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

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

13 Plaintiffs,

14 v.

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

18 Defendants,

19 and

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

*Defendant-  
Intervenors.*

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

**DEFENDANT-INTERVENORS' REPLY  
IN SUPPORT OF CROSS-MOTION FOR  
SUMMARY JUDGMENT**

Hearing: May 10, 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>
INTRODUCTION .....	1
ARGUMENT .....	1
A.    The Service Rationally Concluded that Existing Stressors Do Not Rise to the Level of a “Threat” to the Fisher.....	2
B.    The Service’s Consideration of Whether Stressors Are Manifesting as Operative Threats to the Fisher Was Not Arbitrary and Capricious.....	3
C.    The Service Provided a Rational Basis for Its Conclusion that Small Population Size Does Not Pose a Threat to the Fisher Either Now or in the Foreseeable Future .....	6
D.    The Service’s Conclusion Regarding Fisher Population Trends Is Supported by the Record.....	8
E.    The Service Rationally Concluded that the Best Available Science Does Not Suggest that Either Wildfire and Fire Suppression or Exposure to Toxicants Render the Fisher Likely to Become Endangered in the Foreseeable Future .....	11
1.    Wildfire .....	12
2.    Toxicant Exposure .....	13
F.    If the Court Determines that the Service’s Withdrawal of the Proposed Rule Was Arbitrary and Capricious, Remand Is the Appropriate Remedy .....	14
CONCLUSION .....	14

**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**

**CASES**

*Alaska Oil & Gas Ass’n v. Pritzker*,  
840 F.3d 671 (9th Cir. 2016).....10

*Baltimore Gas & Elec. v. Nat. Res. Def. Council*,  
462 U.S. 87 (1983).....1

*Cook Inlet Beluga Whale v. Daley*,  
156 F. Supp. 2d 16 (D.D.C. 2001) .....10

*Ctr. for Biological Diversity v. Lubchenco*,  
758 F. Supp. 2d 945 (N.D. Cal. 2010) .....5, 10

*Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*,  
246 F. Supp. 3d 1272 (N.D. Cal. 2017) .....10, 11

*Defs. of Wildlife & Ctr. for Biological Diversity v. Jewell*,  
815 F.3d 1 (D.C. Cir. 2016) .....13

*Defs. of Wildlife v. Norton*,  
258 F.3d 1136 (9th Cir. 2001).....3, 6

*Greater Yellowstone Coalition, Inc. v. Servheen*,  
665 F.3d 1015 (9th Cir. 2011).....6

*Humane Soc’y of the United States v. Pritzker*,  
75 F. Supp. 3d 1 (D.D.C. 2014) .....8

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

*Lands Council v. McNair*,  
629 F.3d 1070 (9th Cir. 2010).....1

*Natural Resource Defense Council, Inc. v. Rauch*,  
244 F. Supp. 3d 66 (D.D.C. 2017) .....9

*Or. Nat. Res. Council v. Daley*,  
6 F. Supp. 2d 1139 (D. Or. 1998) .....14

*Sierra Club v. Bureau of Land. Mgmt.*,  
786 F.3d 1219 (9th Cir. 2015).....3

**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**

*Sw. Ctr. For Biological Diversity v. Norton*,  
No. CIV.A.98-934, 2002 WL 1733618 (D.D.C. July 29, 2002).....7

*Trout Unlimited v. Lohn*,  
645 F. Supp. 2d 929 (D. Or. 2007) .....4, 5, 10, 14

*Tucson Herpetological Soc’y v. Salazar*,  
566 F.3d 870 (9th Cir. 2009).....10

**OTHER AUTHORITIES**

81 Fed. Reg. 22,710 (April 18, 2016) .....1

## INTRODUCTION

1  
2  
3 The United States Fish and Wildlife Service’s (the “Service”) decision to withdraw the  
4 proposed rule listing the West Coast distinct population segment (“DPS”) of the fisher (“fisher”)  
5 as a threatened species under the Endangered Species Act (“ESA”) was a reasoned exercise of  
6 scientific and professional judgment within its area of expertise.<sup>1</sup> See Withdrawal of the  
7 Proposed Rule to List the West Coast Distinct Population Segment of Fisher, 81 Fed. Reg. 22,710  
8 (April 18, 2016), AR000711-810 (“final listing determination”). In reaching the final listing  
9 determination, the Service analyzed extensive studies, surveys, and comments from state and  
10 federal agencies, peer reviewers and the public. Plaintiffs do not argue that there is any  
11 information the Service failed to consider. Rather, Plaintiffs ask the Court to second-guess the  
12 Service’s analysis. Interpreting scientific data and applying the legal factors under the ESA is the  
13 special province of the Service, and the Service’s determination is entitled to substantial  
14 deference.

## ARGUMENT

15  
16 It is a well-settled principle of administrative law that reviewing courts are to be at their  
17 “most deferential” when an agency is making predictions within its areas of special expertise.  
18 *Baltimore Gas & Elec. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983). Courts “are not to act  
19 as a panel of scientists, instructing the agency, choosing among scientific studies, and ordering  
20 the agency to explain every possible scientific uncertainty.” *Lands Council v. McNair*, 629 F.3d  
21 1070, 1074 (9th Cir. 2010). The Court’s role is to ensure that the agency has made “no clear error  
22 of judgment” that would render its action “arbitrary and capricious.” *Lands Council v. McNair*,  
23 537 F.3d 981, 993 (9th Cir. 2008) (internal quotation marks). It is Plaintiffs’ burden to show that  
24 the Service’s conclusions “run[] counter to the evidence before the agency or [are] so implausible  
25

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26  
27 <sup>1</sup> Defendant-Intervenors generally join in the arguments submitted by Federal Defendants  
28 in their Reply in Support of Cross-Motion for Summary Judgment, ECF No. 62 (“Federal  
Defendants Reply”).

1 that [they] could not be ascribed to a difference in view or the product of agency expertise.” *Id.*  
2 As explained below, Plaintiffs have not met their burden.

3 **A. The Service Rationally Concluded that Existing Stressors Do Not Rise to the Level of**  
4 **a “Threat” to the Fisher.**

5 The Service’s final listing determination properly considered all five statutory factors  
6 under section 4(a)(1) of the ESA, and the Service rationally concluded that the fisher was not  
7 endangered or likely to become endangered in the foreseeable future. AR000719-35. The  
8 Service explained that there was “varied scientific, Service, other agency, and public opinion  
9 regarding the status of fisher” both prior to and following the Service’s proposed listing decision  
10 in 2014. AR000715. The uncertain nature of potential threats to the fisher led the Service to seek  
11 extensive peer review and public comment following its proposed listing determination, which  
12 relied in part on the draft Species Report. *Id.* However, the draft Species Report’s attempt to  
13 quantify the magnitude of stressors may have created a false sense of certainty as to scientific  
14 opinion and data underlying the proposed listing—precision without accuracy. *Id.* In its  
15 quantitative analysis, the Service attempted to estimate either the number of fishers that would die  
16 annually due to the stressor (for stressors related to direct mortality) or the percentage of fisher  
17 habitat loss over a forty-year period (for stressors related to habitat loss). AR000685.

18 While the Service had empirical data on some stressor-specific effects for some of the  
19 sub-populations of fisher, the quantitative analysis required the Service to make numerous  
20 assumptions and extrapolations. *See* AR000715, AR000685, AR022914. Review of comments  
21 and new information received, as well as reconsideration of prior information led the Service to  
22 conclude that a qualitative analysis was more appropriate to determine the magnitude of stressors.  
23 In the final Species Report, the Service used a qualitative approach to describe stressors (i.e.,  
24 high, medium or low) to avoid having to make numerous assumptions and unsupported estimates.  
25 The Service still used quantitative data when available to analyze stressors in the final Species  
26 Report, but used qualitative evidence when specific empirical data was lacking. After  
27 reconsidering all previously available information as well as new information, the Service

1 concluded that stressors were not of such imminence, intensity or magnitude such that fishers  
2 were experiencing significant impacts now or in the foreseeable future, at either a population or  
3 range-wide scale. AR000716.

4 Plaintiffs do not challenge the Service's use of a qualitative analysis of stressors in the  
5 final listing determination. Rather, Plaintiffs take issue with the final listing determination  
6 reaching a different conclusion than the preliminary assessment in the proposed listing. The  
7 proposed listing was a preliminary analysis, which was expected to change to some degree  
8 following public comment. *See* AR00685 (acknowledging analysis may change in the final  
9 listing determination). Thus, the Service is not required to provide a reasoned explanation as to  
10 changes between a proposed listing and a final listing determination as Plaintiffs claim. *See*  
11 *Sierra Club v. Bureau of Land. Mgmt.*, 786 F.3d 1219, 1226 (9th Cir. 2015); Pls. Combined Opp.  
12 and Reply, ECF 60 ("Pls. Reply") at 18. Although no explanation was required, the final listing  
13 determination did explain the basis for each change in the assessment of a stressor's impact. *See*  
14 AR000716, 720-21, 726-30. Plaintiffs simply ignore the Service's articulated rationale, or  
15 disagree with the weight assigned to the severity of various stressors. However, a difference of  
16 opinion is not a permissible basis on which to overturn the Service's well-reasoned decision.  
17 *Lands Council*, 537 F.3d at 1000.

18 **B. The Service's Consideration of Whether Stressors Are Manifesting as Operative**  
19 **Threats to the Fisher Was Not Arbitrary and Capricious.**

20 Both the proposed listing and the final listing determination explain that mere  
21 identification of stressors that could impact a species negatively is not sufficient to compel a  
22 finding that listing is appropriate; rather there must be "evidence that these stressors are operative  
23 threats that act on the species to the point that the species meets the definition of an endangered or  
24 threatened species under the Act." AR000684, AR000716. This makes inherent practical sense,  
25 since all species face stressors of some sort, and is otherwise consistent with ESA directives and  
26 controlling case law. *See Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1143 (9th Cir. 2001)  
27 (holding that evidence of habitat loss, without a reasoned explanation providing a causal link

1 between loss of habitat and a species' survival, is inadequate to support listing a species as  
2 threatened); *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007) (Although an  
3 agency must use the best available science to make that determination, the Service is not required  
4 to "give the benefit of the doubt to the species" under Section 4 of the ESA if the data is uncertain  
5 or inconclusive.).

6 Plaintiffs argue that the Service's conclusions that particular stressors are not manifesting  
7 as operative threats "hinges" on an absence of evidence of population declines. However, this  
8 oversimplification ignores the Service's thorough analysis of complex scientific data regarding  
9 the effects of stressors on the fisher in the final listing determination. For example, the Service  
10 concluded that the wildfire and fire suppression did not rise to the level of a threat because the  
11 best available data do not indicate that habitat impacts are significant at either the population or  
12 range-wide scale. AR000721. The Service explained that, following wildfire events, no surveys  
13 or other information have shown that this stressor is an operative threat. By contrast, new  
14 information, including studies and surveys, indicate fisher presence and use of previously burned  
15 landscapes. *See* AR022664-65 (citing Sweitzer *et al.* 2016 (finding "no negative association  
16 between local colonization or persistence of fishers and fire") and Hanson 2013 (suggesting "that  
17 mixed-severity and even high severity fire is not at odds with fisher conservation")). The  
18 Service's conclusion that wildfire does not constitute an operative threat to the fisher was based  
19 on the Service's evaluation of past and predicted impacts of wildfire, the beneficial aspects of  
20 wildfire, the beneficial aspects of current and continued management activities, and the presence  
21 of suitable but unoccupied habitat available to the fisher, coupled with the extremely low  
22 likelihood that future wildfires would impact entire fisher population areas. AR000721. Thus, the  
23 Service did not determine that wildfire constituted an operative threat to the fisher, nor did it  
24 dismiss the stressor based on the lack of evidence of population declines as Plaintiffs claim. *See*  
25 *Pls. Br.* at 3, 14.

26 Similarly, the Service determined that rodenticides do not constitute an operative threat to  
27 the fisher. The Service acknowledged that fisher exposure to rodenticides at sub-lethal levels



1 may be widespread in California. AR000726-27; AR022739. However, despite potentially  
2 widespread exposure, only 15 mortalities directly related to rodenticide exposure have been  
3 documented. AR000727. As one peer reviewer explained in criticizing the proposed listing's  
4 assessment of rodenticide exposure as a threat to the fisher:

5 [I]t seems a bit speculative to consider [exposure to toxicants] an  
6 overall threat to fisher populations, particularly relative to other  
7 direct threats (climate effects, disease, predation, vehicle  
8 collisions). The scope of the threat is based on numerous  
9 assumptions (density of marijuana growing operations, whether  
10 each operation uses AR's, etc.) and there are many unknown  
11 variables, both regarding health impacts and exposure levels. One  
12 study found 4/54 fisher mortalities due to AR exposure; similarly  
13 4/73 fishers in California were killed by vehicle strikes, and 11  
14 fishers have been killed by vehicles on the Olympic Peninsula, but  
15 vehicle strikes are not considered an ongoing threat in your  
16 analysis.

17 AR179253 (Sager-Fradkin peer review). Accordingly, the Service reasonably concluded that the  
18 best available information does not indicate that these impacts rise to the level of a threat to the  
19 fisher.

20 The extent of rodenticide-related mortality is not great enough to constitute a threat to the  
21 fisher. As a fallback, Plaintiffs argue that sub-lethal rodenticide exposure is negatively impacting  
22 the fisher because some individual fisher that died from other causes had been exposed to  
23 rodenticides. Pls. Reply at 17. This argument asserts the Service should assume causation where  
24 none has been shown. AR178925 (Pauli peer review) ("detection of these compounds does not  
25 prove that it's an etiologic agent of mortality"). Assuming negative effects, particularly at the  
26 population scale, in the absence of evidence is not scientifically sound nor is it required by the  
27 ESA. *See Trout Unlimited*, 645 F. Supp. 2d at 947 (noting that giving the benefit of the doubt to  
28 a species when the data is uncertain or inconclusive "would require listing a species as threatened  
if there is any possibility of it becoming endangered in the foreseeable future"); *Ctr. for  
Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (finding the  
"benefit of the doubt" concept does not apply in the listing context).

1           Accordingly, Plaintiffs' attempts to equate this case with *Greater Yellowstone Coalition,*  
2 *Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011), are unavailing. In that case, the court held that  
3 the delisting of the Yellowstone grizzly bear was arbitrary and capricious in part because the  
4 Service failed to articulate a rational connection between data in the record and its conclusion that  
5 the decline of whitebark pine was not a threat to the grizzly. *Id.* at 1020. The data showed that  
6 whitebark pines were threatened by beetles, blister rust, and climate change, and that there was a  
7 "well-documented association" between "reduced whitebark pine seed abundance and increased  
8 grizzly mortality." *Id.* at 1025. Here, there is no well-documented association between exposure  
9 to sub-lethal levels of rodenticides and threats to the fisher at the population scale. Accordingly,  
10 the best available science indicates that exposure to sub-lethal doses of rodenticide does not  
11 provide a basis for listing the fisher. *See Defs. of Wildlife*, 258 F.3d at 1143 (holding that  
12 evidence of habitat loss, without a reasoned explanation providing a causal link between loss of  
13 habitat and a species' survival, is inadequate to support listing a species as threatened). The  
14 bottom line is that the Service articulated a rational connection between the facts found  
15 concerning stressors to the species and the decision it made not to list the species, and case law  
16 requires deference to the Service's expert judgment, even if the Court finds an alternative  
17 interpretation more persuasive. *See Lands Council*, 537 F.3d at 1000 ("When specialists express  
18 conflicting views, an agency must have discretion to rely on the reasonable opinions of its own  
19 qualified experts even if, as an original matter, a court might find contrary views more  
20 persuasive.")

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

23           The Service's conclusion that lack of genetic diversity due to isolation and small  
24 population size is not an operative threat is rational and supported by the record, including new  
25 information made available since the proposed listing. AR000728-29; AR022645-46; AR022648.

26           The Service explained that the proposed listing was based on "theoretical principles  
27 regarding the implications of small population size and isolation for the persistence of some

1 generic species.” AR000728. In contrast, the final listing determination focused on research and  
2 studies specific to both the fisher’s native and reintroduced populations. *See* AR000728;  
3 AR022635-50. Based on evidence specific to the fisher, the Service reasonably concluded that  
4 the best available science indicated that the two native fisher populations of were relatively stable  
5 and that the separation and smaller size of the populations were longstanding. AR000728; *see*  
6 *also Sw. Ctr. For Biological Diversity v. Norton*, No. CIV.A.98-934, 2002 WL 1733618, at \*12  
7 (D.D.C. July 29, 2002) (“A species may exist in very low levels and yet still remain safe from  
8 extinction”).

9         Although the final Species Report acknowledges that fisher populations are small and  
10 likely to remain small, there is no evidence that they are suffering any adverse effects from small  
11 population size. AR000728-29. In contrast, new genetic evidence suggests that the southern  
12 Sierra Nevada population and the northern California-southwestern Oregon population have been  
13 isolated for significantly longer than originally assumed (potentially dating back to pre-European  
14 settlement) and have persisted in that isolated state with no evidence of population level effects.  
15 AR022732-33. As the Service explains, when considering the specifics of fisher populations  
16 against broad, theoretical principles of ecology, new information indicates that there is no  
17 evidence that small population size is causing, or likely to cause in the foreseeable future,  
18 significant impacts at the population or range-wide scales. AR000728-29.

19         Plaintiffs continue to ignore the Service’s articulated rationale for its conclusion and the  
20 supporting record evidence. *See* Pls. Reply 10-13. For example, Plaintiffs erroneously claim that  
21 evidence of overlap and genetic interchange occurring between the native northern California-  
22 southwestern Oregon population and the reintroduced northern Sierra Nevada and southern  
23 Oregon Cascades populations is not new information. *Compare* AR000729 *with* Pls. Reply at 13.  
24 Plaintiffs claim that general theoretic principles are the best available science for analyzing the  
25 effects of small population size on fisher persistence, but ignore more applicable evidence that  
26 populations of forest carnivores are often isolated and occur in low densities. *See* AR000728.

1 Plaintiffs have not provided compelling reason for the Court to refuse to defer to the  
2 Service's expertise regarding effects of small population size and isolation on fisher.  
3 Establishment of additional populations coupled with evidence of expansion and genetic  
4 interchange all support the Service's determination that fisher populations demonstrated adequate  
5 resiliency, redundancy, and representation such that they are not at risk of becoming endangered  
6 in the foreseeable future. AR000728-29.

7 **D. The Service's Conclusion Regarding Fisher Population Trends Is Supported by the**  
8 **Record.**

9 Plaintiffs continue to allege that the population studies discussed in the final listing  
10 determination are inconclusive, and do not support the Service's conclusion that fisher  
11 populations are basically stable. Plaintiffs' argument assumes that the Service's conclusions  
12 regarding fisher population trends is based solely on the population growth rate interval in each of  
13 these studies. Accordingly, Plaintiffs engage in extensive analysis of confidence intervals that is  
14 largely irrelevant.<sup>2</sup>

15 The Service did not simply consider the population growth rate and confidence intervals  
16 of the studies in isolation, but considered the studies as a whole and in the context of other  
17 available data regarding fisher abundance and persistence. *See, e.g.*, AR000718 (discussing the  
18 Sweitzer study's finding of a population growth rate of 0.97 and stating "their research suggests a  
19 basically stable trend *when considered together with information on population size and density*")  
20 (emphasis added). Indeed, before discussing individual population studies, the Service explains  
21 that estimates of fisher population growth for the populations surveyed "do not indicate any  
22 overall positive or negative trend as a result of the various stressors acting upon those  
23 populations." AR000728. In support of this conclusion, the Service cites to eight pages of the

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24 <sup>2</sup> Plaintiffs' analysis of confidence intervals is also inaccurate to the extent that it claims  
25 that "when a confidence interval for population growth spans 1, it is equally likely that the  
26 population is increasing, decreasing, or stable." Pls. Reply at 5. For example, looking solely at  
27 the confidence interval for the Eastern Klamath Study of 0.97 to 1.15, it may be stated that  
28 population growth is just as likely to be 0.97 as it is to be 1.15. However, under this confidence  
interval the potential for increase in population is still greater than the potential for decrease. *See*  
*Humane Soc'y of the United States v. Pritzker*, 75 F. Supp. 3d 1, 12 (D.D.C. 2014).

1 final Species Report, which discuss numerous surveys and studies, including new information not  
2 considered in the draft Species Report. *See id*; AR022640-48. While not conclusive, many of  
3 these surveys and studies, and others in the record, indicate that fisher populations are relatively  
4 stable. For example, evidence from one study using two different capture-recapture methods  
5 analyzed fisher density and abundance in a 317 km<sup>2</sup> area of the Southern Sierras from 2000 to  
6 2004 “suggests that that the population may be stable.” AR014491 (Jordan 2007). Similarly,  
7 genetic sampling and mark-recapture analysis of the fisher population in a portion of the Eastern  
8 Klamath Mountains of Northern California for 2006-2011 showed survival was “constant and in  
9 agreement between estimators,” which combined with the estimated population growth rate,  
10 “suggested a stable population.” AR024865-66 (Swiers 2013). Multiple surveys and reports have  
11 also quickly and continuously detected the presence of fishers, *see, e.g.*, AR008875 (Diller *et al.*  
12 2015) (repeated track plates surveys across Green Diamond’s ownership in Northern California in  
13 1994, 1995, 2004 and 2006 indicate that “there was no evidence for any major shifts in the  
14 distribution of fishers in the study area”), and have documented fisher occupation in new areas  
15 not considered to be within the fisher’s range, *see, e.g.*, AR032816-27 (2016 email from Crater  
16 Lake National Park); AR022645.

17       Therefore, this case is easily distinguishable from *Natural Resource Defense Council, Inc.*  
18 *v. Rauch*, 244 F. Supp. 3d 66 (D.D.C. 2017). In that case, the court held that the Service’s  
19 decision not to list the blueback herring as threatened under the ESA was arbitrary and capricious  
20 because the decision was based solely on the outcome of quantitative population modeling  
21 showing an absence of statistically significant evidence of population decline. *Id.* at 78, 89-91.  
22 While the Service had also engaged in qualitative analysis, in theory, the court noted that the  
23 Service merely catalogued potential threats to the herring “without analyzing the magnitudes of  
24 those threats or the likelihood that they would cause extinction.” *Id.* at 77. Thus, the “driver of  
25 the Service’s extinction risk conclusion—and, indeed, of the entire Listing Decision—appears to  
26 have been the Service’s quantitative ‘trend analysis modeling.’” *Id.* at 78. Here, despite  
27 Plaintiffs’ best efforts to characterize the Service’s final listing determination as being based

1 solely on three of four population studies, it is clear that the Service’s listing decision was based  
2 on extensive qualitative analysis of stressors as well. Therefore, the Court should refuse  
3 Plaintiffs’ invitation to second guess the Service’s findings regarding fisher populations,  
4 “particularly given that most of the evidence suggested relatively stable [fisher] abundance  
5 levels.” *See Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 246 F. Supp. 3d 1272,  
6 1282 (N.D. Cal. 2017).

7 Plaintiffs’ Reply also cites to the flat-tailed horned lizard case, *Tucson Herpetological*  
8 *Soc’y v. Salazar*, 566 F.3d 870 (9th Cir. 2009), but that case is similarly inapposite. There, the  
9 Service spun a finding of “no evidence of a ‘large decline in population’” into a “sweeping  
10 conclusion that viable lizard populations persist throughout most of the species’ current range.”  
11 *Id.* at 879. The Service then concluded that lost historic range was insignificant, based solely on  
12 the inference that the lizard population was stable. The Service did not do that here. It  
13 concluded, based on the best scientific information, that small and isolated population effects, in  
14 context of the landscape, habitat availability, and regulatory mechanisms, did not rise to the level  
15 that required listing the species under the ESA. AR000728-35. It did not reach a conclusion  
16 counter to the evidence as occurred in *Tucson*. Indeed, Plaintiffs’ claim extends to an argument  
17 that the *Tucson* court squarely rejected; the court acknowledged “[t]he absence of conclusive  
18 evidence of persistence, standing alone, without persuasive evidence of widespread decline, may  
19 not be enough to establish that the Secretary must list the [species] as threatened or endangered.”  
20 566 F.3d at 879 (citing *Cook Inlet Beluga Whale v. Daley*, 156 F.Supp.2d 16, 21–22 (D.D.C.  
21 2001)).

22 Similarly, in *Center for Biological Diversity v. Lubchenco*, 758 F.Supp.2d 945 (N.D. Cal.  
23 2010), the court rejected placing a thumb on the scales that would “require listing a species as  
24 threatened if there is any possibility of it becoming endangered in the foreseeable future.” *Id.* at  
25 955 (quoting *Trout Unlimited*, 645 F.Supp.2d at 947). Certainly, it is true that the Service need  
26 not wait for conclusive evidence of a species’ decline before listing (*see Alaska Oil & Gas*  
27 *Ass’n v. Pritzker*, 840 F.3d 671, 683 (9th Cir. 2016)), but where, as here, other factors counseled

1 against listing, the Service's determination should be upheld. At bottom, Plaintiffs offer a  
2 different interpretation of the evidence in the record, but that is not a valid basis for this court to  
3 overturn the Service's well-reasoned decision. *Lands Council*, 537 F.3d at 993.

4 As Defendant-Intervenors explained in their opening brief, the Service's conclusion that  
5 fisher populations are basically stable is supported by better evidence than the evidence  
6 supporting the Service's conclusion as to the stability of the Oregon marten population in *Center*  
7 *for Biological Diversity*. Def.-Intervenor's Br. at 23. Plaintiffs cannot distinguish that case and  
8 instead misrepresent both the court's holding and the administrative record in this case. Plaintiffs  
9 claim that the court in *Center for Biological Diversity* upheld the Service's conclusion because  
10 "the Service pointed to a recent study showing that the Oregon population was relatively large  
11 and stable" and "[n]o such similar study exists here." Pls. Reply at 9. However, the Court held  
12 that the best available evidence supported the Service's conclusions about the size of the Oregon  
13 marten population despite the lack of "high quality surveys of marten abundance" because "no  
14 data clearly showed population decline." *Ctr. for Biological Diversity*, 246 F. Supp. 3d at 1281-  
15 82. Far from holding that a recent study showed that the Oregon population "was relatively large  
16 and stable," the court rather pointed to the fact that "recent (and still ongoing) surveys in Oregon  
17 have quickly detected the presence of coastal marten" as supporting the Service's conclusion that  
18 Oregon marten populations were stable. *Id.* at 1281. Here, peer review studies, recent survey  
19 data, and qualitative evidence all support the Service's conclusions that the fisher population is  
20 basically stable, and there is no evidence indicating that the population is declining. Moreover, a  
21 declining population is not in and of itself a basis for finding that a species is at risk of extinction.  
22 The Service considers many factors when making listing determinations under the ESA.

23 **E. The Service Rationally Concluded that the Best Available Science Does Not Suggest**  
24 **that Either Wildfire and Fire Suppression or Exposure to Toxicants Render the**  
25 **Fisher Likely to Become Endangered in the Foreseeable Future.**

26 Plaintiffs ignore the Service's conclusions and much of the analysis of scientific evidence  
27 in the final Species Report regarding the predicted effects of wildfire and toxicants on fisher  
28 population and habitat in the foreseeable future. Contrary to Plaintiffs' claim that the Service

1 “ignored the ESA’s mandate to consider the ‘foreseeable future,’” *see* Pls. Reply at 14, the  
2 Service analyzed current stressors as well as stressors that may become “operative threats” in the  
3 future. *See, e.g.*, AR000721 (“best available information does not suggest that fisher habitat will  
4 experience significant impacts . . . in the future as a result of wildlife fire and suppression  
5 activities”); AR000722 (“[N]or is there any indication that these scales of impacts are likely to  
6 occur in the foreseeable future.”); AR000727 (Best available information does not suggest “that  
7 significant [anticoagulant rodenticides] impacts would occur as operative threats on fisher  
8 populations . . . in the future”).

9 **1. Wildfire**

10 The Service rationally concluded that the best available information does not show that  
11 fisher habitat will experience significant impacts at either the population or range-wide scale in  
12 the foreseeable future as a result of wildfire and fire suppression. AR000721. The Service  
13 explained its conclusion as follows:

- 14 (1) Future wildfires are expected to continue at a similar rate and  
15 severity across the landscape as has been occurring in the recent  
16 past,  
17 (2) wildfires are not expected to be high severity in all cases such  
18 that they destroy habitat for entire populations,  
19 (3) forest ingrowth is expected to continue to provide suitable  
20 habitat across the proposed DPS’s range to help offset some future  
21 wildfire impacts, and  
22 (4) future low- or mixed-severity wildfires are expected to continue  
23 to provide some benefits to fisher habitat to help offset some future  
24 wildfire impacts.

25 AR000721. The Service’s articulated basis for its conclusion are fully supported by the record.  
26 Plaintiffs ignore the Service’s explanation, incorrectly asserting that the Service’s decision is  
27 based on the lack of evidence of population declines. Pls. Reply at 18.

28 Plaintiffs also ignore the evidence in the record that conflicts with their view that wildfire  
constitutes a threat to the fisher in the foreseeable future. *See* Pls. Reply at 17-18. For example,  
Plaintiffs assert that it is undisputed that fire severity is increasing, and that the final Species



1 Report confirms “the basic fact” that climate change will cause increasing high severity fires. Pls.  
2 Reply at 18. However, the Service recognized that there was debate regarding whether fire  
3 severity may be increasing, requiring the Service to use its “best professional judgment based on  
4 the best fire effects information available.” AR000721. This evaluation of scientific data is  
5 within the Service’s technical expertise and, therefore, warrants deference. *See Defs. of Wildlife*  
6 *& Ctr. for Biological Diversity v. Jewell*, 815 F.3d 1, 14 (D.C. Cir. 2016).

## 7 **2. Toxicant Exposure**

8 The Service also reasonably concluded that toxicants do not constitute a threat to fisher  
9 survival in the foreseeable future. The Service explained that there is no evidence that rodenticide  
10 usage will increase in the foreseeable future. The final Species Report already considered  
11 rodenticide usage to be widespread in California,<sup>3</sup> but confirmed mortality of fishers associated  
12 with rodenticides has remained relatively low, especially when compared to other mortality  
13 causes like vehicle collisions. Indeed, although not conclusive, there is extensive evidence in the  
14 record indicating that a decline in fisher exposure to rodenticides is likely. *See, e.g.*, AR170702-  
15 03; AR179204; AR164955; AR022757.

16 Plaintiffs selectively quote fragments of the final Species Report to argue “that exposure  
17 to toxicants ‘may result in significant population-level impacts in the near future’” for the  
18 southern Sierra Nevada fisher population. Pls. Reply at 15 (quoting AR022755). However, the  
19 quoted text is not the final Species Report’s conclusion, but an excerpt from the discussion of  
20 potential implications of modeling studies. *See* AR022755 (“*If* adult female survivorship is a  
21 major driver of demographic rates in the [southern Sierra Nevada] population and perhaps others,

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22 <sup>3</sup> Indeed, some peer reviewers indicated that the draft Species Report may be  
23 overestimating the scope of this threat to the extent it assumed the presence of rodenticides on all  
24 marijuana grow operations and did not consider the decreased number of such operations on  
25 private lands within the fishers’ range. AR179199 (Sauder peer review) (noting that if the draft  
26 report assumes rodenticides “are present at all sites, it may be overestimating the scope of this  
27 threat because it is doubtful that absolutely every grow operation uses anticoagulant  
28 rodenticides”); AR179204 (Verschuyt peer review) (“An unrecognized benefit to fisher from  
private forest management operations is the increased scrutiny of land area by managers and  
biologists. Illicit marijuana grow operations using large quantities of rodenticides are less likely  
to occur on private lands, due to the vigilance and financial interests of the land owners and  
investors.”).

1 the observed reduction in adult female survivorship for females with higher numbers of marijuana  
2 cultivation sites within their home ranges (Thompson et al. 2014, pp. 96-98) *may* result in  
3 significant population-level impacts in the near future.”) (emphasis added).

4 Plaintiffs essentially argue that listing of the fisher is required because there is a  
5 *possibility* that exposure to rodenticides may have significant impacts on fisher populations in the  
6 foreseeable future. *See* Pls. Reply at 15. That is not the listing standard under the ESA. *See Or.*  
7 *Nat. Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (“The ESA requires a  
8 determination as to the likelihood—rather than the mere prospect— that a species will or will not  
9 become endangered in the foreseeable future.”). Indeed, courts have recognized that applying  
10 such a standard “would result in all or nearly all species being listed as threatened.” *Trout*  
11 *Unlimited*, 645 F. Supp. 2d at 947.

12 Here, the Service examined the best available information and reasonably concluded that  
13 rodenticide exposure is not significantly impacting the fisher either currently or in the foreseeable  
14 future.

15 **F. If the Court Determines that the Service’s Withdrawal of the Proposed Rule Was**  
16 **Arbitrary and Capricious, Remand Is the Appropriate Remedy.**

17 Defendant-Intervenors adopt the Federal Defendants’ argument, (Fed. Defs. Reply at 13-  
18 14), against Plaintiffs’ requested remedy, and fully incorporate it herein by reference. If a remand  
19 is ordered, Defendant-Intervenors believe the appropriate course would be for the Court to  
20 entertain supplemental submissions on the length of the remand in light of the Service’s  
21 budgetary and staffing constraints.

22 **CONCLUSION**

23 The final agency action subject to review in this case is the Service’s conclusion that the  
24 fisher does not warrant listing under the ESA. The Service provided a rational scientific  
25 justification within its expertise, based on ample record evidence, for this decision. The ESA and  
26 APA require no more.

1 Plaintiffs, however, seek to have the Court essentially ignore the Service's reasoned  
2 analysis regarding the current and foreseeable effects of stressors on fisher, and instead have the  
3 Court substitute its judgment for that of the Service. That the Court may not do.

4 The Court should grant summary judgment in favor of Defendants and Defendant-  
5 Intervenors.

6 DATED: April 19, 2018.

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7  
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15 **CERTIFICATE OF SERVICE**

16 I HEREBY CERTIFY that on the 19th day of April, 2018, I filed the foregoing  
17 electronically through the CM/ECF system, which caused the following parties or counsel to be  
18 served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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