

1 Erika E. Malmen, Idaho Bar No. 6185 *Pro Hac Vice*  
 EMalmen@perkinscoie.com  
 2 Robert A. Maynard, Idaho Bar No. 5537 *Pro Hac Vice*  
 RMaynard@perkinscoie.com  
 3 Alison C. Hunter, Idaho Bar No. 8997 *Pro Hac Vice*  
 AlisonCHunter@perkinscoie.com  
 4 PERKINS COIE LLP  
 1111 West Jefferson Street, Suite 500  
 5 Boise, ID 83702-5391  
 Telephone: 208.343.3434  
 6 Facsimile: 208.343.3232

7 *Attorneys for Defendant-Intervenors*

8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN FRANCISCO DIVISION

10 CENTER FOR BIOLOGICAL DIVERSITY,  
 ENVIRONMENTAL PROTECTION  
 11 INFORMATION CENTER, KLAMATH-  
 SISKIYOU WILDLANDS CENTER, and  
 12 SIERRA FOREST LEGACY,

13 Plaintiffs,

14 v.

15 U.S. FISH & WILDLIFE SERVICE; RYAN  
 K. ZINKE, in his capacity as Secretary of the  
 16 Interior; and GREG SHEEHAN, as Acting  
 Director of the U.S. Fish & Wildlife Service,

17 Defendants,

18 and

19 AMERICAN FOREST RESOURCE  
 20 COUNCIL, an Oregon nonprofit corporation,  
 CALIFORNIA FORESTRY ASSOCIATION,  
 21 a California nonprofit corporation,  
 NATIONAL ALLIANCE OF FOREST  
 22 OWNERS, a District of Columbia nonprofit  
 corporation, OREGON FOREST  
 23 INDUSTRIES COUNCIL, an Oregon  
 nonprofit corporation, and WASHINGTON  
 24 FOREST PROTECTION ASSOCIATION, a  
 Washington nonprofit corporation,

25 *Defendant-*  
 26 *Intervenors.*

Case No. 3:16-cv-06040-WHA

**DEFENDANT-INTERVENORS' NOTICE  
 OF MOTION, CROSS-MOTION FOR  
 SUMMARY JUDGMENT AND  
 MEMORANDUM IN SUPPORT**

Hearing: May 3, 2018

Time: 8:00 AM

Judge: Hon. William H. Alsup

Place: Courtroom 12

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<b>Page</b>
NOTICE OF MOTION .....	1
INTRODUCTION .....	1
BACKGROUND .....	2
A.    Statutory Background.....	2
B.    Factual Background .....	3
1.    Species.....	3
2.    Petition to List and Proposed Rule.....	5
3.    New Information and Reanalysis Following the Proposed Listing Decision.....	7
4.    Final Species Report and Withdrawal of Proposed Rule.....	11
STANDARD OF REVIEW .....	12
ARGUMENT .....	12
A.    In Withdrawing the Proposed Rule, the Service Properly Considered the Five Statutory Listing Factors Prescribed in ESA Section 4 .....	12
1.    The Service Properly Considered the Effects of Climate Change .....	15
2.    The Service Properly Considered the Effects of Wildfire and Fire Suppression .....	17
B.    The Service’s Conclusions Regarding Fisher Population Size Were Rational, Supported and Explained.....	18
C.    The Service Provided a Rational Basis for Its Conclusion that Small Population Size Does Not Pose a Threat to Fisher Either Now or in the Foreseeable Future .....	23
D.    If the Court Determines that the Service’s Withdrawal of the Proposed Rule Was Arbitrary and Capricious, Remand Is the Appropriate Remedy .....	25
CONCLUSION .....	25

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**  
**(s)**

**CASES**

*Alaska v. Lubchenco*,  
825 F. Supp. 2d 209 (D.D.C. 2011) .....15, 25

*Ctr. for Biological Diversity v. Lubchenco*,  
758 F. Supp. 2d 945 (N.D. Cal. 2010) .....3, 16

*Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*,  
246 F. Supp. 3d 1272 (N.D. Cal. 2017) .....22, 23

*Colo. River Cutthroat Trout v. Salazar*,  
898 F. Supp. 2d 191 (D.D.C. 2012) .....18

*Defs. of Wildlife v. Jewell*,  
176 F. Supp. 3d 975 (D. Mont. 2016) .....23, 24

*Defs. of Wildlife v. Babbitt*,  
958 F. Supp. 670 (D.D.C.1997) .....20, 22

*Kern Cnty. Farm Bureau v. Allen*,  
450 F.3d 1072 (9th Cir. 2006).....18

*Lands Council v. McNair*,  
537 F.3d 981 (9th Cir. 2008).....15

*Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*,  
475 F.3d 1136 (9th Cir. 2007).....15, 20

*Or. Nat’l Res. Council v. Daley*,  
6 F. Supp. 2d 1139 (D. Or. 1998) .....3

*Sw. Ctr. for Biological Diversity v. Norton*,  
No. CIV.A.98-934, 2002 WL 1733618 (D.D.C. July 29, 2002).....20

*Trout Unlimited v. Lohn*,  
645 F. Supp. 2d 929 (D. Or. 2007) .....3

*Tucson Herpetological Society v. Salazar*,  
566 F.3d 870 (9th Cir. 2009).....21, 22

*W. Watersheds Project v. Ashe*,  
948 F. Supp.2d 1166 (D. Idaho 2013).....16

**TABLE OF AUTHORITIES**  
**(continued)**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**

*Wildwest Inst. v. Kurth*,  
855 F.3d 995 (9th Cir. 2017).....2

**STATUTES**

16 U.S.C. § 1532.....2

16 U.S.C. § 1533.....2, 3, 15, 18

**NOTICE OF MOTION**

1  
2  
3 Please take notice that Defendant-Intervenors American Forest Resource Council,  
4 California Forestry Association, National Alliance of Forest Owners, Oregon Forest Industries  
5 Council, and Washington Forest Protection Association (“Defendant-Intervenors”) respectfully  
6 move for summary judgment. This motion will be heard on May 3, 2018, at 8:00 a.m., before the  
7 Honorable William H. Alsup at the United States Courthouse, 450 Golden Gate Avenue, San  
8 Francisco, California. This motion is supported by the accompanying Memorandum and the  
9 administrative record lodged by the United States Fish & Wildlife Service (the “Service”).

10 Summary judgment is appropriate because the administrative record shows that the  
11 Service reasonably determined, using the best available science, that withdrawal of the proposed  
12 rule listing the fisher as threatened under the Endangered Species Act (“ESA”) was warranted.  
13 Accordingly, Defendant-Intervenors request that the Court grant the instant motion and enter  
14 summary judgment in favor of all Defendants.

**INTRODUCTION**

15 This case involves a challenge to a final decision by the Service to withdraw a proposed  
16 rule listing the West Coast distinct population segment (“DPS”) of the fisher (“fisher”) as a  
17 threatened species under the ESA. Plaintiffs disagree with the Service’s ultimate conclusion that  
18 the best available science does not support such a listing, and seek to have this Court inject itself  
19 into that scientific debate. In so doing, Plaintiffs essentially argue that the Service should ignore  
20 the best available science on fisher population trends, but do not point to any better available  
21 science or studies the Service failed to consider. Instead, Plaintiffs selectively cite excerpts from  
22 the record they believe support their side of the debate—that listing is warranted due to the small  
23 fisher population size. The question for the Court, however, is whether the record supports the  
24 agency’s rationale for withdrawing the proposed rule—i.e., that the fisher is not in danger of  
25 extinction now or in the foreseeable future.  
26  
27  
28



1 ... is not promulgated as a final regulation . . . because the Secretary finds that there is not  
 2 sufficient evidence to justify the action proposed by the regulation, the Secretary shall  
 3 immediately withdraw the regulation.” 16 U.S.C. § 1533(b)(6)(B)(ii).

4 When evaluating the likelihood and foreseeability of extinction, the Service must utilize  
 5 “the best scientific and commercial data available.” *Id.* § 1533(b)(1)(A). While this standard  
 6 allows consideration of uncertain information, it does not supplant the ESA’s definitional  
 7 prohibition on listing as threatened any species for which extinction is not likely or foreseeable.  
 8 Contrary to Plaintiffs’ assertions otherwise, courts have universally held that the decision to list a  
 9 species may not be based on speculation or a “benefit of the doubt” principal:

10 Under Section 4, the default position for all species is that they are  
 11 not protected under the ESA. A species receives the protections of  
 12 the ESA only when it is added to the list of threatened species after  
 13 an affirmative determination that it is ‘likely to become endangered  
 14 within the foreseeable future.’ Although an agency must still use  
 15 the best available science to make that determination, *Conner* [*v.*  
 16 *Burford*, 848 F.2d 1441 (9th Cir. 1988)] cannot be read to require  
 an agency to ‘give the benefit of the doubt to the species’ under  
 Section 4 if the data is uncertain or inconclusive. Such a reading  
 would require listing a species as threatened if there is any  
 possibility of it becoming endangered in the foreseeable future.  
 This would result in all or nearly all species being listed as  
 threatened.

17 *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see also Ctr. for Biological*  
 18 *Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (finding the “benefit of the  
 19 doubt” concept does not apply in the listing context); *Or. Nat’l Res. Council v. Daley*, 6 F. Supp.  
 20 2d 1139, 1152 (D. Or. 1998) (ESA requires a determination as to the likelihood—rather than the  
 21 mere prospect— that a species will or will not become endangered in the foreseeable future).

## 22 **B. Factual Background**

### 23 **1. Species**

24 The West Coast fisher is a forest-dwelling mammal with populations in Oregon,  
 25 California and Washington.<sup>1</sup> AR000712. Currently, the fishers in the west coast states include

---

26  
 27 <sup>1</sup> The West Coast distinct population segment of the fisher is also referred to as the Pacific  
 28 fisher.

1 two original native fisher populations (Northern California-Southwestern Oregon Population  
2 (“NCSO”) and the Southern Sierra Nevada Population (“SSN”)). AR000716. There are also  
3 three reintroduced populations: (1) the Olympic Peninsula Reintroduced Population (“ONP”) in  
4 Washington, (2) the Southern Oregon Cascades (“SOC”) Reintroduced Population in Oregon, and  
5 (3) the Northern Sierra Nevada Reintroduced Population (“NSN”) in California. *Id.*

6 The ONP reintroduced population began with the release of 90 fishers (50 females and 40  
7 males) into Olympic National Park between 2008-2010 by state and federal partners. AR000716-  
8 17; AR179269 (Happe peer review). Surveys of the reintroduced fishers show they “have been  
9 detected in a wider array of habitats than was predicted at the onset of the reintroduction effort, in  
10 fact 1/3 of the detections were on state, private or tribal lands and 5/6 were in hexes containing a  
11 variety of seral stages and landownerships.” AR038002 (Happe 2013 email regarding progress  
12 on Olympic fisher restoration). Research is ongoing of course, but monitoring and recapture  
13 analysis have indicated positive results from the reintroduction. AR038001-02; AR0012269  
14 (Happe *et al.* 2015).

15 The fishers making up the SOC reintroduced population are descendants of fishers that  
16 were introduced in 1961 and between 1977 and 1981. AR022636, 022638. Despite the relatively  
17 small number of individuals introduced, this population has persisted without any additional  
18 augmentation since 1981. AR022636.

19 Finally, the NSN population began with a translocation of 40 individual fishers from  
20 northwestern California to private timberlands in Butte County, California owned by Sierra  
21 Pacific Industries (“SPI”) in late 2009 through 2011 as part of the Stirling Management Unit  
22 Candidate Conservation Agreement with Assurances (“CCA”).<sup>2</sup> AR022637. Monitoring of the

---

23  
24 <sup>2</sup> This CCA was finalized in 2008 and implements conservation measures on 160,000  
25 acres of SPI land. AR022715. The CCA also includes provisions requiring fisher monitoring  
26 and incentivizing the acceptance of reintroduced fishers on enrolled land. *Id.* SPI is also in the  
27 process of getting a second CCA approved that would cover approximately 1.5 million acres of  
28 its private commercial forest in the southern Cascades and Sierra Nevada Mountains of  
California. AR022715-16. The Service is also working on another CCA in Oregon, with  
prospective non-federal landowners and manager committing over 375,000 acres as of March  
2016. AR022716. Finally, the Washington Department of Fish and Wildlife (“WDFW”) has also



1 fishers indicated that twelve of the female fishers are known to have denned after translocation,  
2 producing at least 31 kits the first three years of the reintroduction. AR020269-70 (Powell *et al.*  
3 2013). In October 2012, field personnel conducted a large-scale trapping effort on the Stirling  
4 Management Unit to recapture previously released fishers and their progeny. Twenty-nine fishers  
5 were captured and, of those, 19 had been born on Stirling. AR020264 (Powell *et al.* 2013).  
6 Based on the results of trapping at Stirling, most females (70%) were less than 2 years of age and  
7 males represented 47% of the population, suggesting relatively high levels of reproduction and  
8 recruitment. AR020263 (Powell *et al.* 2013). The Service concluded in the Final Species Report  
9 that ongoing monitoring of these reintroduced fishers indicates that they are reproducing and have  
10 expanded their occupancy northward into the surrounding forested areas beyond the original  
11 footprint of the reintroduction. AR022637-68; AR020264 (Powell *et al.* 2013) (“[A]ll metrics  
12 suggest a stable to increasing population of fishers on the area of Stirling that we trapped.”).

13 Survey data and genetic information submitted during the two public comment periods  
14 show that the SOC and NSN reintroduced populations are converging with the NCSO population,  
15 which will allow interbreeding among these three formerly isolated populations. *See* AR022638.  
16 Accordingly, the Service now considers the NCSO fisher population to include areas formerly  
17 identified as being the SOC and NSN reintroduced populations. AR000716; AR022638.

## 18 **2. Petition to List and Proposed Rule**

19 Efforts to list the species, or certain distinct population segments of the fisher, date back to  
20 1990, and, not surprisingly, have generated a substantial amount of controversy and litigation.

21 On December 5, 2000, the Service received a petition from the Center for Biological  
22 Diversity and other groups to add the West Coast DPS of the fisher to the list of endangered  
23 species pursuant to the ESA, and to concurrently designate critical habitat for this DPS. On April  
24 8, 2004, the Service published a 12-month status review finding that listing the West Coast DPS

---

25  
26 sought a permit from the Service so that it can be responsible for enrolling non-federal  
27 landowners in Washington in a CCAA. AR022716; AR033236 (WDWF 2016 Programmatic  
28 CCAA). Enactment of these CCAAs will “further fisher conservation” and “support future  
reintroductions” of fisher. AR022716; AR033245-49.

1 of fisher was warranted, but was precluded by higher priority actions. This finding added the  
2 fisher to the federal candidate species list. AR000007-30.

3 On October 7, 2014, the Service issued a proposed rule to list the fisher as a threatened  
4 species under the ESA (“Proposed Rule”). AR000676-700. In the Proposed Rule, the Service  
5 found that “the main threats to the West Coast DPS of fisher are habitat loss from wildfire and  
6 vegetation management; toxicants (including anticoagulant rodenticides); and the cumulative and  
7 synergistic effects of these and other stressors acting on small populations.” AR000677. The  
8 Service also analyzed climate change, development, trapping, research, disease and predation,  
9 and vehicle collisions as potential stressors, but found that these activities were not threats to the  
10 fisher either now or in the future. AR000686-90.

11 The Proposed Rule states that mere identification of stressors that could impact a species  
12 negatively is not sufficient to compel a finding that listing is appropriate; rather there must be  
13 “evidence that these stressors are operative threats that act on the species to the point that the  
14 species meets the definition of an endangered or threatened species under the Act.” AR000684.  
15 In attempting to evaluate potential stressors across eight sub-regions, the Service estimated the  
16 potential scope and severity of stressors on fisher or their habitat, often-times based on  
17 extrapolation, due to the limited available data. AR000685. For example, the Service noted that  
18 “[f]ishers’ behavioral and population responses to fires are unknown within the West Coast  
19 range,” and considered wildfire and fire suppression to be threats to fisher habitat now and in the  
20 future based on “fishers outside the West Coast range and other related species” and estimates  
21 that “the frequency and size of wildfires is increasing.” *Id.*; AR000686.

22 In addition to the Proposed Rule, the Service also made the Draft Species Report, a  
23 compilation of the best scientific and commercial data available through December 2013,  
24 available for peer review and comment. AR000677. Recognizing the complexity and potential  
25 uncertainty regarding issues concerning the fishers’ status, the Service provided extensive  
26 questions with background information on the issues on which it particularly sought comments  
27 and information to ensure its final determination was based on the best scientific and commercial  
28

1 information available. AR000677-79. The Service also had 22 scientists, with a range of subject  
2 matter expertise and experience with fisher, provide peer review of the Draft Species Report and  
3 Proposed Rule.

### 4 **3. New Information and Reanalysis Following the Proposed Listing Decision**

5 The Service received an extensive amount of information and comments regarding the  
6 proposed listing of the fisher from both peer reviews and public comments. The peer reviewers  
7 generally praised the Service for the thoroughness of its review.<sup>3</sup> Indeed, several reviewers also  
8 concluded that the Draft Species Report appeared to use the best science available at the time of  
9 its publication (December 2013), while also pointing out new relevant studies or studies that  
10 potentially deserved more consideration than the Draft Species Report provided. While both  
11 support for and against listing could be cherry-picked from peer reviews and public comments, a  
12 notable pattern of criticism emerged in both peer reviews and public comments regarding the  
13 modeling of habitat effects and the analysis of each of the stressors the Proposed Rule found to be  
14 operative threats.

---

15  
16 <sup>3</sup> Plaintiffs' characterization of the peer reviews is misleading. While it is true that many  
17 peer reviewers praised the thoroughness of the Draft Species Report and the breadth of science it  
18 considers, the vast majority of reviewers did not address the continued validity of the Proposed  
19 Rule's listing conclusion. Indeed, many of the reviewers offered pointed criticisms of the  
20 Service's conclusions regarding the scope or severity of various stressors or the science  
21 underlying those specific conclusions. For example, Plaintiffs cite both Dr. Blake Murden's and  
22 Dr. Michael Schwartz's peer reviews as noting that the "Service's proposal to list the Pacific  
23 fisher as threatened" was "well supported by the Draft Species Report." Plaintiffs' Brief, ECF  
24 No. 55 ("Pls. Br."), at 12. While Dr. Murden did describe the proposed rule as being "well  
25 researched and well-written" overall, he went on to recommend improving the accuracy of the  
26 analysis by "correcting an identified inaccuracy, limiting the assumptions related to fisher habitat  
27 requirements, and by considering the short- and long-term benefits of active forest management,  
28 climate change, and natural disturbances," AR179247. These recommendations were  
incorporated into the Withdrawal. *See, e.g.*, AR000720-24. Similarly, Dr. Schwartz praised the  
thorough background work as "helping [him] understand the logic behind the decisions that were  
ultimately made in the proposed rule," but he also provided pointed criticisms. AR179366.  
Specifically, he points out both new information and studies that were not adequately considered  
in the Draft Species Report showing that the isolation between the two native populations has  
been longstanding, potentially occurring pre-European settlement and that the reintroduced SOC  
population has extended into the range of the NCSO population, with those populations  
potentially growing together and becoming indistinguishable in the 40-year time period the  
Service identified as the foreseeable future. AR179366-37. Such comments clearly anticipated a  
reevaluation of the proposed conclusions in the Proposed Rule prior to making a final  
determination regarding the listing decision.

1           Modeling of Fisher Habitat. The main criticism of fisher habitat modeling in the Draft  
2 Species Report was that the model relied on inapplicable data and unsupported extrapolations  
3 increasing the uncertainty of its predictions regarding fisher habitat and the effects of various  
4 stressors on this habitat. AR 179191 (Oregon Department of Fish and Wildlife “ODFW” peer  
5 review) (criticizing use of the northern spotted owl as a surrogate for the fisher to evaluate habitat  
6 loss on federal lands and stating that the Oregon Department of Fish and Wildlife “recommends  
7 using a different filter for examining habitat loss, and reevaluating the severity ascribed to  
8 vegetation management activities”); AR179263-64 (Peer review from Patti Happe of the National  
9 Park Service, who was the co- lead of the Olympic fisher reintroduction noted concerns “about  
10 the use of a projection of habitat relationships from northern California all the way up to the  
11 British Columbia (BC) boundary or the Straits of Juan de Fuca” and advising that the Service  
12 temper its predictions by stating “the uncertainty of the model increases as you travel north.”).

13           The Service also received multiple comments pointing out broad swaths of land on which  
14 fisher had been observed, but that were not considered fisher habitat by the modeling estimates.  
15 *See, e.g.*, AR116335 (Crater Lake National Park comment stating the modeling was inaccurate  
16 because it determined that “a majority of the Park (87%)” was not fisher habitat when in actuality  
17 there had been fisher observations in those areas and the habitat met fisher habitat description in  
18 the Draft Species Report).

19           Wildfire and Fire Suppression. Many peer reviewers and commentators criticized the  
20 Service’s conclusions regarding the threat of wildfires and fire suppression to fisher habitat for  
21 not considering that wildfires have been a part of fishers’ naturally-occurring historical habitat  
22 and the potential positive effects that both wildfires and fire suppression activity have on fisher  
23 habitat in addition to the potential negative effects. *See, e.g.*, AR179247 (Murden peer review)  
24 (suggesting that the Service consider “naturally-occurring wildfires in the West Coast region as  
25 an ecological disturbance that results in a potential long-term habitat enhancement rather than a  
26 short-term negative stressor” and that fisher “evolved under a natural disturbance regime that  
27 includes wildfires”); AR179183 (Zielinski peer review) (criticizing the failure to “evaluate the  
28

1 trade-offs between the negative direct effects of fuels treatments on fisher habitat and the indirect  
2 benefits, in terms of reduced severity of wildfire”).

3 The Service also received new information and references to studies documenting fishers’  
4 use of habitat in areas that had received fire suppression or fuels reduction treatment. *See*  
5 AR179191 (ODFW peer review) (noting that “Clayton (2013) observed fishers using stands that  
6 had recently received commercial and non-commercial fire resiliency treatments. The stated  
7 severity index may be an overestimate.”); AR009427-28 (Wildlife biologist with the Roseburg  
8 Resource Company comment noting surveys showing fisher “in areas that did not have fishers in  
9 the recent past” and throughout 45,000 acres of “heavily burned, heavily salvaged lands”).

10 Vegetation Management. The Service received extensive comments and new information  
11 challenging the estimates of the effects of vegetation management on fisher habitat. *See, e.g.,*  
12 AR179272 (Happe peer review) (recommending caution in “stating too much about the strength  
13 of the relationship between old-growth forests (OG) and fishers, given where we are finding  
14 fishers today” and noting that “[m]ost of the fishers we are finding are in areas that include a  
15 habitat mosaic of harvested and unharvested stands.”); AR179191 (ODFW peer review)  
16 (criticizing the severity estimate assigned to vegetation management as too high given the  
17 “fisher’s ability to use stands that have been managed” and noting that fishers “occur in northern  
18 California’s heavily managed forests and do not always demonstrate selection for the pockets of  
19 old growth that persist within their range”). These comments included observations and survey  
20 data from numerous timber companies documenting the presence of fisher across their private  
21 lands, which largely consist of managed forests with a long history of timber harvests. *See, e.g.,*  
22 AR008843-88 (*Diller et al.* 2015) (summary and analysis of surveys finding fishers present  
23 throughout land owned and managed by Green Diamond with the greatest number of incidental  
24 sightings occurring in areas “that had higher levels of timber management activities.”);  
25 AR164924-27 (Humboldt Redwood Company comment providing survey data showing that  
26 fisher were well distributed on its 210,000 acres of managed forest lands and that fisher density  
27 had likely increased since it began surveying in 2000); AR164953 (Roseburg Resources  
28

1 Company comment noting that surveys had detected fishers throughout 26,000 acres burned in  
2 the 1992 Fountain Fire that was “heavily salvage logged and subsequently replanted in the six  
3 years following the fire,” including areas where no older trees were retained).

4 The Service also received information challenging the assumptions in the Proposed Rule  
5 that fisher require old growth forests and that reduction in the amount of late-successional forests  
6 was a primary cause of fisher declines. *See, e.g.*, AR179272 (Happe peer review) (“There was no  
7 timber harvest in Olympic National Park, but we still lost our fishers due to fur harvest and  
8 predator control actions.”); AR179188 (ODFW peer review) (“First, the Draft Species Report  
9 applies a filter to descriptions of fisher habitat that relies too heavily on loss of mature forests.”).

10 The Service received criticism in regard to the Draft Species Report’s failure to consider  
11 the positive effects of vegetation management in addition to the potential negative effects.  
12 AR179248 (Murden peer review) (criticizing analysis in Draft Species Report for only including  
13 vegetation management-related habitat loss as a stressor “with no consideration of habitat  
14 recruitment and/or the habitat enhancements to fisher prey populations as a result of active  
15 management on private timberlands”); AR170700 (SPI public comment that “the low long-term  
16 impact of harvesting on fisher are demonstrated by the widespread presence of fishers on  
17 managed timberlands across various forest types in the NCSO [...] and the expansion of fisher in  
18 Northern California where these lands reside”).

19 Toxicants. Many commentators that expressed concerns regarding toxicants such as  
20 anticoagulant rodenticides (“ARs”) used on illegal marijuana grow sites, also acknowledged the  
21 uncertainty regarding the effects of ARs, particularly at a population level. *See, e.g.*, AR179199  
22 (Sauder peer review) (noting that it was unclear whether the Draft Species Report assumed all  
23 illegal marijuana grow sites use ARs, but if so “it may be overestimating the scope of this threat  
24 because it is doubtful that absolutely every grow operation uses [ARs]”); AR179253 (Sager peer  
25 review) (noting that it “seems a bit speculative to consider [rodenticide] an overall threat to fisher  
26 populations” and pointing out that “[t]he scope of the threat is based on numerous assumptions  
27 (density of marijuana growing operations, whether each operation uses ARs, etc.) and there are  
28

1 many unknown variables, both regarding health impacts and exposure levels”). Several  
2 commentators believed the Service’s estimates of fisher AR exposure, in particular in regard to  
3 exposure related to illegal marijuana grows, were overstated because it did not take into account  
4 habitat on private lands, which are far less likely to be used for illegal marijuana cultivation, or  
5 the effects marijuana legalization may have on such operations. *See, e.g.*, AR179204 (Verschuyt  
6 peer review) (“Differences in prevalence of large marijuana grow operations using rodenticide  
7 between private and public lands are not addressed.”); AR164955 (Roseburg Resources Company  
8 comment noting declines in illegal marijuana grows on its property and on public lands);  
9 AR170702-03 (SPI comment criticizing the failure to discuss “the recent legalization of  
10 marijuana in Washington, Oregon, Colorado and California and how that legislation may affect  
11 the trend in illegal grows and thus the certainty of the stressor scope and severity”).

12 Finally, comments from both the Washington State Department of Fish & Wildlife and the  
13 National Park Service noted that data regarding fisher AR exposure in California was not  
14 applicable to fisher in Washington. AR116334 (Comments from the Olympic, North Cascades  
15 and Mount Rainier National Parks); AR 179274 (Happe peer review).

#### 16 **4. Final Species Report and Withdrawal of Proposed Rule**

17 After considering an extensive amount of information and comments regarding the  
18 proposed listing of the fisher, the Service issued the withdraw of the Proposed Rule on April 18,  
19 2016 (“Withdrawal”). AR000711. In support of the Withdrawal, the Service also issued the  
20 Final Species Report, which had previously been circulated in draft form along with the Proposed  
21 Rule for comments and peer review and only included research and studies through December  
22 2013. The Final Species Report incorporated new science and information, constituting the best  
23 available science through March 2016. In the Withdrawal, the Service explained its decision  
24 stating: “Our evaluation of all this information leads us to conclude that the stressors acting upon  
25 the proposed West Coast DPS of fisher are not of sufficient imminence, intensity, or magnitude to  
26 indicate that they are singly or cumulatively resulting in significant impacts at either the  
27 population or rangewide scales.” AR000712.

1 Six months following the Service's Withdrawal, Plaintiffs filed this action on October 19,  
2 2016. ECF No. 1. Plaintiffs' Complaint challenges the Service's determination that the fisher  
3 does not warrant listing as a threatened species and asks this Court to set aside the Service's  
4 decision to withdraw the Proposed Rule. *Id.*

### 5 STANDARD OF REVIEW

6 Defendant-Intervenors adopt the Federal Defendants' Standard of Review from their brief,  
7 ECF No. 57, at 7, and fully incorporate it herein by reference.

### 8 ARGUMENT

9 The Service's decision to withdraw the Proposed Rule listing the Pacific fisher as  
10 threatened is supported by the administrative record and is entitled to deference.

#### 11 **A. In Withdrawing the Proposed Rule, the Service Properly Considered the Five** 12 **Statutory Listing Factors Prescribed in ESA Section 4.**

13 The Service's final rule withdrawing its proposal to list the West Coast DPS of the fisher  
14 properly considered all five statutory factors under section 4(a)(1) of the ESA. AR000719-32. In  
15 its evaluation of the five factors, the Service analyzed 12 stressors or activities "that may have  
16 some negative effects on fishers or their habitat." AR000715.

17 In evaluating what constitutes a "threat", an identified stressor was considered to rise to  
18 the level of a threat to fisher if the magnitude of the stressor is such that it is resulting in  
19 significant impacts at either the population or rangewide scales to fisher or their  
20 habitat. AR000715. The "mere identification of stressors that could impact a species negatively  
21 is not sufficient to compel a finding that listing is appropriate." AR000716. As the Service also  
22 stated in the Proposed Rule, "we require evidence that stressors are operative threats that act on  
23 the species to the point that the species meets the definition of endangered or threatened species  
24 under the Act." AR000716, AR000684. Contrary to Plaintiffs' argument otherwise, the Service  
25 did not require evidence that stressors are "currently causing detectable declines" as a prerequisite  
26 for listing the fisher. *See* Pls. Br. at 18. Indeed, the Service analyzed current stressors as well as  
27 stressors that may become "operative threats" in the future. *See, e.g.* AR000721 ("best available  
28



1 information does not suggest that fisher habitat will experience significant impacts . . . in the  
2 future as a result of wildlife fire and suppression activities”); AR000722 (“[N]or is there any  
3 indication that these scales of impacts are likely to occur in the foreseeable future.”); AR000727  
4 (Best available information does not suggest that AR impacts are currently an operative threat or  
5 would occur as an operative threat in the future).

6 For the first listing factor, “the present or threatened destruction, modification, or  
7 curtailment of its habitat or range,” the Service examined the risk from wildfire and fire  
8 suppression, climate change, vegetation management, development, and forest insects and tree  
9 diseases. AR000720-25. Significant to the Service’s analysis of this factor was consideration of  
10 the potential positive effects of climate change, vegetation management, and fire suppression on  
11 fisher habitat and new evidence showing the effects of vegetation management, wildfire, and fire  
12 suppression on fisher habitat were less severe than was previously assumed in the Proposed Rule.  
13 *See, e.g.*, AR179247 (Murden peer review); AR179183 (Zielinski peer review); AR022695;  
14 AR179225 (Diller peer review); AR179188, 179191 (ODFW peer review); AR179272 (Happe  
15 peer review); AR008843-88 (Diller *et al.* 2015); AR009427-28 (Public hearing testimony from  
16 Roseburg Resource Company’s wildlife biologist). Accordingly, the Service reasonably  
17 concluded that factor one did not rise to the level of a threat.

18 As for the second listing factor, “[o]verutilization for commercial, recreational, scientific,  
19 or educational purposes,” the Service noted that, historically, unregulated fur trapping presented  
20 the main threat to fisher, but concluded that the incidence of trapping or incidental capture is  
21 extremely low and not expected to increase in the foreseeable future. AR000725.

22 Third, the Service analyzed the risk to fisher from disease or predation and found no  
23 evidence that either rose to the level of a threat. AR000726.<sup>4</sup>

24 Looking to the fourth factor, the “inadequacy of existing regulatory mechanisms,” the  
25 Service found there were numerous federal and non-federal regulatory mechanisms that pertained  
26

---

27 <sup>4</sup> Plaintiffs do not challenge the Service’s conclusions on these two Factors.  
28

1 to management of fisher, including its protected status under state law in Washington, Oregon,  
2 and California,<sup>5</sup> its protected sensitive species status on Forest Service and Bureau of Land  
3 Management lands, and the numerous forest management practices on federal and private land,  
4 like the Northwest Forest Plan, that explicitly apply to benefit fishers or other species with many  
5 similar habitat requirements. AR000730. The Service determined that, far from posing a threat,  
6 multiple federal and state land use plans and regulations have “abated the large-scale loss of  
7 fishers to trapping and loss of fisher habitat.” AR000730.

8 As to the final listing factor, “other natural or manmade factors affecting [the fisher’s]  
9 continued existence,” the Service considered the risks to fisher from collisions with vehicles,  
10 exposure to toxicants, small population size and isolation, and the synergistic effects of all  
11 stressors. AR000726-30. In regard to the threat from small population size, the Proposed Rule’s  
12 conclusion to list was based on “*theoretical principles* regarding the implications of small  
13 population size and isolation for the persistence of *some generic species*.” AR000728 (emphasis  
14 supplied). In contrast, the Withdrawal focused on research and studies specific to both the  
15 fisher’s native and reintroduced populations. See AR000728; AR022635-50. Based on evidence  
16 specific to the fisher, the Service reasonably concluded that the best available science indicated  
17 that the two native populations of fisher were relatively stable and that the separation and smaller  
18 size of the populations were longstanding. AR000728. The Service also reasonably concluded  
19 that the recent and ongoing reintroductions to establish additional populations of fisher reduce the  
20 likelihood of loss to random stochastic events. *Id.*

21 In evaluating the five listing factors in conformance with the statutory requirement to base  
22 a listing decision *solely* on the best available science, the Service reasonably concluded that “the  
23 best available data do not indicate significant impacts at either the population or rangewide scales  
24 currently or in the foreseeable future.” AR000734. Listing determinations, such as the one at  
25 issue here, are “inherently fact-specific and science-dependent, and federal courts are particularly

---

26  
27 <sup>5</sup> The fisher is listed as endangered in Washington, it is a protected nongame species in  
28 Oregon, and the SSN population is listed as threatened in California. AR000730.

1 deferential toward agency findings—like those here—that involve ‘scientific determination[s].’”  
2 *Alaska v. Lubchenco*, 825 F. Supp. 2d 209, 215 (D.D.C. 2011) (citation omitted); *Lands Council*  
3 *v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (“[W]e are to conduct a ‘particularly deferential  
4 review’ of an ‘agency’s predictive judgments about areas that are within the agency’s field of  
5 discretion and expertise ... as long as they are reasonable.’”) (citation omitted). Moreover, courts  
6 recognize that the Service may change its mind after internal deliberation. *See Nw. Ecosystem*  
7 *All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1145 (9th Cir. 2007). The only question before  
8 the Court is whether the Service, in reaching its ultimate finding, “‘considered the relevant factors  
9 and articulated a rational connection between the facts found and the choices made.’” *Id.*  
10 (citation omitted). Where, as here, the Service has articulated a rational connection between the  
11 facts found concerning stressors to the species and its determination regarding the need for listing,  
12 the Court must defer to the Service’s expert judgment. *See Alaska*, 825 F. Supp. 2d at 214-15.

13 Plaintiffs ignore the Service’s conclusions and much of the analysis of scientific evidence  
14 in the Final Species Report regarding the effects of climate change, wildfire, and toxicants on  
15 fisher population and habitat. Rather, Plaintiffs misleadingly cite excerpts from the Final Species  
16 Report to argue that the Service found that these activities are “threats” to the fisher, which will  
17 become more intense in the future. No party disputes that there are stressors that may have  
18 negative effects on fisher or their habitat; the issue in this case is whether the identified stressors  
19 render the fisher “likely to become endangered in the foreseeable future,” which is a decision left  
20 to the sound discretion and expertise of the Service, not the courts. *See* 16 U.S.C. § 1533;  
21 AR000715.

22 **1. The Service Properly Considered the Effects of Climate Change.**

23 Plaintiffs’ arguments regarding the Service’s climate change analysis are unfounded. The  
24 Service examined numerous scientific studies regarding climate change. The Service recognized  
25 that climate change was likely to affect habitat within the range of the fisher, but that there was  
26 considerable uncertainty as to when habitat changes would occur, with most studies predicting  
27 that such changes would be gradual and only occur over a relatively long period of time. *See*  
28

1 AR022689. Because the variability between predictions as to the effects of climate change  
2 increases significantly the further out projections go, the Service determined that a 40-year  
3 timeframe was reasonable for estimating climate change effects on fisher habitat. AR0022677,  
4 022690. This analysis conforms to how both federal courts and the Department of the Interior  
5 have interpreted “foreseeable future” under the ESA. *See, e.g., W. Watersheds Project v. Ashe*,  
6 948 F. Supp.2d 1166, 1180 (D. Idaho 2013) (“The [agency’s] assessment of the ‘foreseeable  
7 future’ is typically based on the timeframes over which the best available scientific data allow  
8 [the agency] to reliably assess threats and the species’ response to those threats...” (internal  
9 quotation marks omitted)); *Ctr. for Biological Diversity*, 758 F. Supp.2d at 967 (observing that  
10 “the length of time that constitutes the ‘foreseeable future’ for listing purposes may vary  
11 depending on the species and the threats it faces”); Mem. from Office of the Solicitor, U.S. Dep’t  
12 of the Interior on the Meaning of “Foreseeable Future” in Section 3(20) of the ESA, No. M-37021  
13 (Jan. 16, 2009) (notifying the Service that its interpretation of the “foreseeable future” must be  
14 supported by reliable data regarding “threats to the species, how the species is affected by those  
15 threats, and how the relevant threats operate over time.”).

16 In regard to the few studies that were specific to future fisher habitat, the results were  
17 conflicting with some studies predicting habitat loss and some predicting habitat gain.  
18 AR022695; AR179225 (Diller peer review) (opining that attempting to predict the overall impact  
19 of climate change on fisher habitat was “too speculative” and that climate change “may have an  
20 overall positive impact on fishers on the west coast”). The Final Species Report concluded that  
21 while there is general scientific agreement that climate change will affect fisher habitat, there is  
22 no agreement “as to when and how these changes will occur, how they will affect the availability  
23 of suitable fisher habit, or how fishers will respond to these changes.” AR022695.

24 Plaintiffs do not attempt to dispute the Service’s exhaustive analysis of scientific studies  
25 regarding the effects of climate change and the limitations and uncertainties of these studies  
26 identified by the Service. Instead, Plaintiffs argue that climate change will increasingly become a  
27 threat to fishers in the future alleging that the Service found that the majority of studies show  
28

1 “climate change as causing ‘losses of up to 62 percent of currently forested habitat by the *late*  
2 *21st century* as a result of disturbance and subsequent conversion to grassland, shrubland, or  
3 woodland.’” Pls. Br. at 17 (quoting AR0022690) (emphasis supplied). This argument and citation  
4 is misleading for at least two reasons. First, it ignores the Service’s rational conclusion to look at  
5 a 40-year timeframe in predicting climate change effects on fisher habitat. Second, the quoted  
6 text is taken out of context as it referred to the majority of studies “showing shifts from conifer  
7 forests to mixed-conifer hardwood forest.” The full quote reads:

8           Models of future vegetation type vary greatly, with the majority  
9           showing shifts from conifer forests to mixed-conifer hardwood  
10           forest, as well as losses of up to 62 percent of currently forested  
11           habitat by the *late 21st century* as a result of disturbance and  
12           subsequent conversion to grassland, shrubland, or woodland; such a  
13           conversion would represent a long-term loss of fisher habitat.  
14           Other projections do not show a loss of forested habitat and suggest  
15           that the Sierra Nevada will maintain climate refugia for the  
16           foreseeable future.

17 AR0022690 (emphasis supplied). Contrary to Plaintiffs’ assertion otherwise, this passage is  
18 consistent with the Service’s conclusions regarding the effects of climate change on fisher habitat  
19 and does not represent a finding that climate change poses a threat to fisher in the foreseeable  
20 future such that a listing is warranted.

## 21           **2. The Service Properly Considered the Effects of Wildfire and Fire** 22           **Suppression.**

23           The Final Species Report also does not conclude that high-severity fires pose a risk to  
24 fisher viability or that high-severity fires are likely to increase in the future. Rather, the Service  
25 notes that “[w]hether fires may be increasing in severity is subject to continuing debate” and that  
26 the limited studies on the effects of fire on fisher habitat demonstrate “a variety of both positive  
27 and negative consequences, depending on specific circumstances.” AR000721. While the  
28 Service acknowledges that individual fisher will likely be impacted by this stressor, it reasonably  
concluded that the best available information does not suggest that fisher habitat will experience  
significant impacts at either the population or rangewide scales in the foreseeable future given:

- 1 (1) Future wildfires are expected to continue at a similar rate and  
 2 severity across the landscape as has been occurring in the recent  
 3 past,  
 4 (2) wildfires are not expected to be high severity in all cases such  
 5 that they destroy habitat for entire populations,  
 6 (3) forest ingrowth is expected to continue to provide suitable  
 7 habitat across the proposed DPS's range to help offset some future  
 8 wildfire impacts, and  
 9 (4) future low- or mixed-severity wildfires are expected to continue  
 10 to provide some benefits to fisher habitat to help offset some future  
 11 wildfire impacts.

12 AR000721. Plaintiffs do not dispute any of these conclusions nor do they point to any research or  
 13 studies the Service failed to consider in reaching its conclusion regarding the effects of wildfire  
 14 and fire suppression.

15 **B. The Service's Conclusions Regarding Fisher Population Size Were Rational,  
 16 Supported and Explained.**

17 The Service's decision to withdraw the Proposed Rule was made "solely on the basis of  
 18 the best scientific and commercial data available," as required by the ESA. 16 U.S.C. §  
 19 1533(b)(1)(A). This evidentiary requirement "merely prohibits [an agency] from disregarding  
 20 available scientific evidence that is in some way better than the evidence [it] relies on." *Kern  
 21 Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006). "The [Service] may not base  
 22 its listings on speculations or surmise or disregard superior data," but "occasional imperfections  
 23 do not violate [the ESA]." *Colo. River Cutthroat Trout v. Salazar*, 898 F. Supp. 2d 191, 208  
 24 (D.D.C. 2012) (citation omitted).

25 Analysis of the best available science led the Service to conclude that the growth rates for  
 26 the two native fisher populations are stable. The Service analyzed studies of fisher population  
 27 trends for the NCSO and the SSN fisher populations, all of which provide confidence intervals  
 28 bounding 1.0 for the growth rate,<sup>6</sup> indicating that the growth rate is not statistically different from

---

26 <sup>6</sup> For the NCSO population, the confidence intervals for the two studies cited in the  
 27 Withdrawal were 0.883-1.100 and 0.97-1.15. AR000728. For the SSN population, the  
 28 confidence interval for the cited studies was 0.79-1.16. *Id.*

1 1.0. AR000728. The Service also noted that the SOC reintroduced population “has now  
2 persisted for more than 30 years, despite a very small founding population” and that the other two  
3 more newly reintroduced populations are showing encouraging signs that they are breeding and  
4 expanding. AR000728.

5 Here, Plaintiffs argue that the four studies, (Sweitzer *et al.* 2015; Zielinski *et al.* 2013;  
6 Higley *et al.* 2013 (“Hoopa Reservation study”); and Powell *et al.* 2014 (“Eastern Klamath  
7 study”)), that the Service relied upon in the Withdrawal are “too limited and inconclusive” to  
8 provide a basis for the Service’s conclusion that the fisher population is stable overall. Plaintiffs  
9 do not identify any fisher population studies that the Service allegedly failed to consider or  
10 disregarded. Indeed, the Service’s review of the best scientific data available was thorough and  
11 included an examination of the limitations of the studies analyzed. *See* AR0022648. Plaintiffs  
12 essentially argue that the Service should not have relied on each of the studies because of certain  
13 limitations or findings in the studies, all of which the Service specifically acknowledged and  
14 considered in the Withdrawal and Final Species Report. Plaintiffs also intimate that the four  
15 studies they specifically criticize are the only information upon which the Service based its  
16 findings. However, it is clear from both the Withdrawal and the Final Species Report that the  
17 Service considered numerous other studies and reported data in addition to the four studies  
18 Plaintiffs challenge.

19 First, Plaintiffs criticize the Service’s use and interpretation of the Sweitzer study to  
20 support its conclusion that the SSN population is basically stable because the study found a  
21 population growth rate of 0.97, which Plaintiffs argue indicates a slightly decreasing population,  
22 and because the authors expressed concern for the viability of the population in the study area.  
23 Pls. Br. at 20. The Service acknowledged both of these points from the study, before concluding  
24 that “their research suggests a basically stable trend when considered together with information  
25 on population size and density.” AR000718 (providing that the estimated growth rate from the  
26 study is 0.97 and noting that the “authors express concern for the population”).

1 Plaintiffs similarly criticize the Service’s reliance on the Zielinski study based on  
2 limitations in the study the Service explicitly acknowledged. *See* AR0022648 (noting that the  
3 because of the small sample size and shorter duration, the results of the Zielinski study “must be  
4 considered inconclusive.”). These acknowledged limitations do not, however, mean that the  
5 Service should disregard the findings of the Zielinski study. Indeed, courts have held the Service  
6 may not ignore evidence simply because it falls short of absolute scientific certainty. *See Defs. of*  
7 *Wildlife v. Babbitt*, 958 F. Supp. 670, 679–80 (D.D.C.1997) (Service applied wrong legal  
8 standard in dismissing scientific evidence because it was not “conclusive”); *Nw. Ecosystem All.*,  
9 475 F.3d at 1147; *Sw. Ctr. for Biological Diversity v. Norton*, No. CIV.A.98-934 (RMU/JMF),  
10 2002 WL 1733618, at \*9 (D.D.C. July 29, 2002) (The “best scientific data available” requirement  
11 requires that the Service “rely on even inconclusive or uncertain information if that is the best  
12 available at the time of the listing decision.”).

13 Plaintiffs also criticize the Service’s reliance on the Hoopa Reservation and Eastern  
14 Klamath studies to estimate population growth trends for the NCSO population. The Hoopa  
15 Reservation study analyzed the results of a mark-recapture monitoring program on the Hoopa  
16 Reservation from 2005 through 2013,<sup>7</sup> and found female “annual population estimates trended  
17 upwards while male estimates were stable to declining.” AR00012951. Plaintiffs’ only criticism  
18 of the Eastern Klamath study was that its 95% confidence growth rate was .97-1.15, meaning it  
19 was “*possible* that the population is declining.” Pls. Br. at 22 (emphasis supplied). Plaintiffs thus  
20 ignore the Service’s rational and supported conclusion that “confidence intervals that include 1.0  
21

---

22 <sup>7</sup> The study did not involve analysis of a mark-recapture monitoring program from 1998  
23 through 2004. Thus, Plaintiffs’ claim that the study “found that fisher density declined  
24 dramatically—by 73%—between 1998-2004” misrepresents the scope of the study. Plaintiffs Br.  
25 at 21. The study began at the end of 2004 with the authors conducting a population density  
26 estimation for the area. AR012929. The study authors remarked that population density estimate  
27 was 73% lower than a similar population density estimate performed in 1998. AR012929.  
28 However, the scope of the study did not include any analysis of why there were differences  
between the 1998 and 2004 estimates, or otherwise include any other data or analysis concerning  
any of the years between 1998 and 2004. Finally, the comparison of one data set estimate from  
2004 to one data set estimate from 1998 does not disrupt the study’s findings of an essentially  
stable population within the study area from 2005 to 2013.



1 indicate “a statistically stable trend.” AR000728 (citing Powell *et al.* 2014, p. 23). A “possible”  
2 decline does not satisfy the listing standard—a species may only be listed as threatened if it is  
3 “likely” to become an endangered species in the foreseeable future.

4         Again, the four studies are not the only information upon which the Service based its  
5 findings. It is clear from both the Withdrawal and the Final Species Report that the Service  
6 considered numerous other studies and reported data. *See, e.g.*, AR000728, AR0022646. For  
7 example, in regard to the SSN population, the Service noted that “[s]everal approaches have been  
8 taken to understanding the [SSN] population status,” including density estimates for three study  
9 sites, one preliminary population viability analysis with parameters based on expert opinion, a  
10 spatially explicit population model based on a combination of empirical data and expert opinion,  
11 and one monitoring program. AR0022646 (citing Zielinski *et al.* 2004b, p. 654; Jordan 2007, pp.  
12 12-44; Sweitzer *et al.* 2015d, p. 78; Lamberson *et al.* 2000, entire; Spencer *et al.* 2011, entire;  
13 Zielinski *et al.* 2013b, entire). The Final Species Report examined all of these studies.  
14 AR0022646-48.

15         Plaintiffs’ attempts to compare the facts of the instant case to *Tucson Herpetological*  
16 *Society v. Salazar*, 566 F.3d 870 (9th Cir. 2009), are unavailing. In that case, Plaintiffs  
17 challenged the Service’s determination that the lost historical range for the flat-tailed horned  
18 lizard was not significant because the lizard persists throughout most of its range. *Id.* at 878-79.  
19 An earlier Service finding concluded that population dynamics information for the flat-tailed  
20 horned lizard was “limited and inconclusive.” *Id.* at 878. Indeed, much of the prior research had  
21 been based on a “scat count” method of estimating lizard population size, which all of the parties  
22 agreed had been discredited. Instead, the Service relied on a “capture-mark-recapture” study “for  
23 the proposition that, between 2003 and 2005, in two discrete sections of the lizard’s current range  
24 (both within designated lizard MAs), there is no evidence of a ‘large decline in population’ for the  
25 areas for which the researchers had more than one year of data.” *Id.* at 879. The Ninth Circuit  
26 found that the Service’s reliance on this “single attenuated finding” as the sole “evidentiary  
27 support for its sweeping conclusion that viable lizard populations persist throughout most of the  
28

1 species' current range" was unreasonable. *Id.* In contrast to the lack of evidentiary support for  
2 the Service's decision in *Tucson*, *see id.* at 882 ("How many flat tailed horned lizards are there?  
3 No one knows the answer to that question."), here the Service had and evaluated affirmative  
4 evidence demonstrating not only fisher population stability but also that fisher populations have  
5 been stable at or near their current size over a long period of time.

6 Plaintiffs also compare this case to *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670,  
7 wherein the court held that the Service erred in refusing to issue a proposed rule listing the  
8 Canada lynx as endangered or threatened. In that case, however, there was convincing evidence  
9 of the lynx's *declining* population levels. The administrative record showed a "dramatic" drop in  
10 lynx numbers, as well as their complete disappearance from 17 states. *Id.* at 674. The court  
11 found that the agency's decision, moreover, made repeated, false and unsupported assertions. *Id.*  
12 at 682 (criticizing the agency for making "unsupported statements" containing "significant factual  
13 errors contradicted by overwhelming record evidence."). None of these facts are at play in this  
14 case, making any comparison misguided.

15 The court's analysis in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*,  
16 246 F. Supp. 3d 1272 (N.D. Cal. 2017), regarding the Service's conclusions as to the stability of  
17 the California and Oregon populations of the Coastal Marten is instructive. In the marten case,  
18 Plaintiffs challenged the Service's characterization of the Coastal Marten population in California  
19 as stabilized despite the Service's Species Report "document[ing] a 42% population decline  
20 between 2001 and 2008 and a total population of less than 100 individuals." *Id.* at 1279. The  
21 Service's conclusion that the California population was stable was based on preliminary  
22 occupancy data showing similar numbers to those from 2008. *Id.* The court found that the  
23 Service's decision "[i]n the face of evidence of small and declining marten populations in  
24 California that was outdated by a few years," unreasonably relied on the *absence of more recent*  
25 *data* to conclude that the California population was stable. *Id.* at 1281. No such reliance  
26 occurred with respect to the fisher.

1 Plaintiffs also disputed the Service’s conclusion that the Oregon marten population was  
2 stable. However, the Court disagreed, finding that the best available evidence supported the  
3 Service’s conclusions about the size of the Oregon marten population. *Id.* at 1282. The Court  
4 explained the fact that “high quality surveys of marten abundance were unavailable and no data  
5 clearly showed population decline” for the Oregon population, distinguished the Service’s  
6 conclusions regarding the Oregon marten population from its conclusions regarding the California  
7 marten population. *Id.* at 1281. The court also found it notable that “recent (and still ongoing)  
8 surveys in Oregon have quickly detected the presence of coastal marten.” *Id.* While the court  
9 opined that “a rigorous, large-scale study of [Oregon marten population size] would be  
10 preferable,” in the absence of such a study, anecdotal evidence may constitute the best available  
11 evidence and cannot be ignored. *Id.* at 1282. Accordingly, the court refused to second guess the  
12 Service’s findings regarding the Oregon marten population, “particularly given that most of the  
13 evidence suggested relatively stable marten abundance levels.” *Id.*

14 Here, both recent survey data and qualitative evidence supports the Service’s conclusions  
15 that the fisher population is stable, and there is no evidence indicating that the population is  
16 declining. At bottom, Plaintiffs’ argument is based entirely on a disagreement over the science  
17 and does not support a finding that the Service’s Withdrawal was arbitrary and capricious.

18 **C. The Service Provided a Rational Basis for Its Conclusion that Small Population Size**  
19 **Does Not Pose a Threat to Fisher Either Now or in the Foreseeable Future.**

20 Plaintiffs contend that “the lack of definitive evidence that populations are currently  
21 declining does not provide a rational basis for dismissing well-documented threats.” Pls. Br. at  
22 23. As explained above, the Service did not ignore any “well-documented threats” to the fisher,  
23 nor did the Service ignore potential increasing impacts from stressors in the foreseeable future.

24 Plaintiffs argue that this case is analogous to *Defenders of Wildlife v. Jewell*, 176 F. Supp.  
25 3d 975 (D. Mont. 2016), which involved a challenge to the Service’s decision to withdraw the  
26 proposed rule listing the wolverine. The similarities Plaintiffs note between the two cases largely  
27 appear to relate to the Service’s change in determination rather than any similarity in the actual  
28

1 case facts.<sup>8</sup> However, neither the facts nor the Service’s conclusions in that case are relevant  
2 here. In its withdrawal of the proposed rule listing the wolverine, the Service catalogued  
3 “seemingly perilous circumstances” related specifically to the genetic effects of small population  
4 size on wolverine, including that studies suggesting that an effective population size (i.e.,  
5 reproducing individuals) of at least 50 was required for short-term maintenance of genetic  
6 diversity for wolverine, that long-term genetic diversity requires an effective population size of at  
7 least 500 individuals (significantly more than the entire population of less than 300 wolverines in  
8 the contiguous United States) and that “population connectivity exchange with the larger  
9 Canadian/Alaskan population would likely be required for long-term genetic health,” but such  
10 connectivity had already been lost. *Id.* at 1005-06. The court held that the Service’s failure to  
11 explain why none of these concerns, all of which related specifically to the small wolverine  
12 population at issue, were cause for alarm and instead simply concluded they did not constitute  
13 threats because “there have been no observed adverse effects as a result of the lack of diversity”  
14 was arbitrary and capricious. *Id.* at 1006.

15 This case is distinguishable because the Service did not ignore specific, documented  
16 threats to the fisher without explanation. In the Withdrawal, the Service explained that the basis  
17 for its conclusion on small population size in the proposed rule was the application of general  
18 theoretical principles regarding the implications of small population size, but that it was unknown  
19 whether “generalities about persistence based on untested theoretical models may apply to  
20 fisher.” AR000728. Moreover, the best available evidence indicated that the two native fisher  
21 populations had been small and isolated from one another for a long period of time and that these  
22 populations were stable and not evidencing negative trends in growth rate. Indeed, studies  
23 indicate that the NCSO population has actually grown if the expansion of the reintroduced  
24 populations into its area are considered. *See id.* Finally, the Service concluded that the  
25 reintroduced populations also reduced the likelihood of loss from any random stochastic events.

---

26  
27 <sup>8</sup> In *Defenders of Wildlife*, the Court noted that Plaintiffs “rightly seek to focus the Court’s  
28 attention on the Withdrawal, not on the substantial change of course it represents.” *Id.* at 1000.

1 In sum, the Service articulated a rational connection between the facts found concerning potential  
2 threats from small population size related to the fisher and the Service's listing determination.  
3 *See Alaska*, 825 F. Supp. 2d at 214-15.

4 **D. If the Court Determines that the Service's Withdrawal of the Proposed Rule Was  
5 Arbitrary and Capricious, Remand Is the Appropriate Remedy.**

6 Defendant-Intervenors adopt the Federal Defendants' argument against Plaintiffs'  
7 requested remedy, ECF No. 57, at 23-24, and fully incorporate it herein by reference.

8 **CONCLUSION**

9 The Pacific fisher does not meet the ESA's definition of an "endangered" or "threatened"  
10 species. The Service's analysis underpinning its withdrawal of the Proposed Rule was fully  
11 explained and in accordance with the ESA. The Service conducted a comprehensive and  
12 deliberative scientific process that considered the best data available, including significant new  
13 data developed or discovered after the Proposed Rule. The Service's Withdrawal was based on,  
14 and supported by, the administrative record, and is entitled to deference by this Court. Plaintiffs  
15 have not shown that the Service misapplied the ESA's listing standards, evidentiary requirements,  
16 or that the Service arbitrarily or capriciously assessed the potential threats to the species. Indeed,  
17 Plaintiffs identify no credible deficiency in the Service's analytical process. They simply  
18 disagree with the outcome of that process, and ask the Court to do so as well. But such a  
19 disagreement does not provide a basis for overturning the final agency action here.

20 For the reasons above, the Court should grant summary judgment in favor of Federal  
21 Defendants and Defendant-Intervenors, and deny Plaintiffs' Motion for Summary Judgment and  
22 any other requested relief.

1 DATED: January 24, 2018.

**PERKINS COIE LLP**

3 By: /s/ Erika E. Malmen

4 Erika E. Malmen, Idaho Bar No. 6185 *Pro*  
5 *Hac Vice*

6 EMalmen@perkinscoie.com

7 PERKINS COIE LLP

8 1111 West Jefferson Street, Suite 500

9 Boise, ID 83702-5391

10 Telephone: 208.343.3434

11 Facsimile: 208.343.3232

12 *Attorneys for Defendant-Intervenors*

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 24th day of January, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Stacey P. Geis

[sgeis@earthjustice.org](mailto:sgeis@earthjustice.org)

Gregory C. Loarie

[gloarie@earthjustice.org](mailto:gloarie@earthjustice.org)

*Attorneys for Center For Biological  
Diversity*

Nicole M. Smith

[nicole.m.smith@usdoj.gov](mailto:nicole.m.smith@usdoj.gov)

*Attorney for Defendants*

/s/ Erika E. Malmen

Erika E. Malmen