluated All of the Stressors Facing the Fisher and Reasonably Concluded That the Fisher Did Not Warrant Listing As Threatened.

In reaching the conclusion that the fisher is neither in danger of extinction nor likely to become so in the foreseeable future, the Service noted the equivocal nature of the information considered at the proposal and thoroughly and objectively re-examined all available scientific and commercial information as applied to the statutory listing factors, as well as new information obtained through comments from peer reviewers and the public. AR 153824. The Service thoroughly considered the stressors that may impact the fisher, including wildfire, vegetation management, human development, climate change, exposure to toxicants, trapping, disease or predation, and collisions with vehicles. AR 153828. Although the Service exhaustively considered all of the potential stressors, Plaintiffs challenge the Service's analysis of only four of

these stressors – climate change, wildfire, exposure to toxicants, and small population size. Plaintiffs' Brief (ECF No. 55) ("Pls. Br.") at 16-18.

The stressors that the Service considered of the highest current or future scope and magnitude within the range of the proposed DPS included those stressors that may result in present or future habitat destruction or modification, as well as exposures to toxicants. Stressors which may result in impacts to the fisher's habitat include vegetation management, wildfire, and habitat-related loss from the effects of climate change. Habitat loss from logging has been implicated as one of the two primary causes of fisher decline (with unregulated fur trapping being the other). AR 153831, 834. Despite some ongoing habitat loss, the Service determined that vegetation management activities were not a threat.[4] AR 153833-834. In reaching its conclusion that vegetation management did not constitute a threat to fisher now or in the foreseeable future, the Service made four principal findings. First, the Service determined that, although timber harvest is still ongoing, habitat ingrowth is also occurring, offsetting some habitat losses. AR 153832; AR 15368-81. For example, habitat in the southern Sierra Nevada appears to be increasing despite losses to logging and recent large wildfires. AR 153571. Structurally, older forest is also increasing in the Oregon coast rage, concurrent with a decrease in forest fragmentation. AR 153573. Second, fishers can continue to use some managed landscapes – that is fishers and fisher habitat can be found in logged areas. AR 153833, AR 153580-81. Third, there are large areas of suitable but unoccupied habitat throughout the fisher's range, suggesting that habitat does not appear to be limiting for fishers in the proposed DPS. AR 153833-34. Fourth, there is no evidence of a population-level response attributable to vegetation management activities. *Id*.

Similarly, the Service concluded that neither wildfires nor climate change threatened the viability of fisher populations now or in the foreseeable future. AR 153829-153834. Wildfires are a naturally occurring phenomenon, which historically demonstrated a variety of both positive

[4] The Service acknowledged that, in the proposed rule, data limitations prevented quantification of areas that may still function as fisher habitat after vegetation management, and the rule did not account for ingrowth of fisher habitat over the 40-year analysis timeframe. AR 153832.

and negative consequences. AR 153830; AR 153533-35. Although there is some evidence that wildfires may be increasing in severity, such a conclusion is subject to scientific debate and the best available information does not suggest that fisher habitat will experience significant impacts as a result of wildfire or fire suppression activities. AR 153830. The Service determined that wildfires did not rise to the level of a threat based on the expectation that (1) future wildfires will continue at a similar rate and severity across the landscape has been occurring in the recent past, (2) wildfires are not expected to be high severity in all cases such that they destroy habitat for entire populations, (3) forest ingrowth is expected to continue to provide suitable habitat to help offset anticipated wildfire-related habitat losses, and (4) future low- or mixed-severity fires are expected to continue to provide some benefits to fisher habitat. AR 153830. Likewise, impacts to fisher habitat from climate change ranged from negative to neutral to potentially beneficial. AR 153830-31. Consistent with the proposed rule, in the final listing determination the Service reaffirmed its conclusion that climate change is not a threat to fishers now or in the foreseeable future because there is no indication that this stressor is causing habitat loss or range contraction at the population level and because there is suitable unoccupied habitat available to help offset any foreseeable impacts from climate change. AR 153831; *cf.* Pls. Br. at 16-17.

In addition to habitat-related impacts, the Service considered whether exposure to toxicants or small population size might warrant the fisher's listing under the ESA. Although noting that there is evidence that fishers have been exposed to anticoagulant rodenticides, the Service concluded that exposure to toxicants was not a threat. AR 153836. This conclusion was based on the fact that there is no evidence that toxicants are impacting fishers at the population level, in connection with no evidence that rodenticide usage will increase within the range of the fisher DPS in the future. AR 153836. Moreover, the Service determined that there was no evidence indicating that exposure to toxicants at sub-lethal levels, *i.e.*, at levels below which would cause direct mortality but may impair an animal's ability to recover from injury, was occurring range-wide or at the population level. AR 153626; 153836. Thus, the best available information does not suggest that, in areas where toxicant exposure has been documented, there has been any population level declines. AR 153836, *cf.* Pls. Br. at 17.

Finally, the Service evaluated whether fisher populations were small and isolated, and if those factors would increase the species' vulnerability to extinction from random, large-scale threats (stochastic events). AR 153836-37. In the proposed rule the Service concluded that isolation of small populations and associated risk of extinction from stochastic events was a threat to the fisher. AR 153837. The Service noted, however, that those conclusions were based largely on general theoretical principles of ecology rather than information specific to fisher population dynamics. *Id*. However, new information indicates that the native NCSO population and the reintroduced NSN and SOC populations may be overlapping and genetic interchange occurring. *Id.* The reintroduction of additional populations of fisher reduce the likelihood of loss to random events, thereby increasing the resiliency of the species. *Id*. Moreover, the separation between the NCSO and SSN populations is longstanding, and the best available information does not suggest that there have been negative consequences on these populations as a result of separation, or that there will be population-level impacts in the future. *Id*. Thus, population size and isolation are not considered threats. *Id.* In sum, the Service considered all of the stressors facing fishers and reasonably concluded, based on evidence in the record, that the fisher was neither in danger of extinction, or likely to become endangered in the foreseeable future throughout all or a significant portion of the species' range.

B. The Best Available Science Supports the Service's Conclusion that Identified Stressors are Not Having Population-Level Effects.

In determining that fishers do not meet the definition of a threatened or endangered species, the Service relied on two key types of evidence. First, the Service considered qualitatively the scope and severity of identified stressors, based on data in the record, including input from the public and the expert opinions of numerous scientists, including the Service's own experts. AR 153824. For example, when considering whether wildfire is a threat at the population level, the Service considered evidence that wildfires are not expected to be high severity in all cases such that they would destroy habitat for entire populations because of the broad distribution of fisher habitat, even if wildfire severity were to increase. AR 153830. The Service also determined, based on evidence in the record, that forest ingrowth is expected to

continue to provide suitable habitat, and future low- or mixed- severity fires would provide some benefits to fisher habitat and offset some future wildfire impacts. AR 153830.

Similarly, when considering impacts such as toxicants or climate change, the Service evaluated a range of evidence indicating that neither stressor was expected to be a threat to the fisher's habitat or population levels. As noted, the underlying studies of climate change in the record present a range of effects including some that indicate conditions would remain suitable for fisher. AR 153830. The best available information also indicated that suitable unoccupied habitat for fisher throughout its range would offset any potential foreseeable future impacts from climate change. AR 153831. With respect to toxicants, the best available data did not indicate that toxicant usage was expected to increase in the foreseeable future, nor was there evidence of significant impacts on fisher populations, or that there was any decline in fisher abundance in areas where toxicant use was documented. AR 153836.

In addition to qualitatively analyzing the scope and severity of each identified stressor, the Service also analyzed whether or not identified stressors were operating as threats at the population or range-wide level. In doing so, the Service relied in part on population trend data as circumstantial evidence of stressors having a manifested impact. AR 153828.

Four studies in the record describe population trends of fisher. AR 153827. Population trend information for the NCSO population is based on two long-term studies (Higely *et al.* 2014 ("Hoopa study area"); Powell *et al*. 2014 ("Eastern Klamath study area")). AR 153827. For both studies, the estimated growth rate was within a 95% confidence interval (the estimated range values which, with a 95% probability, is likely to include the actual population growth rate) that included 1. AR 153827. A growth rate of 1.0 indicates a stable overall population trend. *Id*. Two available studies in the record estimated population trend information for the SSN population (Zielinski, *et al.* 2013; Sweitzer, *et al.* 2015). *Id.* The Zielinski study showed no declining trend in fisher occupancy, but the Service determined that this study was inconclusive, and did not rely on the results. *Id*. Like the East Klamath and Hoopa studies, Sweitzer's study showed a population trend confidence interval which straddled 1.0, the indicator of a stable overall population trend. *Id*.

Contrary to Plaintiffs' arguments, these studies are not "limited and inconclusive." Pls. Br. at 22. The cited population studies are, by all accounts, the best available data about fisher population trends. The standard for making listing decisions established in the ESA is that they be based on "the best scientific and commercial data available." 16 U.S.C § 1533(b)(1)(A). Even if the available scientific and commercial data are "quite inconclusive, [the Secretary] may – indeed must – still rely on it at that stage." *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000); *see also Jewell*, 747 F.3d at 602 (the Service "cannot ignore available biological information") (citation omitted). Thus, the best available science requirement "merely prohibits an agency from disregarding available scientific evidence that in some way is better than the evidence it relies on." *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006) (citation omitted).

Plaintiffs do not contest that the population data is not the best available, nor do they offer other studies to support their arguments. *See* Pls. Br. at 19-23. Rather, Plaintiffs look at the same evidence the Service considered and argue for a different conclusion. The law of this Circuit is clear, however, that reviewing courts should defer to the judgment of the expert agency in such situations. *Kern Cty. Farm Bureau*, 450 F.3d at 1081. For example, Plaintiffs point to the Service's statement that the Zielinski study "must be considered inconclusive," as evidence to rebut the Service's conclusion. Pls. Br. at 21. But the Service acknowledged such limitations in the final rule as a reason for relying on the other three population studies instead. AR 153827. In addition, Plaintiffs point out that the Sweitzer study found a population growth rate of 0.97, Pls. Br. 20, discounting the 95% confidence interval that included values above 1.0, while simultaneously noting that the East Klamath study had a confidence interval that included values below 1.0 and could theoretically indicate a declining population, despite the overall growth rate estimated at 1.06. Pls. Br. at 22. But these are two sides of the same coin. For example, the Sweitzer study includes values above 1.0, and thus could possibly indicate a growing population. The underlying science indicates that fishers naturally exhibit population fluctuations (AR 020150), thus the trend variation around 1.0 does not necessarily indicate either a steady decline or increase. It is inconsistency such as this that underscores the absurdity of allowing Plaintiffs to

substitute their opinion for the expert analysis of the agency charged with implementing the ESA.

Plaintiffs also speculate that the authors of the population studies would disagree with the Service's ultimate conclusion about the fisher. Pls. Br. at 20-22. In doing so, Plaintiffs cherry-pick phrases from each author's report, ignoring contrary evidence that the paper authors also agreed that the populations may be stable. *See*, *See, e.g.*, AR 012744 ("The increasing [population trend] estimate and the shift in age structure towards a slightly higher proportion of adult animals coupled with an increasing female to male ratio all indicate that the population is showing signs of stability or increase"); AR 024651 (noting that the growth rate model had upper range well above "suggesting stability or growth in some years. The estimated range for [population growth rate] was consistent with the estimated population densities, which did not indicate a persistent decline during 4 years from 2008-2009 to 2011-2012"); AR 035731 ("It is encouraging that the small population in the southern Sierra does not appear to be decreasing"). Moreover, Zielinski, in providing comments during the peer review period on the draft species report, did not dispute the Service's interpretation that his paper indicated that the SSN population was stable. AR 022520.

Aside from making unfounded assumptions, Plaintiffs' argument suffers two additional flaws. First, Plaintiffs' argument assumes that the only basis for the Service's decision not to list the species was an assumption that fisher populations were stable. However, as explained above, the Service did not rely exclusively on persistence in its listing decision, and in fact considered other factors in determining whether the potential stressors were threats to the species. Second, Plaintiffs' arguments conflate the tasks before the paper authors and the Service. It is the Service that is charged with evaluating the best available data and determining whether the fisher meets the statutory definition of "threatened" or "endangered". *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1539-40 (9th Cir. 1993). It is not surprising that the paper authors would recognize that fisher populations continue to face many stressors – the same stressors identified by the Service in the proposed rule. But at bottom, the paper authors were not charged with, and

did not evaluate, whether the fisher meets the statutory definition of a threatened or endangered species. That is a role reserved exclusively for the Service.

Thus, in tandem with the Service's qualitative analysis for each potential stressor, it was reasonable for the Service to conclude that none of the potential stressors were so great that the fisher is currently in danger of extinction, or likely to become so within the foreseeable future. AR 153825. While Plaintiffs may disagree with the Service's approach, the Service is the expert agency charged with making listing determinations under the ESA. *Cent. Ariz. Water Conservation Dist*., 990 F.2d at 1539-40. Indeed, the Ninth Circuit has recognized that determining whether a species is in danger of extinction required a great deal of predictive judgment, which is entitled to deference. *See Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009). Further, the Service "may not ignore evidence simply because it falls short of absolute scientific certainty." *See Northwest Ecosystem Alliance v. USFWS*, 475 F.3d 1136 (9th Cir.2007); *Jewell*, 747 F.3d at 602. The population studies are but one tool that the Service used in making such predictions about the fisher.

At their core, Plaintiffs' claims that the population trend data is "inconclusive" are nothing more than a policy disagreement with the Service's reasoned weighing of the evidence. Plaintiffs ask the Court to substitute their weighing of the available data and preferred conclusion for that of the Service. But Congress has charged the Service with weighing the available data, and its rational exercise of that duty is entitled to deference. *See Trout Unlimited*, 559 F.3d at 959; *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983).

II. Plaintiffs Have Not Shown that the Service's Decision is Arbitrary and Capricious.

As explained above, the Service thoroughly evaluated each of the statutory listing factors and reasonably concluded that the fisher does not meet the definition of either a threatened or endangered species. Plaintiffs fail to acknowledge the majority of the Service's analysis and mischaracterize the potential stressors to fisher as threats. Moreover, Plaintiffs are fundamentally mistaken about what the ESA requires for listing. First, Plaintiffs fail to address that, as a matter of law, the ESA requires that a species meet the statutory definition of "threatened" or

"endangered" if it is to be listed. 16 U.S.C. § 1533(a)(1); § 1532(6), (20). Second, Plaintiffs impose a standard on the Service that is contrary to the ESA by arguing that the Service is precluded from considering population trend data when making a listing determination. Contrary to Plaintiffs' assertions, the Service properly considered all of the best available data and reasonably analyzed whether population size, by itself or in combination with other factors, was a threat to the fisher either currently or in the foreseeable future.

A. A Species Can Be Listed Under the ESA Only If It Meets the Statutory Definition of a Threatened or Endangered Species.

Plaintiffs attempt to read into the statute a mandatory requirement that the Service "must" list a species if it is exposed to any level of stressor. Both the proposed rule and final listing determination are clear, "[t]he mere identification of stressors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate." AR 000684. In considering whether the stressor is a threat to the species' continued existence, the Service must "look beyond the mere exposure of the species to the stressor to determine whether the species responds to the stressor in a way that causes actual negative impacts to the species." AR 00684. To list a species the Service requires "evidence that these stressors are operative threats that act on the species to the point that the species meets the definition of an endangered or threatened species under the [ESA]."*Id.*[5]

Nothing in the statute directs the Service to list a species if it is merely exposed to stressors. Rather those stressors must be great enough such that they are operating on the species to the point that the species meets the definition of either a threatened or endangered species under the ESA. Neither does the statute establish a formula for the Service to follow in assessing the magnitude of potential stressors. Instead, the appropriateness of listing a species is left to the Service's informed discretion whether a species is in danger of becoming extinct throughout all

[5] Under the ESA, the Secretary is charged with determining whether any species is an endangered or threatened species based on any one of the five listing factors. 16 U.S.C. § 1533(a)(1). Thus, the ultimate question is: does the species meet the statutory definition of a threatened or endangered species? 16 U.S.C. § 1532(6), (20).

or a significant part of its range, or is likely to become an endangered species. 16 U.S.C. § 1532(6), (20).

Plaintiffs' argument mischaracterizes the stressors facing fisher as threats to the fisher's existence. Pls. Br. at 16-18. The Service clearly explained in the final listing determination why none of the identified stressors caused the fisher to be in danger of extinction now or in the foreseeable future. AR 153828-39. For example, in the proposed rule and final listing determination, the Service determined that climate change was not a threat, in part because climate change studies indicate that climate change was not anticipated to cause significant habitat loss in the foreseeable future, and that availability of unoccupied habitat would help offset any potential foreseeable future impacts to the species. AR 000686, AR 153831. Similarly, the Service gave a reasoned explanation of why wildfires (AR 153830), toxicants (AR 153836), or small population size (AR 153838) did not rise to the level of a threat to the species. Thus, Plaintiffs' arguments that an exposure to stressors requires the Service to list a species conflicts with the plain language of the statute and should be rejected.

B. The Service Is Permitted to Consider Evidence of Persistence in Making a Listing Determination.

There is nothing unlawful (nor surprising) about the Service having considered the extent to which the fisher persists as evidence important to predicting whether it will continue to persist in the future (*i.e.*, not go extinct). *See, e.g., Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 877 (9th Cir. 2009) ("Although [the Service] places considerable weight on the lizard's persistence throughout most of its remaining range, reliance on persistence is not *per se* inconsistent with *Defenders*.") (citing *Defs. of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001). Furthermore, the Service, in fact, did not rely exclusively on data relating to the fisher's persistence, but instead used various metrics to assess whether the identified stressors could be considered threats to the fishers continued existence. *Supra* § I(B).

Plaintiffs argue that the Service erred in concluding that fisher populations are "basically stable." Pls. Br. at 19. As explained above, the best available data do not indicate that any of the monitored fisher populations are exhibiting a trend that is anything other than stable. *Supra* § I(B). That is, there is no evidence in the record, and Plaintiffs fail to present any information, that

fisher populations are currently declining. Nor is there anything "underdeveloped" or "unclear" about the population studies that the Service considered. *Supra* § I(B); *cf.* Pls. Br. at 19-20. Fishers may be "difficult to survey" but, if anything, that would *underestimate* the abundance and distribution of the species, not counsel in favor of erring on the side of assuming that the population is declining. *Cf.* Pls. Br. at 19. Moreover, evidence available since the proposed rule was published indicates that the NCSO population may be expanding its range and that the NCSO, NSN, and SOC populations may be converging. AR 153509-10.

The circumstances in this case are neither analogous to *Tucson Herpetological Society*, nor are they analogous to *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670 (D.D.C. 1997). *Cf.* Pls. Br. at 22-23. In *Tucson Herpetological Society*, the court faulted the Service for inferring that lost range was insignificant on the basis of one ambiguous study. 566 F.3d at 879. It was not merely the Service's reliance on the ambiguous study that was the problem – it was the Service's inference that the study indicated that lost range was not significant in the absence of other data. *Id*. Here, the Service is relying on three studies which all show the same results – the available population trend data for the fisher is within a confidence interval that includes a population growth rate which is considered stable. AR 153825-27. In *Babbitt*, the court faulted the Service for claiming that lynx populations were increasing when the underlying studies in fact showed "dramatic declines with no associated increases on the expected 10 year scale" – in essence, the Service completely ignored the scientific data before the it. 958 F. Supp. at 682. But here, the population studies in this case are clear – there is no evidence that the population is in decline. AR 153825-27. Moreover, "[t]he absence of conclusive evidence of persistence, standing alone, without persuasive evidence of widespread decline, may not be enough to establish that the Secretary *must* list the lizard as threatened or endangered." *Tucson Herpetological Soc'y*, 566 F.3d at 879 (citing *Cook Inlet Beluga Whale v. Daley*, 156 F. Supp. 2d 16, 21-22 (D.D.C. 2001). And, as already explained, not only is there no evidence of widespread current decline in the record, the Service considered persistence of the species in tandem with its qualitative analysis of the scope and severity of potential stressors in evaluating whether the fisher was a threatened or endangered species. AR 153828.

In sum, the Service is permitted to consider population trend data in determining whether the identified stressors rise to the level of threats to the fisher. Indeed, the best available information requirement in the ESA required the Service to consider the population studies. *Southwest Ctr.*, 215 F.3d at 60; *Jewell*, 747 F.3d at 602. The best available data supports the Service's determination that fishers are generally stable and not experiencing population or range-wide effects as a result of the identified stressors. Thus the Service's determination that the fisher does not meet the definition of a threatened or endangered species does not run "counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) *cf.* Pls. Br. at 23.

C. The Service Reasonably Evaluated Population Size and the Foreseeable Future Requirement Under the ESA.

Certainly, it is true that the Service need not wait for conclusive evidence of a species' decline before listing. *See Alaska Oil & Gas Ass'n v. Priztker*, 840 F.3d 671, 683 (9th Cir. 2016) (*pets. for cert. docketed*, Nos. 17-118, 17-133 (July 21, 2017). But there must at least be a "causal link" between a stressor and the species' survival. *Id.* Where, as here, the best available information counseled against listing, the Service's determination should be upheld. Listing decisions may not be based on speculation or surmise. *Bennett v. Spear*, 520 U.S. 154, 176 (1997). Thus, there must be some evidence that identified stressors are a threat if the Service is to list a species. Plaintiffs argue, however, that the Service's approach ignores (1) threats that small populations may experience, and (2) the ESA's mandate to evaluate threats to the species in the foreseeable future. Pls. Br. at 23. But the final listing determination clearly shows that the Service thoroughly evaluated whether small population size warranted the fisher's listing, and whether the fisher was likely to become an endangered species in the foreseeable future. AR 153828-39.

In the final listing determination, the Service provided a robust discussion of why small population size was not considered a threat to the fisher, such that it warranted listing. AR 153836-38. The Service did not "brush[ ] the small population size… issue aside." *Cf.* Pls. Br. at 24. This is not like *Defenders of Wildlife v. Jewell*, where the court concluded that the Service had failed to articulate how small population size was not itself an adverse effect. 176 F. Supp.

3d 975, 1006 (D. Mont. 2016). In the final listing determination, the Service explained that forest carnivores generally occur in low densities and, despite their size, the SSN and NCSO populations had persisted over a long period of time. AR 153837. The Service also cited evidence of interchange between the NCSO population and the NSN and SOC populations as reducing the risk of small population size on the species. *Id*. The Service also analyzed whether there was sufficient redundancy, representation, and resiliency to ensure that fishers would persist into the future and contribute to the long-term genetic viability of the species. AR 153837-38. The Service concluded that multiple populations provided sufficient redundancy and representation, particularly in light of reintroduced populations, such that "small population size by itself is not a threat" to the fisher. AR 153838.

The Service then evaluated the overall resiliency, redundancy, and representation of the species to determine, qualitatively, if the fisher meets the definition of a threatened or endangered species. The Service found that redundancy, interacting populations across a broad geographic area, continues to exist across the west. AR 153838. There are five broadly distributed populations, which increases the probability that fisher populations within the DPS boundary will persist into the future and contribute to the species' long-term genetic viability. *Id*. The Service also concluded that, with five separate populations of fisher, representation, or the diversity of the species, was also sufficient. *Id.* Finally, the Service evaluated the resiliency of the species, or the capacity of the species to recover from disturbances or adapt to change, *i.e*. potential stressors. AR 153837. Resiliency is often a function of genetic diversity. *Id*. Although the smaller population sizes of the fisher may contribute to decreased resiliency, forest carnivores generally occur at low densities. *Id*. Moreover, fishers exhibit a broad range of genetic diversity throughout the DPS, which may contribute to increased resiliency. AR 153838. In addition, the two native populations have continued to persist for a long time in the face of identified stressors, and there is no indication that populations are declining. *Id*. Thus, the Service concluded that the fisher populations exhibit sufficient resiliency, redundancy, and representation, such that the species is not in danger of extinction or likely to become endangered

in the foreseeable future. AR 153838. It is simply not the case that the Service ignored small population size in determining that the fisher did not meet the definition of a threatened species.

Nor did the Service ignore the foreseeable future requirement in the ESA. *Cf.* Pls. Br. at 24-25. Congress has directed the Service to look into the "foreseeable future" and determine if a species is likely to become endangered in that time period. 16 U.S.C. § 1532(20). As explained above, this exercise necessarily requires the Service to make predictions based on its expertise. Here the Service determined that the best available science allows the agency to reliably forecast impacts to fisher over a time period of 40 years. AR 153825. For each stressor, the Service considered whether, over the next 40 years, the scope and severity of the identified stressors would impact the fisher such that the species would become endangered in that time period – the definition of a "threatened" species. For example, in considering whether high-severity fires pose a risk to the fisher, the Service concluded that "even in the event that [wildfire] frequency and severity increases rather than decreases, it is extremely unlikely that any such magnitude would cover an entire fisher population area." AR 153830. Indeed, the expected risk of "future" wildfires was considered throughout the Service's analysis. *Id.* Likewise, with respect to toxicants, the Service concluded that there was no information in the record that the use of anticoagulant rodenticides would increase within the range of the DPS in the future. AR 153836. Thus it is clear the Service did not ignore the ESA's requirement to consider whether the fisher would become an endangered species in the foreseeable future.

Plaintiffs' attempt to impose restrictions on how the Service exercises its predictive judgment runs afoul of the ESA and Congressional intent. Congress intended for the Service to be the arbiter of whether a species will become endangered in the foreseeable future. *Cent. Ariz. Water Conservation Dist.*, 990 F.2d at 1539-40. Although the Service may take preventative measures before a species is definitively headed for extinction, *Babbitt*, 958 F. Supp. at 680, the ESA does not permit speculation or surmise, *Bennett*, 520 U.S. at 176. Instead the standard for making listing decisions established in the ESA is that they be based "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). The best available

data support the Service's conclusion that the fisher is not likely to become endangered in the foreseeable future and the Service's predictive judgment should be upheld.

Plaintiffs point to nothing that the Service failed to consider. At bottom, Plaintiffs disagree with the Service's interpretation of the evidence; however, the Court cannot remand the final listing determination based on a difference of opinion. *See, e.g.*, *Lands Council*, 537 F. 3d at 988.

III. Plaintiffs Have Waived Count II by Failing to Properly Advance an Argument in Their Summary Judgment Brief.

Plaintiffs fail to advance an argument in support of their second claim for relief and have thus waived that claim. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008) (arguments not raised in an opening summary judgment brief are waived). Although Plaintiffs' second claim for relief alleged that the Service's conclusion that the fisher was not threatened throughout any significant portion of its range is contrary to the best scientific and commercial data available (ECF No. 1 ¶ 64), Plaintiffs advance no specific arguments in support of their claim. Rather, the only mention of "significant portion of its range" is tacked on the final sentence of Plaintiffs' argument that the best available science allegedly supports a finding that the fisher is facing threats *throughout its entire range.* Pls. Br. at 18.

This is a classic example of waiver. "It is a general rule that a party cannot revisit theories that it raises but abandons at summary judgment." *USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1284 (9th Cir. 1994) (citations omitted). This rule promotes fairness and judicial economy by denying parties a "second bite at the apple" in the wake of adverse decisions. *Id.* at 1280. *Cf. Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1281 (2015) (Scalia, J., dissenting) ("By playing along with appellants' choose-your-own-adventure style of litigation, willingly turning back the page every time a strategic decision leads to a dead-end, the Court discourages careful litigation and punishes defendants who are denied both notice and repose."). Accordingly, courts in the Ninth Circuit routinely treat unpursued summary judgment arguments as waived. *See, e.g., Ramirez v. City of Buena Par*k, 560 F.3d 1012, 1026 (9th Cir. 2009). Because Plaintiffs have abandoned their second claim, the Court should find in favor of Federal

Defendants on claim 2. *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1116 (9th Cir. 1987).

IV. While no remedy is required here because the Service's determination is reasonable, Plaintiffs' Request that the Court Order the Service to Complete a Revised Listing Rule Within 90 Days Should be Rejected.

Plaintiffs, in their concluding remarks, ask this Court to order the Service to prepare a new rule within 90 days (Pls. Br. at 25) – a remedy which Federal Defendants note deviates from the relief requested in Plaintiffs' Complaint. *See* ECF No. 1 at 17, Paragraph C (requesting that the Court order the Service to publish a final rule within six months). As an initial matter, there is no statutory deadline applicable here for the Service to issue a revised finding for the fisher. The Ninth Circuit has found that, if the Service issues an initial positive 90-day finding on a listing petition, it must complete a 12-month finding on the petition within 12 months of receiving the petition. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1170-71 (9th Cir. 2002). But the Service addressed any such obligation here by issuing the proposed rule, to which this final determination discharges any remaining statutory obligations. 16 U.S.C. § 1533(b)(6)(A)(i) (a final listing determination can be either: (1) a final regulation to implement a determination whether a species is endangered or threatened; or (2) withdrawal of the proposed rule because the Service determines that the species is not endangered or threatened).

Nor is the Court required to set a deadline for publication of a revised rule, as the "ordinary remedy when a court finds an agency's action to be arbitrary and capricious is to remand for further administrative proceedings," although a court may "remand with specific instructions in 'rare circumstances'". *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 770 (9th Cir. 2007), *quoting Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Indeed courts often remand rules to the agency without setting a date for completing a revised 12-month finding. *See, e.g.*, *Defs. of Wildlife*, 176 F. Supp. 3d at 1011-12; *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. C04-04324 WHA, 2005 WL 2000928, at *16–17 (N.D. Cal. Aug. 19, 2005).

Ninety days would simply not be enough time for the Service to prepare a new rule, as recognized by prevailing case law in this circuit. *Tucson Herpetological Soc'y*, 566 F.3d at 874 (requiring a new decision on listing within 12 months); *Ctr. for Biological Diversity v. Norton*, 208 F. Supp. 2d 1044, 1052 (N.D. Cal. 2002) (allowing just over 11 months for a new listing decision). If the Court is inclined to set a date for completing a revised 12-month finding, Federal Defendants submit that briefing the question of remedy is necessary. Remedy briefing would allow the Service to evaluate staffing and budget constraints, and present any such relevant evidence to the Court before equitable relief is fashioned. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008) (the court has broad latitude in fashioning equitable relief) (citation omitted); *Envtl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 972 (9th Cir. 1995) (requiring the district court to consider availability of appropriated funding in setting a date for completing a 12-month finding under the ESA).

CONCLUSION

The Service's determination that the fisher does not meet the definition of an "endangered" or "threatened" species is fully explained and supported by the administrative record. Plaintiffs have not shown that the Service misapplied the ESA listing standards, or that the Service's determination was anything but rational. Plaintiffs ask this Court to adopt their interpretation of the evidence, which is an impermissible basis to overturn the Service's determination under the applicable standard of review. Plaintiffs failed to meet their burden to show that the agency's action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. For the foregoing reasons, the Court should grant summary judgment for Federal Defendants.

Respectfully submitted this 19th day of January, 2018,

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