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Counsel for Plaintiffs

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

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|---|---|------------------------------|
| WILDEARTH GUARDIANS <i>et al.</i> , |) | |
| |) | |
| Plaintiffs, |) | Case No. 9:14-cv-0250-DLC |
| |) | |
| vs. |) | (Consolidated with Case Nos. |
| |) | 14-246-M-DLC and 14-247- |
| SALLY JEWELL, in her official capacity as |) | M-DLC) |
| Secretary of the Interior; the UNITED STATES |) | |
| DEPARTMENT OF THE INTERIOR; |) | RESPONSE IN |
| DANIEL ASHE, in his official capacity as |) | OPPOSITION TO |
| Director of the U.S. Fish and Wildlife Service; |) | FEDERAL-DEFENDANTS' |
| THE U.S. FISH AND WILDLIFE SERVICE, |) | MOTION FOR SUMMARY |
| |) | JUDGMENT AND REPLY |
| Federal-Defendants. |) | IN SUPPORT OF |
| |) | PLAINTIFFS' MOTION |
| |) | FOR SUMMARY |
| |) | JUDGMENT |

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INTRODUCTION

Plaintiffs hereby submit this response in opposition to the U.S. Fish and Wildlife Service's (Service's) motion for summary judgment and reply in support of their motion for summary judgment.

ARGUMENT

A. The Service's about-face decision is not entitled to deference.

The APA's standard of review is deferential and courts ought to defer to an agency's expertise, but deference is not automatic or unlimited. *Nat'l Wildlife Fed'n v. NMFS*, 422 F.3d 782, 789 (9th Cir. 2005). Courts must ensure agency decisions are made in accordance with statutory mandates, *Rocky Mountain Wild v. USFWS*, 2014 WL 7176384 at *3 (D. Mont. 2014), and well-reasoned, *Earth Island Institute v. Hogarth*, 494 F.3d 757, 766 (9th Cir. 2007). Agency decisions must also be supported by the relevant studies, the data it purports to interpret, and the scientific advice provided by its qualified experts. *Id.* Courts should defer to an agency's expertise only to the extent it "utilizes, rather than ignores, the analysis of its experts." *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 685 (D.D.C. 1997).

Here, the Service's decision is not entitled to deference because it conflicts with the published studies and the findings of its qualified experts. *See* FR-5636; PI-070. This case is therefore unlike the deference cases relied upon by the

Service. Plaintiffs are asking the Court to defer to best available science and recommendations of the Service's qualified experts, not second-guess them.

B. The Service's climate change arguments conflict with the best available science.

The ESA's best available science requirement prohibits the Service from disregarding "superior" data or information that is "better than" the information it relies on. *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006). This is precisely what happened here.

The Service's about-face decision not to list wolverine was based on unsubstantiated claims from state agencies, FR-5537 and FR-3568, an administrator's (Noreen Walsh's) opinion that greater certainty is required, FR-5364 to FR-5366, and a personal communication with Stephen Torbit, *see* FR-5361, that was not peer reviewed, not examined by the Service's qualified experts, *see* FR-503, and is not relevant to areas occupied by wolverine, FR-3928.

In choosing to rely on this information, the Service made a conscious decision to disregard the findings of the published literature, including Copeland (2010) and McKelvey (2011), which support the underlying rationale for listing. PI-070; FR-5632. The Service also disregarded the two stages of independent peer-review, both of which validated the findings of McKelvey (2011), SOF at ¶¶ 90 to 106; FR-14023. The Service also disregarded the recommendations of its own experts who unanimously recommended listing. FR-5631 to FR-5636. This is why

the Society for Conservation Biology and fifty-six independent wildlife biologists were so outraged by the Service's decision. *See* PI-100717; PI-100722.

In response, the Service makes a number of arguments about the climate change science, all of which lack merit.

1. The Service disregarded the findings of McKelvey (2011).

The Service does not dispute that McKelvey (2011) is the best available science. Doc. 76 at 26-27. McKelvey (2011) predicts that wolverine habitat in the contiguous United States will “decline significantly” and that wolverine populations “will likely become smaller and more isolated” in the foreseeable future. LIT-2568; FR-5632. Approximately 31% of wolverine habitat will be lost by 2045 and 63% will be lost by 2085. LIT-2568; LIT-2575 (Fig. 4); FR-5632.

By admitting McKelvey (2011) is the best available science, the Service must also concede there will be significant declines in wolverine habitat within the foreseeable future and that this loss will result in less habitat connectivity and increased declines in genetic diversity. FR-5632. Indeed, there are no new scientific papers or data suggesting otherwise. McKelvey (2011) “remains scientifically justified” and the Service “ha[s] been unable to obtain or evaluate any other peer reviewed literature or other bodies of evidence that would lead [it] to a different conclusion.” FR-5636.

The Service maintains it never ignored McKelvey (2011) but it chose to disregard the paper's findings which is the functional equivalent to ignoring the paper altogether. As with the study and literature review at issue in *Brower v. Evans*, 257 F.3d 1058, 1071 (9th Cir. 2001), the data at issue in *Earth Island Institute*, 494 F.3d at 768, and the information at issue in *Rocky Mountain Wild*, 2014 WL 7176384 at *12, the Service violated the ESA by disregarding and neglecting to use the available science and choosing instead to base its conclusion on a dearth of data. *Id.*

2. McKelvey (2011) provides a sufficient basis for listing.

The Service maintains the predictions made in McKelvey (2011) are “too uncertain to provide a reasonable basis” for listing. According to the Service, McKelvey (2011) involves “too much speculation” and fails to include the necessary “fine scale” data needed for listing. This insistence on certainty, definitive conclusions, and fine scale data raises the scientific bar too high, well beyond what the ESA requires.

Scientific findings are often necessarily made from “incomplete or imperfect information.” *Brower*, 257 F.3d at 1070. This is why Congress directed the Service to make listing decisions based on the best available, not the best possible, science. *Building Indus. Ass’n v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001). For this reason, the Service cannot use “insufficient” evidence in the scientific literature as

an excuse for not listing. *Brower*, 257 F.3d at 1071. Indeed, the Service's insistence on having fine scale data to draw "definitive conclusions" about how climate change will precisely impact wolverines is an impossible request. The Service is asking for more than scientifically defensible predictive modeling approaches can deliver, *see* FR-5639, PI-073, more than the ESA's best available science standard requires, *Defenders of Wildlife*, 958 F. Supp. at 679, and more than is reasonable or necessary for a rare mammal threatened by climate change, *see* FR-5640. The Service's own biologists agree: "The precise mechanism(s) behind the relationship between wolverines and deep snow is less important than the fact that deep snow appears to be an obligate habitat feature for this species." FR-5631. While there is "uncertainty" and "conclusion that there will not be population effects appears to be based on opinion and speculation," not the best available science. FR-5636.

The Service attempts to distinguish the wolverine listing decision from the polar bear and Pacific walrus on the grounds that those species had "stronger evidence" of climate change threats. But the Service's climate scientist noted that there is a reasonable basis to list all three species because a key aspect of their habitat is likely to be directly impacted by future climate changes. PI-465; *see also* FR-6086; PI-254; PI-089. To the extent differences exist between the three listing decisions, it is the lack of a "smoking gun" for wolverine. FR-5640. In the case of

the polar bear, the Service had evidence of drowning bears and bears stranded on land due to retreating ice. FR-5640. Obtaining such information for wolverine is a “near impossibility.” *Id.* Wolverine “are seldom observed even when radio collared, and the effects of climate change are likely to be much more subtle, such as slightly decreased reproductive output, fewer prime home ranges that are productive enough to support a female with kits, or decreased connectivity resulting in fewer successful movements between major habitat areas.” FR-5640. The absence of a “smoking gun,” however, should not deprive wolverine of listing given the ESA’s best available science standard and the published evidence, include McKelvey (2011). FR-5636; *see also* PI-100719 (the Service’s insistence on such evidence would “substantially limit the ability of science to inform listing determinations.”).

3. No published evidence undermines McKelvey (2011).

Unable to rely on the published evidence, the Service maintains all of the published papers, except for McKelvey (2011), are flawed. The Service chose to rely on McKelvey (2011) over the other papers due to differences in methodology and focus area, not necessarily because they are flawed. *See* PR-772. The take away is that McKelvey (2011) is not an outlier: every other published study on the impacts of climate change to wolverine supports “the hypothesis that future climate

warming is likely to significantly reduce wolverine habitat” and “the conclusions of McKelvey (2011).” PI-070; FR-5632.

The Service provides a string cite to “other relevant studies” that were published after the proposed rule but no explanation as to their relevance is provided. *See* Doc. 76 at 33. Nor does the Service assert the studies were even relied upon. All of the papers cited comport with McKelvey (2011) and only two of the papers cited involve wolverine. These include McKelvey (2014), LIT-8166, and Inman (2013), LIT-1653, which expressly found that the model used in McKelvey (2011) “matched well, concurring across >96% of the western US.” LIT-1660. “This level of agreement derived from different approaches . . . suggests that distribution of wolverine habitat is fairly well described.” LIT-1660.

The Service describes Noreen Walsh’s memorandum as a “detailed analysis” that was based on a “new analysis by Torbit.” Walsh’s opinion, however, is not a detailed analysis and certainly not the best available science. As discussed *supra*, her opinion was primarily based on unsubstantiated comments from state agencies, personal opinions about McKelvey (2011), and speculation. *See* FR-5372. Walsh made it clear that she “came to a different conclusion” from her own biologists but this conclusion is hers “alone.” FR-02877. The communication between Walsh and Torbit regarding a 2008 NOAA report is also not a “new analysis.” The Torbit communication does not qualify as the best available science: it was made behind

closed doors, never subjected to peer-review, and never discussed with the wolverine biologists charged with making the listing decision. *See* FR-5031; *WWP v. Kempthorne*, 2008 WL 2338501, *14 (D. Idaho. 2008) (reliance on internal report is not the best available science). The communication also occurred after Walsh had already decided not to list wolverine. *See* FR-5535. The Torbit communication is also of limited value because the 2008 NOAA report it relies on pertains to unoccupied, high-elevation mountains of the Southern Rockies where dramatic decreases in snow are not likely to occur and where no wolverine population exists. FR-3928 (comment); *see also* FR-5031 (discussing report).

4. Independent peer review validated McKelvey (2011).

The Service maintains there was no “concrete support” from the peer review process. Concrete support from the scientific community is an anomaly; it rarely occurs and is never expected. That said, both stages of peer review in this case validated the underlying rationale for listing.

The science panel recognized some areas of uncertainty in the literature but validated the use of McKelvey (2011) as the best available science on climate change impacts to wolverine. FR-14023; *see also* FR-5636 (same). Likewise, five of the seven biologists tasked with reviewing the scientific literature agreed that the link between projected climate change impacts and the species’ listing was well-documented. SOF at ¶¶ 91-95. The two dissenting biologists expressed

concerns about the snow model in McKelvey (2011) but disputes of this nature are to be expected. *See* PI-277. And, as noted by Squires, the “scientific disagreement among peer-reviewers does not in [his] opinion negate the science . . . The basic conclusion that wolverine may be detrimentally impacted by climate change is consistent with best available science.” PI-1255. McKelvey and Copeland agree. *See* PI-503; FR-14834.

The Service’s counsel maintains the “more fundamental objection” raised by peer review is the assumption that wolverines *require* deep persistent spring snow, as opposed to a *clear preference* for deep snow. Doc. 76 at 29. The Service’s counsel is confusing the concerns raised about the May 15 snow model with snow. *See* FR-13428 (explaining the difference); PI-1939 (same); PI-504 (same). While there may be exceptions to the May 15 snow model (as is to be expected), there is no evidence of wolverines denning in areas without snow. Every wolverine den that has ever been verified “has been associated with snow.” PI-1938; *see also* PI-1939 ; FR-13634. The relationship between wolverine and spring snow during the denning period “is strongly founded in wolverine biology.” PI-100944. “[W]olverines are snow dependent animals. Everything from their morphology to their caching behavior to their denning choices suggest they are dependent on snow in general and are selecting extensive areas of persistent snow pack through the denning period. There is no published evidence to the contrary.” PI-100949.

Notably, no wolverine dens in the contiguous United States – at issue in this case – occur outside snow or outside the May 15 snow model. FR-13430.

C. Wolverine are threatened by a small population size.

The Service maintains Plaintiffs merely disagree with its “scientific conclusion” that wolverine are not threatened by small population size. But when *every* peer-reviewed paper on the subject demonstrates wolverine are threatened by a small population size, *see* SOF at ¶¶ 42-46, and no published papers suggest otherwise, there is no scientific disagreement. The Service asks the Court to defer its “scientific conclusion” but there is nothing to defer to. There is no analysis supporting the Service’s conclusion and this Court cannot defer “to a void.” *ONDA v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010).

The Service’s conclusion that wolverine are not threatened by a population of only 250 to 300 (and an effective population of less than 50) is premised on an absence of information, not published science. *See Rocky Mountain Wild*, 2014 WL 7176384, *12. The Service criticizes Plaintiffs for relying on “statements by two individual employees” but neglects to mention that the statements are from the Service’s PhD biologists tasked with making a listing recommendation. *See* FR-5616; FR-5691; SOF at ¶ 142. The biologists correctly note that any hypothesis that wolverine are not threatened by small population size because they are “expanding and may continue to expand” is based on speculation, not scientific

analysis. FR-5638; FR-5616; *see also* FR-5804 (edits to language). This is consistent with the published literature, including Inman (2013)'s determination that wolverine expansion is unlikely in the absence of reintroduction efforts. LIT-1661; *see also* FR-16 (dispersals of lone males may be response to habitat loss, not expansion); FR-14523 (no evidence of expansion). Even if evidence of expansion exists, the leading biologists note it does not negate the threats to the species: “When an organism has been extirpated from most of its range, there is room for expansion even if, globally, habitat has been reduced.” PI-100958.

The Service also maintains any threats to wolverine from small population size remain undocumented “potential” threats. Doc. 76 at 36. But the best available science, including Schwartz (2009), LIT-3162, Cegelski (2003), LIT-677, Cegelski (2006), LIT-662, and Kyle and Strobeck (2001), LIT-2021, reveal that small population size combined with low connectivity “has already resulted in low genetic diversity.” FR-5634; *see also* FR-022 (“Genetic drift has already occurred in the [wolverine] subpopulations . . .”); SOF at ¶¶ 42-46.

The Service maintains Cegelski (2003) is consistent with its findings but this paper found that wolverine gene flow in the contiguous United States “may not be high enough to prevent genetic drift” and that “at least 400 breeding pairs” would be needed to ensure genetic viability in the long term in the contiguous United States. LIT-662. The current wolverine population: (a) is well below this threshold

and what, as the Service concedes, is “necessary for short-term maintenance of genetic diversity,” FR-22; (b) remains isolated from Canadian populations, FR-022; (c) is unlikely to expand beyond currently occupied habitat without reintroduction, SOF at ¶ 23; and (d) will become smaller and more isolated due to loss of habitat from climate change. PR-773; LIT-2575 (fig. 4). This dangerously small wolverine population is “already experiencing gene flow issues within an environment where gene flow is certainly not going to improve.” PI-547; *see also* LIT-662; LIT-3162.

D. The Service failed to analyze cumulative impacts.

The Service summarily concludes that no cumulative threat to wolverines exists because: (1) there is too much uncertainty over how climate change will impact wolverine; and (2) as a result, all of the secondary threats to wolverine from small population size and trapping no longer “rise to the level” of a threat to wolverine. FR-023. This conclusion was made in the absence of any analysis or evaluation of the collective or combined impacts of the various threats.

The Service disagrees, citing eleven pages of its withdrawal decision, FR-012 to FR-023, but nowhere in the pages cited does the Service analyze and evaluate the combined effects. All threats are discussed, i.e., climate change, small population size, trapping, winter recreation, and human development, are addressed in isolation and never in concert with one another.

Page FR-023 does include a subheading entitled “synergistic interactions between threat factors” where the Service explicitly recognizes that “multiple stressors acting in combination have greater potential to affect wolverines than each source alone.” FR-023. But having recognized this fact, the Service fails to take the logical and requisite next step and actually analyze and evaluate what the combined effects of those “multiple stressors” might be. This is a major oversight and violation of the ESA. When making listing decisions, the Service “cannot ‘disregard the reality that small, non-threatening injuries can incrementally lead to a fatal result, whether it is the ‘straw that broke the camel’s back’ or ‘death by a thousand cuts.’” *Rocky Mountain Wild*, 2014 WL 7176384 at *7.

E. The Service misinterprets Factor D.

The Service’s interpretation of listing Factor D – the directive to evaluate whether a species warrants listing due to the “inadequacy of existing regulatory mechanisms,” 16 U.S.C. § 1533(a)(1)(D) – is a moving target. *Compare* PI-082 (no Factor D threat) *with* FR-5634 (Factor D a threat). The Service now maintains Factor D need not be addressed because there are no threats to wolverine under the other four listing factors. Under this interpretation, an evaluation of listing under Factor D is only triggered if Factors A, B, C, or E, *see* 16 U.S.C. § 1533 (a)(1), are also triggered.

This interpretation conflicts with the plain language of the ESA, 16 U.S.C. § 1533(a)(1), the regulations, 50 C.F.R. § 424.11(c), and applicable Ninth Circuit case law, *see GYC v. Servheen*, 665 F.3d 1015, 1029 (9th Cir. 2011), all of which recognize Factor D as one of five listing factors that – by itself – may qualify a species for listing. Of course, the “adequacy” of a regulation “is tied to the level, or even existence, of any threat the regulation is designed to meet.” *Rocky Mountain Wild*, 2014 WL 7176384 at *10. The threat, however, need not be significant enough to warrant listing under the other listing factors to warrant a Factor D evaluation. *Id.* at *11. Any interpretation to the contrary would render Factor D superfluous. In *Rocky Mountain Wild*, for example, this Court set aside the Service’s Factor D determination because some level of threat existed: oil and gas development occurring in the absence of regulation “may be ‘detrimental to the species.’” 2014 WL 7176384 at *11.

The Service relies on *Friends of the Blackwater v. Salazar*, but in that case the court determined no threat existed to the species under the other listing factors so there was nothing to regulate. 691 F.3d 428, 436 (D.C. Cir. 2012). This case is different: the wolverine’s habitat is threatened at some level by climate change, a dangerously small population size, and synergistic effects. *See* SOF at ¶¶ 25 to 31, ¶¶ 47 to 62, ¶¶ 63 to 75, and ¶¶ 76 to 81. Inman (2013) also notes that adequate

regulatory mechanisms are critical to wolverine conservation in the contiguous United States. LIT-1660 to LIT-1661.

F. The Service's SPR interpretation is unreasonable.

None of the Service's arguments made in support of its interpretation of the term "significant portion of its range" (SPR) – an interpretation that narrowly defines "range" to only include a species' current range, not lost historic range, see SPR-106 – have merit.

The Service maintains Plaintiffs must satisfy the "no set of circumstances" test. The Ninth Circuit, however, has questioned the use of the "no set of circumstances" test, noting that it may be dicta. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023-24 (9th Cir. 2007). The Ninth Circuit also cites numerous Supreme Court decisions asserting the same. *Id.* at 1023 fn. 4. The test, rather, is whether the SPR policy is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); *see Friends of the Columbia Gorge v. Schafer*, 624 F. Supp. 2d 1253, 1264 (D. Or. 2008) (adopting *Bosworth's* reasoning and declining to apply "no set of circumstances" standard).

Plaintiffs agree that the SPR policy, and its application to the wolverine listing, should be analyzed under *Chevron* step two, *see Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-83 (1984), which asks whether the Service's interpretation is reasonable. *Id.* In evaluating the reasonableness of the Service's interpretation,

however, the Court is “not obligated to accept an interpretation that is ‘demonstrably irrational or clearly contrary to the plain and sensible meaning of the statute.’” *Coronado-Durazo v. I.N.S.*, 123 F.3d 1322, 1324 (9th Cir. 1997). *Chevron* “does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.” *Michigan v. EPA*, --- U.S. ---, 135 S. Ct. 2699, 2708 (2015).

In support its SPR interpretation, the Service also attacks the legislative history cited by Plaintiffs, but misreads its import. Although H.R. Rep. 95-1625 (1978) post-dates the passage of the ESA, it is speaking directly to the use of the term “range” in Section 4 of the ESA generally, which governs the listing of a species and was a term used in the ESA as passed by Congress in 1973. *Compare* Pub. L. No. 93-205 § 4(c)(1) (1973) *with* 16 U.S.C. §1533(c)(1). Congress was speaking to the use of “range” generally and not solely to the 1978 amendments. The Service also maintains Congress intended different definitions for “range” to apply to different sections of the ESA but this argument conflicts with the “presumption that a given term is used to mean the same thing throughout a statute.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

Next, the Service objects to Plaintiffs’ reliance on *Humane Soc’y v. Jewell*, 2014 WL 7237702 (D. D.C. 2014), to explain that the SPR policy renders meaningless the word “curtailment” in the ESA, but fails to adequately explain its

rationale for doing so. To assert the word “curtailment” could have two meanings without explaining why those two meanings are of any import is non-responsive. Congress instructed that a species may be listed as a result of “the present or threatened destruction, modification, or curtailment of its habitat or range.” 16 U.S.C. § 1533(a)(1)(A). The “range” of a species could only be presently “curtail[ed]” if it had lost some of its historic range. There is no other rational interpretation. The SPR policy unreasonably erases this language from the ESA.

Finally, the Service maintains it correctly applied the SPR policy to the wolverine decision. But the Service fails to actually respond to Plaintiffs’ arguments, concluding only that it analyzed potential threats to wolverine and found no such threats that are “significantly concentrated or substantially greater than in other portions” of the wolverine’s range. *Id.* at 49. This conclusory statement, by itself, does not suffice. *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 876-77 (9th Cir. 2009). The Service fails to point to any analysis to support its conclusion. Nor does the Service respond to Plaintiffs’ assertion that it needed to explain why loss of the wolverine’s historic range, including in the Great Lakes, Southern Rockies, Utah, Sierras, and Oregon do not qualify as a significant portion of wolverine range, or why the trapping of wolverine or loss of habitat due to climate change are not threats to a significant portion of the wolverine range.

Doc. 66 at 39-40. This is a fatal mistake and one that cannot be corrected on reply.

Eberle v. City of Anaheim, 901 F.2d 814, 818 (9th Cir. 1990).

CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request this Court grant their motion for summary judgment and the relief requested.

Respectfully submitted this 25th day of September, 2015.

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