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

WILDEARTH GUARDIANS, CONSERVATION NORTHWEST, OREGON WILD, CASCADIA WILDLANDS, and WILDERNESS WORKSHOP, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR; S.M.R. JEWELL, in her official capacity as Secretary of the Department of the Interior; DANIEL M. ASHE, in his official capacity as Director of the U.S. Fish and Wildlife Service; and U.S. FISH and WILDLIFE SERVICE, Defendants.	No. CV 14-270-M-DLC (Consolidated with No. CV 14-272-M-DLC) **DEFENDANTS' REPLY IN SUPPORT OF THEIR COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT**

ALLIANCE FOR THE WILD ROCKIES, NATIVE ECOSYSTEMS COUNCIL, ROCKY MOUNTAIN WILD, and SIERRA CLUB, INC.,
Plaintiffs,
v.

MICHAEL BEAN, in his official capacity as Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at the U.S. Department of the Interior; S.M.R. JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior; and U.S. FISH AND WILDLIFE SERVICE,
Defendants.

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INTRODUCTION

The U.S. Fish and Wildlife Service's ("FWS") designation of critical habitat for the Canada lynx was well-reasoned, based on the best scientific data available, and fully compliant with the Endangered Species Act ("ESA"), Administrative Procedure Act ("APA"), and *Alliance for the Wild Rockies v. Lyder* ("*Lyder*"), 728 F. Supp. 2d 1126 (D. Mont. 2010). Plaintiffs in *WildEarth Guardians v. U.S. Department of the Interior* ("WildEarth") and *Alliance for the Wild Rockies v. Bean* ("Alliance") offer no valid reason to overturn FWS's rational decision. Instead, they rely on inferior scientific information to argue in favor of expanding FWS's critical habitat designation to include areas that lynx have never inhabited, that lack the features lynx need to survive, and that are not essential for the conservation of the species.[1] But the ESA does not permit such a broad designation; it only allows FWS to designate as critical habitat areas that meet the statute's specific requirements. FWS should not be faulted for adhering to the law. FWS's listing of lynx as a threatened species ensures lynx will be protected

[1] Plaintiffs continue to cite their Statements of Undisputed Facts throughout their responses to make legal arguments in violation of the Court's word limits. FWS repeats its request that these references be stricken. *See* ECF 40-41, 48. In the alternative, FWS incorporates its corresponding responses to Plaintiffs' Statements of Undisputed Facts. *See* ECF 45. Additionally, Alliance intentionally disregards the spacing requirements for standard legal citations to further circumvent the Court's word limits. *See, e.g.*, Alliance Resp. (ECF 52) 6 (citing "79FR54788; 54797; 54817").

wherever they appear in the contiguous U.S., 79 Fed. Reg. 54,782 (Sept. 12, 2014), and its critical habitat designation will ensure that areas necessary for lynx survival and conservation are preserved.

I. The Primary Constituent Element is Complete, Specific, and Measurable

Plaintiffs persist in misinterpreting the Primary Constituent Element, or PCE, used to designate lynx critical habitat. First, Alliance backs away from its initial claim that the PCE "lack[s] any element specific to lynx winter habitat," arguing, "[w]hile the PCE address[es] some winter habitat," it allegedly does not address "maintenance nor recruitment of winter habitat." *Compare* Alliance MSJ 30 (ECF 35) *with* Alliance Resp. (ECF 52) 2. This misses the point of critical habitat designation. By defining a PCE that requires winter habitat and then designating critical habitat that includes the PCE, FWS ensures "maintenance" of that habitat via the ESA's various critical habitat protections. *See*, *e.g.*, 16 U.S.C. § 1536(a)-(d); *see also* Defs. MSJ (ECF 44) 16. Alliance's related claim that the PCE must provide for "recruitment" of winter habitat comes with no explanation or legal support. Alliance Resp. 2. Regardless, the PCE does ensure recruitment of winter habitat by requiring "[b]oreal forest landscapes supporting a mosaic of differing successional forest stages and containing," among other things, "dense understories of young trees, shrubs or overhanging boughs that protrude above the snow, and mature multistoried stands with conifer boughs touching the snow

surface." 79 Fed. Reg. at 54,811-12, 40. These young trees will eventually become mature, multistoried stands, while these mature stands may return to early successional stages due to natural or anthropogenic disturbances, like fire. This cycle encompassed by the PCE thereby ensures both "recruitment" and "maintenance" of winter habitat.

Next, WildEarth repeats its allegation that the PCE does not require the identified physical and biological features to exist in adequate quantity and spatial arrangement to support lynx. WildEarth Resp. (ECF 50) 11. However, this is *precisely* what the PCE requires, as FWS explained in detail when it promulgated the PCE. *See, e.g.*, 79 Fed. Reg. at 54,817 ("[T]he PCE is the elements of the PBFs [(physical and biological features)] in adequate quantity and spatial arrangement on a landscape scale"); *id.* at 54,814 ("[W]e must be able to distinguish . . . areas that contain all essential physical and biological features in adequate quantity and spatial arrangement to support lynx populations over time (areas with the PCE . . .) from other areas that may contain some or all of the features but in inadequate quantities and/or spatial arrangements of one or more feature (and which, therefore, by definition do not contain the PCE)"); *id*. at 54,812 ("[T]he distinction between areas that may contain *some* of each of the physical and biological features . . . and areas that have *all* of the physical and biological

features, each in adequate quantities *and* spatial arrangements to support populations (i.e., contains the PCE), is very important.") (emphasis added).

"[T]he Service is entitled to substantial deference to its interpretation of its own regulations," including FWS's regulation containing the lynx PCE. *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) (citation omitted). "[J]udicial review of an agency's interpretation of its own regulations is limited to ensuring that the agency's interpretation is not plainly erroneous or inconsistent with the regulation." *Id.* (citation omitted). Here, FWS offered a detailed and rational interpretation of the PCE regulation *at the exact same time* it finalized that regulation. WildEarth has presented no argument that FWS's logical interpretation is plainly erroneous or inconsistent with the PCE regulation.

Instead, WildEarth insists the Court cannot consider this clear statement of the PCE's meaning because it appears in the preamble to the PCE regulation, and not in the regulation itself. WildEarth Resp. 11-13. But courts routinely consult preambles when interpreting regulations and uphold agency actions that are consistent with them. *See, e.g.*, *Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1187 (9th Cir. 2012) (upholding agency interpretation of its own regulation, noting it was "consistent with the views expressed in the preamble"); *Strom v. U.S.*, 641 F.3d 1051, 1063 (9th Cir. 2011) ("We owe 'substantial deference' to the SEC's 'published interpretation of its own regulations and will treat it as

controlling if it is not 'plainly erroneous or inconsistent with the regulations.'") (citation omitted); *City of Las Vegas v. FAA*, 570 F.3d 1109, 1117-18 (9th Cir. 2009) ("When a regulation is ambiguous, we consult the preamble of the final rule as evidence of context or intent of the agency promulgating the regulations," and agency "was entitled to rely on this clear evidence of intent" in the preamble).

WildEarth cites a D.C. Circuit case to argue preambles are not "an operative part of the law," WildEarth Resp. 12, but it ignores the remainder of the quoted sentence – "although the language in the preamble of a statute is 'not an operative part of the statute,' it may aid in achieving a 'general understanding' of the statute." *Wyo. Outdoor Council v. U.S. Forest Serv*., 165 F.3d 43, 53 (D.C. Cir. 1999). In fact, in that case, the D.C. Circuit *consulted the preamble* and found the challenged agency action was "consistent with [the agency's] interpretation of the preamble language." *Id*. at 54. The only other case WildEarth cites is also from the D.C. Circuit and held that the preamble at issue, which included a "drafting error" referencing a non-existent final rule, was not a binding, final agency action. *Nat. Res. Def. Council v. EPA*, 559 F.3d 561, 564-65 (D.C. Cir. 2009). This holding is irrelevant and says nothing about the validity of consulting preambles when interpreting regulations. FWS took care to explain in detail the meaning of the lynx PCE when it finalized the rule containing that PCE. This

contemporaneous explanation of agency intent presents a rational, consistent interpretation of the PCE regulation that should apply in this case.

Plaintiffs also attack the PCE by repeating their allegation that FWS cannot define or measure the quantity and spatial arrangement of the physical and biological features needed to support lynx. Alliance Resp. 2; WildEarth Resp. 9-11. FWS acknowledged that various inherent limitations prevent a *perfect* measurement of the PCE across the vast range of the distinct population segment. 79 Fed. Reg. at 54,815-16; Defs. MSJ 14. "Nonetheless, [FWS] use[d] the best *available* information to identify where the physical and biological features occur in adequate quantity and spatial arrangement to provide for the conservation of the species." 79 Fed. Reg. at 54,815 (emphasis added). This is all the ESA requires. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) ("[I]f the only available data is 'weak, and thus not dispositive,' an agency's reliance on such data 'does not render the agency's determination arbitrary and capricious.'") (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992)). Plaintiffs do not argue FWS was wrong to consider the best information available when it defined and measured the quantity and spatial arrangement of the physical and biological features needed to support lynx. Instead, Plaintiffs take issue with the conclusions FWS reached after it evaluated that information. However, Plaintiffs' disagreement with FWS's assessment is not

proof that FWS employed a "murky metric." The PCE used by FWS was specific, rational, and contained all the features necessary for FWS to properly identify lynx critical habitat. Plaintiffs have not proven otherwise.

II. FWS's Decision Not to Designate the Southern Rockies was Reasonable

FWS rationally decided not to designate the Southern Rockies[2] as lynx critical habitat because the area lacked the PCE.[3] 79 Fed. Reg. at 54,794-95, 816-17. Plaintiffs do not deny that FWS evaluated the "presence of snowshoe hares and their preferred habitat conditions" in the Southern Rockies. *Id*. at 54,811-12, 40. This is a distinct feature of the PCE and is, in fact, "the most important factor explaining the persistence of lynx populations." *Id*. at 54,807; *see also id*. at 54,807-08 ("While seemingly all of the physical aspects usually associated with lynx habitat may be present in a landscape, if snowshoe hare densities are inadequate to support reproduction, recruitment, and survival over time, lynx

[2] Plaintiffs continue to use "Southern Rockies" and "Colorado" interchangeably, even though the Southern Rockies is a broader region that includes New Mexico, southern Wyoming, and northeastern Utah. *See* Defs. MSJ 17.

[3] This is part of the test for designating "occupied" critical habitat. 16 U.S.C. § 1532(5)(A). Alliance incorrectly states FWS applied the standard for designating "unoccupied" habitat because FWS observed that Colorado's introduced lynx population was not essential for recovery of the species. Alliance Resp. 9. However, FWS made this statement *after* it analyzed the Southern Rockies under the occupied standard, and it was not the basis for FWS's decision. *See* 79 Fed. Reg. at 54,817; *Lyder*, 728 F. Supp. 2d at 1138 n.10 (rejecting similar argument).

populations will not persist."). FWS's scientific analysis of hare densities in the Southern Rockies was detailed and exhaustive. *See id*. at 54,807-08, 17. Plaintiffs can point to no hare study that FWS failed to evaluate, as reflected in the Rule and the administrative record. Therefore, Plaintiffs' allegation that FWS did not consider the best scientific data available necessarily fails. S*ee Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1081 (9th Cir. 2006) (rejecting argument that agency "in reality ignored" studies that were actually analyzed in record); *Conservation Cong. v. George*, No. 14-CV-01979-TEH, 2015 WL 2157274, at *5 (N.D. Cal. May 7, 2015) ("The threshold, and determinative, flaw in Plaintiff's argument is that Defendants plainly did consider all of the scientific data about which Plaintiff complains," as each "was included in the administrative record").

Instead, Plaintiffs misrepresent FWS's hare density analysis and dispute its conclusions using inferior science. For example, Plaintiffs complain both that FWS allegedly required a specific hare density and that it did not. *Compare* WildEarth MSJ (ECF 32) 14 *with* WildEarth Resp. 3 n.2 *and* Alliance Resp. 10-11. As FWS made clear, it did not set a hard density requirement in the PCE because "[m]inmum snowshoe hare densities necessary to maintain lynx populations *across the range of the DPS* have not been determined." 79 Fed. Reg. at 54,808 (emphasis added); *see also id*. at 54,783; Defs. MSJ 18-19. It was therefore appropriate for FWS to evaluate the best data *available* and decide, as to the

Southern Rockies specifically, whether hare densities were sufficient. *See Defenders of Wildlife v. Jewell*, No. CV 14-1656-MWF, 2014 WL 1364452, at *10 (C.D. Cal. Apr. 2, 2014) ("The ESA tolerates uncertainty so long as the agency relies on 'the best scientific data *available.*'") (citation omitted).

Considering that range of data, FWS reasonably concluded that the Southern Rockies did not exhibit either the hare densities thought necessary to support an introduced population[4] (0.4-0.7 hares per acre), as described by Steury and Murray, or the lower density that Ruggerio et al. suggested was necessary to support a native lynx population (0.2 hares per acre). 79 Fed. Reg. at 54,817; LIT-011149-63; LIT-005899-900. To rebut this rational finding, Plaintiffs merely repeat references to inferior studies,[5] including a 1998 hare pellet survey by Byrne which Byrne himself later deemed unreliable. WildEarth Resp. 3; Alliance Resp. 11-12; LIT-014495, 502-03 ("A number of problems with the snowshoe hare pellet survey have been identified in preceding sections. Their overall effect was to

[4] Steury and Murray found introduced lynx populations, as compared to native populations, likely require a higher hare density because of dispersal from the introduced population and density-independent mortality. LIT-011149, 58-60.

[5] FWS's analysis of these studies is not *post hoc*. It appears in the Rule and is represented in the underlying administrative record. *See* 79 Fed. Reg. at 54,808, 17; *In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 634 (8th Cir. 2005) (finding rationale was not *post hoc* because it was "present in the administrative record underlying the [decision] document, and this is all that is required") (citation omitted); Defs. MSJ 19-20.

preclude estimating hare density and detecting meaningful relationships between hares and their habitat."); Defs. MSJ 19.

Plaintiffs also suggest FWS ignored other "updated" studies, but these were expressly addressed in the Rule. WildEarth Resp. 4; Alliance Resp. 11-12; 79 Fed. Reg. at 54,808, 17. FWS found that, although the upper ends of some reported density ranges approached a sufficient level, the lower ends of those same ranges were dismally low. *See* Zahratka and Shenk 2008, LIT-014037 (estimating ranges as low as 0.03 hares per acre in mature Englemann spruce-subalpine fir habitats and 0.02 hares per acre in mature lodgepole pine stands, while also acknowledging methods may have underestimated effective area trapped (LIT-014042) which would cause overestimation of hare density (79 Fed. Reg. at 54,817)); Ivan 2011, LIT-003168 (estimating range from 0.004 to 0.01 hares per acre in same mature Englemann spruce-subalpine fir habitats evaluated at LIT-014037 and as low as 0.08 in small lodgepole pine); Ivan et al. 2014, LIT-018151 (acknowledging that recalculation method that would increase prior estimates "is prone to positive errors (i.e., would likely over-estimate true density")).

Considering the weight of all this evidence, FWS reasonably concluded the Southern Rockies had "poor to marginal hare densities" insufficient to support lynx. 79 Fed. Reg. at 54,794, 817. This rational conclusion was based on varied and sometimes conflicting scientific data. As such, it is entitled to significant

deference and should be upheld. *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (upholding agency's interpretation of studies despite contrary interpretations because "the scientific studies were ambiguous and the analyses of the agencies were supported by a reasonable reading of the evidence"); *Alaska v. Lubchenco*, 723 F.3d 1043, 1055 (9th Cir. 2013) (refusing to "second guess" agency's rational choice between competing studies).

The absence of "snowshoe hares and their preferred habitat conditions" in adequate quantity and spatial arrangement *alone* is enough to disqualify the Southern Rockies as critical habitat, since it is a necessary feature of the PCE. *See* Defs. MSJ 12-13, 21. Plaintiffs attempt to distract from this fact by alleging FWS used other, non-PCE factors in its decision.[6] But this distorts FWS's analysis. FWS chose not to designate the Southern Rockies as critical habitat because the area lacked the PCE. In reaching this conclusion, FWS did not use PCE proxies; however, it did not ignore relevant and reliable information related to lynx in the Southern Rockies just because that information did not speak directly to the PCE's presence. Willfully disregarding such evidence would have been arbitrary –

[6] WildEarth tries to avoid FWS's PCE analysis in the 2014 Rule by complaining about FWS's analysis in prior lynx critical habitat rules, including the 2006 rule that FWS voluntarily withdrew due to its own concerns about accuracy. WildEarth Resp. 1; LIT-013187-88. However, the only agency action under review here is the 2014 Rule, and criticisms of prior rules are irrelevant.

considering it as a relevant fact and explaining its role in FWS's analysis was not. *Lyder* recognized this distinction when it rejected FWS's use of reproduction as a "litmus test" but still found it was a "relevant factor to consider." 728 F. Supp. 2d at 1135; *see also id*. (objecting to reproduction as "proxy" but acknowledging it was a "fact to consider").

For instance, while FWS did examine the historical presence of lynx in the Southern Rockies, it also said the absence of a historical population[7] "does not prove the absence (or disprove the potential presence) of the PCE" and is just "*one piece* of evidence" in its evaluation. 79 Fed. Reg. at 54,788; (emphasis added); *see also* Defs. MSJ 25-27. Certainly, FWS did not *require* any area to have a historical lynx population, and FWS classified Colorado "occupied" even without one because it had a population of introduced lynx at the time of listing. 79 Fed. Reg. at 54,797. Similarly, although FWS acknowledged the Southern Rockies are isolated from other lynx populations, it did not refuse to designate the area because

[7] Plaintiffs wrongly claim FWS ignored the possibility that Colorado lacked a historical population because of "human-caused factors." Alliance Resp. 7-8; WildEarth Resp. 6-7. FWS directly examined this question and found, "no indication that habitat loss, degradation, or fragmentation or trapping pressures were greater in the Southern Rockies than in places where lynx populations persisted despite them." 79 Fed. Reg. at 54,794; *see also id.* at 54,793; Defs. MSJ 27. Additionally, contrary to Alliance's assertion, FWS thoroughly explained its basis for relying only on verified data when assessing lynx, including their historical presence, and established that Plaintiffs' evidence regarding historical presence is not the best available. *See* Defs. MSJ 6-7, 26-27.

of that isolation, nor did it treat connectivity as a feature of the PCE.[8] Defs. MSJ 30-31. However, both the lack of historical population and the area's isolation were relevant factors that FWS correctly considered in its analysis.

Another relevant factor was the status of Colorado's introduced lynx population. FWS found the population had inconsistent and limited reproduction coupled with substantial mortality. 79 Fed. Reg. at 54,816; LIT-20515; LIT-010247-49; LIT-010292-94; LIT-010349; LIT-010381; LIT-018733; Defs' MSJ 27-30. FWS also noted *Colorado's own admission* that the future persistence of the population is uncertain and hinges on the assumption that patterns of annual reproduction and survival observed as of 2010 repeat themselves for twenty or more years, until 2030 or beyond. 79 Fed. Reg. at 54,816-17; LIT-010378, 82, 87; *see also* LIT-010340, 54; LIT-010283, 99. Thus, it was Colorado, not FWS, that set the 2030 date, and FWS has not said Colorado must wait until 2030 to be eligible for critical habitat designation. This is simply the timeframe Colorado itself identified as necessary to prove its introduced population can persist. FWS considered this information a relevant factor in its analysis but did not require the

[8] *Lyder* did not find consideration of connectivity *per se* arbitrary, as Alliance claims. Alliance Resp. 9. Rather, *Lyder* objected to using connectivity as a PCE proxy "[b]ecause the Service fail[ed] to identify whether Colorado has the requisite [primary constituent] element." 728 F. Supp. 2d at 1138. The circumstances are clearly different here – FWS *did* identify that Colorado lacks the PCE and *did not* use connectivity as a PCE proxy.

Colorado population to demonstrate viability for designation, *i.e.*, FWS did not use a self-sustaining population as a proxy for the PCE. FWS merely considered the status of Colorado's introduced population as one piece of evidence in its exhaustive analysis that ultimately concluded the physical and biological features essential to lynx do not exist in the Southern Rockies in sufficient quantities and spatial arrangement to warrant critical habitat designation.

Plaintiffs dispute this conclusion, wrongly arguing other evidence demonstrates the presence of the PCE in the Southern Rockies. First, Plaintiffs claim lynx have reproduced in Colorado over either the last ten or sixteen years, allegedly proving the PCE's presence. Alliance Resp. 5, 12; WildEarth Resp. 4. However, lynx reproduction in Colorado has only been documented in *six* of the last sixteen years (2003-2006, 2009-2010), and data collected by the State indicate that, in most years with reproduction, the majority of kittens died before being recruited into the breeding population. Defs. MSJ 27-28; LIT-010247-49; LIT-010292-94; LIT-010349; LIT-010381. Plaintiffs present no evidence showing otherwise. Consequently, FWS was not obligated to conclude the PCE was present in Colorado based on inconsistent lynx reproduction and minimal apparent recruitment, and it was reasonable for FWS to find that Colorado's "short-term, sporadic, or inconsistent reproduction" suggested, but did not determine, that the PCE was absent. 79 Fed. Reg. at 54,812; Defs. MSJ 29-30.

Plaintiffs also press their misreading of FWS's lynx Recovery Outline, alleging its classification of the Southern Rockies as a "provisional" core area proves the area possesses the PCE. WildEarth Resp. 4-5; Alliance Resp. 11. Plaintiffs claim to know better than FWS what FWS meant when it used the term "provisional," but FWS has made its intention plain. The Recovery Outline deemed the Southern Rockies a "provisional" area "because it contains a reintroduced population," and it was "too early to determine whether a self-sustaining lynx population will result." LIT-019376; Defs. MSJ 22. Nowhere does the Recovery Outline say the Southern Rockies possess the PCE or the characteristics of a core area. In fact, FWS expressly said, "Colorado otherwise does not meet the outline's criteria for core areas." 79 Fed. Reg. at 54,798. Nothing has changed since the Recovery Outline's publication that automatically converts the Southern Rockies' status from "provisional" to "core."[9] Therefore, the Recovery Outline does not show the Southern Rockies possess the PCE. Nor do the other Section 7 documents that Plaintiffs cite, including the Lynx Conservation Assessment and Strategy. WildEarth Resp. 6; Alliance Resp. 13.

[9] WildEarth claims Colorado's lynx introduction was "declared a success" after the Recovery Outline was published, but WildEarth fails to explain that this "declaration" was made by Colorado, not FWS or an objective third party, in the same 2010 document that also said patterns of reproduction and survival would need to repeat themselves during "the next 20 or more years" to sustain the introduced lynx. WildEarth MSJ 9, Resp. 5; PR-005360.

These documents were developed to address whether lynx "may be present" in an area, triggering the need for consultation, and Plaintiffs cite no portions of them that speak specifically to the PCE or the requirements for critical habitat more generally. Defs. MSJ 23-24.

In the Rule, FWS acknowledged Colorado's efforts to introduce lynx and expressed hope that they would ultimately succeed. 79 Fed. Reg. at 54,817. However, even the best intentions cannot justify designating an area critical habitat when it does not qualify. FWS's decision not to designate the Southern Rockies was based on a careful and complete analysis of the best scientific data available and should be upheld.

III. FWS's Designation of Critical Habitat in Montana and Idaho was Reasonable

In its opening brief, FWS outlined in detail the rational basis for its designation of critical habitat in Montana and Idaho (the Northern Rockies). Defs. MSJ 31-38. Alliance – the only Plaintiff to challenge this designation on summary judgment – essentially abandoned its arguments on reply, offering a one-sentence response referencing a handful of allegations in its Statement of Undisputed Facts that FWS previously rebutted. Alliance Resp. 17; ECF 45 ¶¶ 212-22. FWS's designation of critical habitat in Montana and Idaho was rational, reasonable, and fully compliant with *Lyder*. Therefore, it should be sustained.

IV. FWS's Decision Not to Designate the Kettle Range was Reasonable

FWS rationally decided not to designate the Kettle Range as lynx critical habitat after a fulsome review of the best scientific data available. Defs. MSJ 39-44. WildEarth objects to this reasoned decision, primarily complaining that FWS classified the Kettle Range as "unoccupied" at the time of listing. WildEarth Resp. 7-9. WildEarth relies on *Arizona Cattle Growers' Association v. Salazar* to support its position but continues to ignore a key finding of that case – "[d]etermining whether a species uses an area with sufficient regularity that it is 'occupied' is a highly contextual and fact-dependent inquiry . . . within the purview of the agency's unique expertise." 606 F.3d 1160, 1164-65 (9th Cir. 2010); *see also id*. at 1171 (finding assessment of reliability of occupancy studies was "precisely the sort of decision within the agency's technical expertise that we are not free to second-guess"); *Lyder*, 728 F. Supp. 2d at 1130-31 (deferring to FWS's occupancy determinations and citing *Arizona Cattle Growers'* in support).

WildEarth also overstates *Arizona Cattle Growers'* holding. For the owl species at issue, the Ninth Circuit found only that, "FWS ha[d] authority to designate as 'occupied' areas that the owl uses with *sufficient regularity that it is likely to be present during any reasonable span of time*." *Ariz. Cattle Growers'*, 606 F.3d at 1165 (emphasis added); *see also id*. at 1168 (noting as "significant" FWS's choice not to designate "areas with evidence of few or no owls," including

areas with "widely scattered owl sites" and "low owl population densities"). Here, even WildEarth's unverified evidence only suggests that a very small number of lynx may have temporarily passed through the Kettle Range when dispersing from population irruptions in Canada. WildEarth MSJ 16-18; Defs. MSJ 40-41. Certainly, this limited evidence does not prove lynx used the Kettle Range at the time of listing "with sufficient regularity" that lynx were "likely to be present" there "during any reasonable span of time."

Left with little rebuttal, WildEarth repeats essentially verbatim from its opening brief a list of allegations that relies heavily on information from the Washington Department of Fish and Wildlife ("Washington Wildlife"). *Compare* WildEarth Resp. 8-9 *with* WildEarth MSJ 17-18. But WildEarth continues to disregard Washington Wildlife's own agreement with FWS that the Kettle Range did not support a lynx population at the time of listing. 79 Fed. Reg. at 54,797; PI-002683. Moreover, as FWS has already established, WildEarth's evidence is anecdotal and unverified. Defs. MSJ 40; LIT-004932; LIT-018292; E.000031-32; FR-018788; FR-018783. WildEarth argues otherwise, claiming "the majority of the reports" it cites "were made by 'knowledgeable individuals,'" but this misunderstands the verification standard. WildEarth Resp. 9. The table of alleged lynx reports cited by WildEarth contains twenty-three records, twenty of which are outside the 1995 cutoff for assessment to determine occupancy at the time of

listing in 2000. FR-018783; 79 Fed. Reg. at 54,826. Of the three records from 1995 or later, two are track reports. FR-018783. Tracks are only verified if confirmed by genetic analysis, regardless of who reported them. 79 Fed. Reg. at 54,816. However, *none* of the tracks on this chart received any genetic confirmation. The remaining post-1995 record was of an alleged "lynx seen," but nothing indicates the animal was "observed closely by a person knowledgeable in lynx identification," a verification requirement. 79 Fed. Reg. at 54,816; FR-018783 (identifying report made *to* Forest Service employee by undescribed person who saw animal briefly dart out of woods). Therefore, neither this evidence, nor any of WildEarth's other arguments, are enough to undermine FWS's sound scientific judgment that the Kettle Range was unoccupied at the time of listing.

WildEarth does not dispute that the Kettle Range fails to meet the standard for designating unoccupied critical habitat, arguing instead that the area qualifies as *occupied* critical habitat. WildEarth Resp. 9, 10. However, even if the Kettle Range were occupied, FWS has rebutted WildEarth's claims that it possesses the PCE, and WildEarth presents no new evidence in response. *See* Defs. MSJ 42-44. FWS has also shown that the Kettle Range lacks evidence of lynx reproduction, contrary to WildEarth's claims. *See, e.g.*, *id*. 39-40, 43-44; E.000032 ("no indication of reproducing animals has been found" in Kettle Range); LIT-002670

("no evidence of reproduction in northeastern Washington"); 79 Fed. Reg. at 54,797-98. All this proves FWS rationally concluded the best available science did not warrant designating the Kettle Range as critical habitat. This judgment is entitled to significant deference and should not be second-guessed now.

V. FWS Considered but Reasonably Decided Against Designating Oregon

WildEarth wrongly argues the Service "failed to consider Oregon for critical habitat designation" and "ignore[d]" WildEarth's comments requesting that it do so. WildEarth Resp. 13. To the contrary, in the Rule, FWS expressly identified and responded to comments that suggested designating Oregon. 79 Fed. Reg. at 54,797-98. FWS noted, "[w]e received many public comments requesting that we designate additional areas as critical habitat, including . . . Oregon." *Id*. at 54,797. However, "[w]ith the exception of parts of western Colorado . . . there is no evidence that the places mentioned above [including Oregon] were occupied by resident lynx populations at the time of listing." *Id*. This finding is supported by multiple documents in the administrative record, which FWS considered when designating critical habitat. *See* Defs. MSJ 44-47; LIT-012988-89, 993, 3008; LIT-013031-32; LIT-014469; LIT-015051; LIT-019379; LIT-002635. FWS also explained in the Rule that the identified areas, including Oregon, did not meet the standard for designation of unoccupied, or even occupied, critical habitat. 79 Fed. Reg. at 54,797-98. Additionally, the Rule details FWS's process for identifying

occupied areas generally, the importance of relying only on verified evidence, and the significance of lynx's transient nature in occupancy determinations. *Id*. at 54,788, 794, 813-14, 816.

WildEarth complains that FWS "lumped Oregon in" with other undesignated areas in the Rule's analysis, but there is no requirement that FWS *individually* address in the Rule every area that was not included in the critical habitat designation. WildEarth Resp. 13. FWS is only required to provide a reasoned response to significant comments, which it did, as outlined above. *Safari Aviation v. Garvey*, 300 F.3d 1144, 1151 (9th Cir. 2002) (finding agency adequately responded to comments by "acknowledge[ing]" their submission and providing a "reasoned response"); *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. C 13-4517 CW, 2014 WL 3908220, at *7-8 (N.D. Cal. Aug. 7, 2014) (holding agency's response to comments was sufficient even though it lacked specificity).

Finally, FWS's explanation of its decision not to designate Oregon is not a *post hoc* rationalization – FWS is merely summarizing the decision-making process that resulted in the critical habitat designation, as represented in the administrative record and Rule. *In re Operation of Mo. River Sys. Litig*., 421 F.3d at 634; *Defenders of Wildlife v. U.S. Dep't of Navy*, 733 F.3d 1106, 1120 n.6 (11th Cir. 2013) ("There is 'no requirement that every detail of the agency's decision be stated expressly in the [decision document]' as long as the 'rationale is present in

the administrative record underlying the document.'") (citation omitted); *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1478 (9th Cir. 1994) (upholding agency action because, "[a]lthough not a model of clarity, the court finds that it can discern the Defendants' decision-making path from the Administrative Record").

After reviewing WildEarth's comments and the best available science, FWS reasonably concluded that Oregon – a state with only twelve *total* verified records of lynx, only three since 1927, and no evidence of reproduction – did not qualify as critical habitat. PI-008094-95; LIT-014469-70; Defs. MSJ 44-47. WildEarth has presented no valid reason to reverse this rational scientific judgment.

VI. FWS's Critical Habitat Designation Reasonably Accounts for Climate Change and Travel Corridors

Alliance incorrectly maintains that FWS should have designated various areas unoccupied by lynx at the time of listing as critical habitat to address climate change and provide travel corridors. Alliance Resp. 13-17. However, FWS rationally concluded that no areas meet the ESA's "onerous" standard for designation of unoccupied habitat, which requires that the habitat itself be essential for the conservation of the species. 16 U.S.C. § 1532(5)(A); *Lyder*, 728 F. Supp. 2d at 1138; 79 Fed. Reg. at 54,798, 813. Alliance's arguments on these two issues mirror identical claims made and rejected in *Lyder*. 728 F. Supp. 2d at 1139-43;

Defs. MSJ 48-53. To sidestep this fact, Alliance claims *Lyder's* findings on climate change should not govern because of a single, six-page declaration from Healy Hamilton. COR000107. First, this document is not new – plaintiffs submitted it in *Lyder*. *Lyder*, ECF 10. It is also essentially duplicative of the Gonzalez report[10] which *Lyder* extensively discussed and rejected as support for Plaintiffs' claims. 728 F. Supp. 2d at 1142; COR000107-08; LIT-001426. Therefore, the Hamilton declaration does not impact *Lyder's* analysis.

A fundamental problem with both Hamilton and Gonzalez is that they begin their analyses with "historic distribution" of *suitable* or *potential*, not actual, lynx habitat. COR000107-8, 10; LIT-001429, 32. Both then use bioclimatic modeling to predict that the climatic envelope (temperature and snow) currently encompassing this distribution of "potential" or "suitable" habitat may shift northward and upslope with continued climate warming. COR000108, 110-11; LIT-001430, 32. But a change in the climate of areas that have not historically and do not currently contain lynx habitat or support lynx is irrelevant. Neither modeling effort provides evidence that specific areas within their current or modeled future distribution of "potential" or "suitable" habitat are essential for the

[10] Hamilton agrees her work has "parallels in methodology" to and allegedly "support[s] the general findings of Gonzalez." COR000107-08. Hamilton acknowledges the only difference between her work and Gonzalez's is her use of more model runs and fewer greenhouse gas emissions scenarios. COR000107.

conservation of the species (or even contain the PCE). Gonzalez at least recognizes this distinction and related scientific uncertainty. LIT-001432. Hamilton does not and is not the best available scientific information.

After evaluating Hamilton and numerous other studies, FWS agreed that lynx habitat is likely to shift northward and upslope due to climate change. 79 Fed. Reg. at 54,811. However, the best scientific data available indicate that this shift will occur within the lynx's currently occupied range, not in unoccupied areas. *Id*.; Defs. MSJ 50-51. Specifically, the best available scientific data identify no areas "not currently of value for lynx that will become so as a result of climate-induced changes." 79 Fed. Reg. at 54,811. All lynx habitat is predicted to worsen in quality, meaning habitat not currently used by lynx will only become *less likely* to be occupied, not more. *Id*. at 54,784, 91-95, 810-11. Certainly, such unoccupied habitat is not essential for the conservation of the species. Therefore, to account for climate change, FWS included "higher elevation habitats within the range of the DPS that would facilitate long-term lynx adaptation to an elevational shift in habitat should one occur." *Id*. at 54,811. This is a reasonable decision derived from FWS's unique scientific expertise. Alliance cannot upend FWS's rational conclusion based on a redundant declaration summarizing inferior scientific information. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to

rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *Kern*, 450 F.3d at 1080 ("The best available data requirement 'merely prohibits [an agency] from disregarding available scientific evidence that is in some way *better* than the evidence [it] relies on") (citation omitted) (emphasis added).

Alliance wrongly assumes FWS "ignored" the Hamilton declaration because the Rule did not directly mention it. However, FWS was not obligated to specifically name Hamilton, especially since her declaration was largely duplicative of Gonzalez (which the Rule addressed in detail), and it was not the best available science. *Defenders of Wildlife*, 733 F.3d at 1120 n.6 ("There is 'no requirement that every detail of the agency's decision be stated expressly in the [decision document]'") (citation omitted). However, this does not mean FWS "ignored" her analysis. FWS considered it, along with the rest of the relevant climate change research, and reasonably chose not to rely on it because it was not the best available science. This conclusion, along with FWS's statement that Hamilton's declaration is not peer-reviewed, are not *post hoc* rationalizations – the latter is a simple fact, and the former is reflected in the administrative record and FWS's discussion of climate change science in the Rule. *Lands Council v. U.S. Forest Serv.*, 601 F. App'x 478, 480 (9th Cir. 2015) (finding agency reasoning was

not *post hoc* rationalization because related topics were discussed in record documents).

Alliance also tries to avoid *Lyder's* holdings on connectivity by arguing various "new"[11] documents, including the Hamilton declaration, make them inapplicable. Alliance Resp. 16. However, these documents say nothing about whether Alliance's alleged "corridors" and "linkages" are essential to the conservation of lynx. Alliance again relies on documents developed under ESA Section 7, but, as FWS has repeatedly explained, such documents were developed to show where lynx "may be present" to assist with consultation, a much lower standard than the one required for designating unoccupied critical habitat. *See* Defs. MSJ 23-24, 34-35, 46-47; Alliance Resp. 14 (citing Hamilton declaration, which identified potential linkage areas using information developed for Section 7 purposes, COR000108); 16 (citing Southern Rockies Lynx Management Direction Final Environmental Impact Statement's description of "areas of movement opportunities" mapped in connection with a proposal to amend forest plans, LIT-021191, 231-32, 494; Plaintiffs' comments on proposed rule, relying on Section 7 documents, *e.g.*, Biological Opinion, Biological Assessment, PI-006232-45, 59-61;

[11] Like the Hamilton declaration, not all the travel corridor documents that Alliance cites are "new." *See* PI-007980 (submitted as attachment to plaintiffs' summary judgment motion in *Lyder* (ECF 19) and developed in 2002).

2002 map of potential habitat and hypothetical linkages developed to assist in Section 7 consultations, PI-007980). Additionally, at best, Alliance's documents only show *possible* corridors based on habitat potential, not *actual* corridors proven to be used by lynx. *Id*. Even Alliance classifies them as unoccupied. Alliance Resp. 13. Finally, Alliance has not shown that their alleged corridors connect areas that matter when designating critical habitat. In other words, there is no evidence that Alliance's corridors would connect areas that either contain the PCE or are essential for the conservation of lynx.

As FWS explained, the critical habitat designation appropriately accounted for lynx travel corridors and linkages by "provide[ing] habitat connectivity for travel within home ranges, and exploratory movements and dispersal within critical habitat units." 79 Fed. Reg. at 54,799; Defs. MSJ at 51-53. This approach was reasonable and consistent with the Court's decision in *Lyder*. Alliance presents no new evidence sufficient to reverse FWS's logical conclusion.

CONCLUSION

For all these reasons, Defendants' Combined Cross-Motion for Summary Judgment should be granted, and these consolidated cases should be dismissed.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief is 6,456 words, excluding the caption, table of authorities, table of contents, signature blocks, and certificate of compliance.

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