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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, ENVIRONMENTAL PROTECTION INFORMATION CENTER, KLAMATH-SISKIYOU WILDLANDS CENTER, and SIERRA FOREST LEGACY, Plaintiffs, vs. U.S. FISH & WILDLIFE SERVICE; SALLY JEWELL, in her capacity as Secretary of the Interior; and DANIEL M. ASHE, in his capacity as Director of the U.S. Fish & Wildlife Service, Defendants.	Case No.: **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This lawsuit challenges an illegal decision by the U.S. Fish and Wildlife Service ("Service") to withdraw a proposed rule to list the west coast distinct population segment of the fisher (the "Pacific fisher") as a threatened species under the federal Endangered Species Act ("ESA"). *See* 81 Fed. Reg. 22,710 (Apr. 18, 2016) ("Rule Withdrawal").

2. Pacific fishers are slender mammals with long, bushy tails, closely related to minks, martens, and wolverines. Historically, Pacific fishers were widely distributed throughout the dense coniferous forests that once blanketed the west coast of the United States, from the Sierra Nevada north through the Cascades to Canada. Today, Pacific fishers are gone from the vast majority of their historic range, victim to rampant deforestation, fur trapping, poisoning, and other destructive activities. Only two small native populations survive: one in the southern Sierra and another in the Klamath-Siskiyou region that straddles northwest California and southwest Oregon.

2. In 2014, after fourteen years of illegal foot-dragging and spurred by multiple trips to court, the Service finally published a proposed rule to protect Pacific fishers as a threatened species under the ESA. *See* 79 Fed. Reg. 60,419 (Oct. 7, 2014) ("Proposed Rule"). Consistent with the best scientific and commercial data available, the Service's Proposed Rule concluded correctly that Pacific fishers are "likely to become endangered throughout all of [their] range in the foreseeable future . . . based on multiple threats impacting the remaining two extant native original populations and the cumulative and synergistic effects of the threats on small populations . . . ." *Id*. at 60,436.

3. Pursuant to a court-ordered settlement, the Service had until October 2015 to adopt a final rule listing Pacific fishers as threatened and thereby affording them protection under the ESA. But on April 14, 2016, having failed to promulgate a final rule, the Service inexplicably and illegally abandoned years of work and withdrew its Proposed Rule, leaving Pacific fishers unprotected.

4. This lawsuit challenges the Service's Rule Withdrawal on the grounds that it is arbitrary, capricious, contrary to the best scientific and commercial data available, and otherwise not in accordance with the ESA. As set forth below, plaintiffs ask this Court to set aside the Service's Rule Withdrawal and to order the Service to reinstate its Proposed Rule and publish forthwith a final rule listing Pacific fishers as threatened under the ESA.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action by virtue of 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), 16 U.S.C. § 1540(c) (actions arising under the ESA), and 16 U.S.C. § 1540(g) (citizen suit provision of the ESA).

6. As required by the ESA, 16 U.S.C. § 1540(g), plaintiffs provided sixty days' notice of the violations alleged herein on June 13, 2016. A copy of plaintiffs' notice letter is attached hereto as Exhibit A.

7. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A), because plaintiffs Center for Biological Diversity, Environmental Protection Information Center, and Sierra Forest Legacy are incorporated in this District and have offices here; because the Pacific fishers' range includes Del Norte, Humboldt, and Mendocino counties; and because some or all of the violations alleged herein occurred in this district.

8. Assignment to the San Francisco Division of this Court is proper, because a substantial part of the events and omissions giving rise to the claims herein occurred in counties assigned to the San Francisco Division.

PARTIES

9. Plaintiff Center for Biological Diversity ("Center") is a non-profit organization incorporated in California with offices in Oakland, Sacramento, Joshua Tree, Los Angeles, and Shelter Cove, as well as a number of cities in other states. The Center has over 48,500 members throughout the United States and the world. The Center works through science, law, and policy to secure a future for all species teetering on the brink of extinction. The Center has been involved for decades in species and habitat protection throughout the western United States, including protection of Pacific fishers. For over fifteen years, the Center has worked to secure protection under both state and federal laws for Pacific fishers and their old forest habitat in California, Oregon, and Washington. The Center has also worked extensively to prevent destructive activities such as commercial logging of large trees and overuse of toxic rodenticides that are harming Pacific fishers and their habitat.

10. Plaintiff Environmental Protection Information Center ("EPIC") is a non-profit public benefit corporation with approximately 3,000 members organized under the laws of the State of California with its main office in Arcata, in close proximity to one of California's two remaining populations of Pacific fishers. EPIC's purpose is to protect and restore the biological diversity and ecosystem health of California's rivers and forests. To this end, EPIC monitors state and federal environmental management activities to ensure compliance with current law and works to protect and restore ancient forests, watersheds, coastal estuaries, and native species throughout Northwestern California, including both public and industrial forestlands. EPIC also serves as a community resource center for members of the public working to protect forest ecosystems. EPIC has a long history of working to conserve Pacific fishers and their forest habitat in California.

11. Plaintiff Klamath-Siskiyou Wildlands Center ("KS Wild") is a non-profit corporation organized under the laws of the State of Oregon. KS Wild's main offices are in Ashland, Oregon. KS Wild has 3,500 members in over 10 states, with most members concentrated in southern Oregon and northern California. On behalf of its members, KS Wild advocates for the forests, wildlife, and waters of the Rogue and Klamath Basins and works to protect and restore the extraordinary biological diversity of the Klamath-Siskiyou region of southwest Oregon and northwest California. KS Wild uses environmental law, science, education, and collaboration to help build healthy ecosystems and sustainable communities. Through its campaign work, KS Wild strives to protect biological diversity of the Klamath region. KS Wild routinely participates in commenting, monitoring, and litigation of federal actions impacting wildlife, and has long worked to protect and restore Pacific fishers in the Pacific Northwest.

12. Plaintiff Sierra Forest Legacy ("Legacy") is a project of the San Francisco-based non-profit Tides Foundation. Organized in 1996, Legacy works to protect and restore the ancient forests, wildlands, wildlife, and watersheds of the Sierra Nevada through scientific and legal advocacy, public education and outreach, as well as grassroots forest protection efforts. Legacy's staff and members have been involved in most major policy decisions and research initiatives relating to Sierra Nevada national forest management and species conservation, including efforts to study, protect, and recover Pacific fishers. Legacy has also worked extensively within the Sierra Nevada

Adaptive Management Process to advocate for robust scientific assessment of the impacts of projects on, and to obtain scientifically based protection for, Pacific fishers. Legacy has also worked with researchers in the southern Sierra to develop better techniques for monitoring fishers and to promote additional fisher research.

13. Plaintiffs' members and staff live, work, and recreate in or near the current and historic range of the Pacific fisher. Plaintiffs members use and enjoy, on a continuing and ongoing basis, the habitat of the Pacific fisher and the larger ecosystem upon which it depends. Plaintiffs' members and staff derive aesthetic, recreational, scientific, inspirational, educational, and other benefits from Pacific fishers and their habitat, and they intend to do so frequently in the future on a regular and continuing basis.

14. Plaintiffs' members and staff have been for years, and remain today, engaged in numerous efforts to protect and preserve Pacific fishers and their forest habitat. Among other things, plaintiffs were among the organizations that petitioned the Service to protect the Pacific fisher under the ESA in November 2010, and they have worked tirelessly since to ensure that fishers are afforded legal protection under the ESA.

15. The Service's decision to withdraw its Proposed Rule to list Pacific fishers as threatened under the ESA has caused plaintiffs and their members to suffer a concrete and particularized injury that is actual and imminent. Plaintiffs and their members will continue to suffer injury unless the relief requested herein is granted. Plaintiffs' injuries would be redressed by the relief requested in this complaint.

16. Plaintiffs have exhausted all available administrative remedies and have no other adequate remedy at law.

17. Defendant U.S. Fish and Wildlife Service is the administrative agency within the U.S. Department of Interior responsible for implementing the ESA with respect to terrestrial mammals including the Pacific fisher.

18. Defendant Sally Jewell is the Secretary of the Department of Interior and ultimately responsible for properly carrying out the ESA with respect to terrestrial mammals such as the fisher. She is sued in her official capacity.

19. Defendant Daniel M. Ashe is the Director of the Service. He is sued in his official capacity.

LEGAL BACKGROUND

20. Congress enacted the Endangered Species Act ("ESA") in 1973 to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). The statute contains an array of provisions designed to afford imperiled species "the highest of priorities," so that they can recover to the point where federal protection is no longer needed. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). To benefit from these provisions, however, the Secretary of Interior, acting through the Service, must first list the species as either "threatened" or "endangered" pursuant to Section 4 of the ESA, 16 U.S.C. § 1533.

21. The term "species" is defined broadly by the ESA to include "any subspecies of fish or wildlife or plants, and any *distinct population segment* of any species of vertebrate fish or wildlife which interbreeds when mature." *Id.* § 1532(16) (emphasis added). The ESA does not define the term "distinct population segment" (or "DPS"). However, the Service adopted a policy in 1996 to guide its evaluation as to whether a vertebrate population constitutes a DPS. *See* 61 Fed. Reg. 4,722 (Feb. 7, 1996). In short, the Service weighs the "discreteness of the population segment in relation to the remainder of the species to which it belongs" and the "significance of the population segment to the species." *Id*. at 4,725. If it is both discrete and significant, the population qualifies as a DPS and, therefore, a "species" for purposes of the ESA.

22. The ESA directs the Service to "determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence."

16 U.S.C. § 1533(a)(1).

23. The ESA defines a species as "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). It defines a species as "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). The Service has promulgated regulations construing these statutory definitions, which explain:

> If we determine that the species is in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range, we will list the species as endangered (or threatened) . . . . If the species is neither endangered nor threatened throughout all of its range, we will determine whether the species is endangered or threatened throughout a significant portion of its range. If it is, we will list the species as endangered or threatened, respectively; if it is not, we will conclude that listing the species is not warranted.

79 Fed. Reg. 37,578, 37,585 (July 1, 2014).

24. The ESA requires the Service to make its listing determinations "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). The Ninth Circuit Court of Appeals has held that "[t]he ESA's requirement that agencies use the best scientific and commercial data available means that agencies must support their conclusions with accurate and reliable data." *League of Wilderness Defenders/Blue Mt. Biodiversity Proj. v. Connaughton*, 752 F.3d 755, 763-64 (9th Cir. 2014). However, "the Service may not ignore evidence simply because it falls short of absolute scientific certainty." *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1147 (9th Cir. 2007). "Even if the available scientific and commercial data were quite inconclusive, [the Service] may—indeed must—still rely on it." *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000).

FACTUAL BACKGROUND

25. Fishers are medium-sized members of the weasel family with thick, dark fur and long tails. Until recently, taxonomists referred to fishers by the scientific name *Martes pennanti*, which placed them in the same genus as martens. New genetic research indicating that fishers are more closely related to wolverines than to martens has prompted taxonomists to assign fishers a new scientific name: *Pekania pennanti*. The Service has adopted this new taxonomy.

26. Fishers are native only to North America. Prior to European settlement, their range included the deciduous and evergreen forests of the eastern United States and the boreal forests of

Canada, as well as the mixed conifer forests that buttress the west coast of the United States. Today, fishers are extinct throughout much of their historic range.

27. The Service has concluded that the population of fishers that inhabits the west coast of the United States—a population often referred to as the "Pacific fisher"—qualifies as a "distinct population segment" of fishers for purposes of the ESA, because "loss of the species from the west coast range in the United States would represent (1) a significant gap in the species' range, (2) the loss of genetic differences from fisher in the central and eastern United States, and (3) the loss of the species from a unique ecological setting." 69 Fed. Reg. 18,770, 18,777-78 (Apr. 3, 2004). The Ninth Circuit Court of Appeals has upheld the Service's finding that the Pacific fisher is a DPS and therefore meets the ESA's definition of a "species" that is eligible for listing as threatened or endangered. *See Sierra Forest Products, Inc. v. Kempthorne*, 361 F. App'x 791, 792 (9th Cir. 2010).

28. The Pacific fisher is a quintessential old—or "late successional"—forest animal. The Service has found that "late-successional coniferous or mixed forests provide the most suitable habitat because they provide abundant potential den sites and preferred prey species." 68 Fed. Reg. at 18,775. According to the Service's March 2016 final Species Report ("FSR") for the Pacific fisher, "the strongest and most consistent predictor of fisher occurrence in western North America is an association with moderate to dense forest canopy at larger spatial scales." FSR at 19.

29. According to the Service, Pacific fishers "tend to live in remote locations where they are seldom encountered, documented, or studied." FSR at 29. "They also are wide ranging animals with males making regular long distance movements, particularly during the breeding season and when dispersing." *Id*. The Service has explained that "[s]uch movements can make it difficult to distinguish with certainty between occurrence records that represent established populations in suitable habitats and records that represent short-term occupancy or exploratory movements without the potential for establishment of home ranges, reproduction, or populations." *Id.*

30. The best scientific and commercial data available indicates that Pacific fishers were once broadly distributed throughout the late-successional coniferous and mixed forests of Washington, Oregon, and California, from the southern Sierra Nevada north through the Cascades

and the Olympic Peninsula. Based on the best scientific and commercial data available, the Service's final Species Report describes the Pacific fishers' historic range as follows:

> In Washington, fishers historically occurred throughout densely forested areas both east and west of the Cascade Crest, on the Olympic Peninsula, and probably in southwestern and northeastern Washington. In Oregon, Bailey reports fishers occurred in the boreal forest zones of the Cascade Range from Washington to California, west to the coniferous coastal forests and cool humid Coast Ranges; this report also extends their range to the northeastern portion of the state near the Washington and Idaho borders. In the forested, higher mountain masses of California, Grinnell *et al.* describe fishers as ranging from the Oregon border southward through the Coast Range to Lake and Marin Counties, east through the Klamath Mountains to Mount Shasta, and south throughout the main Sierra Nevada to Greenhorn Mountain in northern Kern County.

FSR at 28 (citations omitted).

31. Many decades of deforestation, fur trapping, and other destructive human activities have reduced Pacific fishers to a small faction of their historic range. In Washington, northern Oregon, and central Oregon, the Service has concluded that Pacific fishers "appear to be likely extirpated, except on the Olympic Peninsula where they have been recently reintroduced." FSR at 37. Fishers are also gone from much of their historic range in the central and northern Sierra Nevada. According to the Service, only two native populations of Pacific fishers still survive: "one in the southern Sierra Nevada . . . and the other in northern California and southwestern Oregon." *Id.* at 32. Collectively, these last two native populations occupy less than 15% of the Pacific fisher's historic range.

32. Both remnant Pacific fisher populations are small and isolated. According to the Service, estimates for the northern California/southwestern Oregon ("NCSO") population "range from a population size of 258 to 4,018." FSR at 43. Estimates for the southern Sierra Nevada ("SSN") population range from a low of 100 to a high of 500 individuals. *Id*. at 49. The Service has determined that conclusive abundance and trend information for either the NCSO or the SSN populations is not currently available.

33. According to the Service, "[a] principle of conservation biology is that small, isolated populations are subject to an increased risk of extirpation from stochastic (random) environmental, genetic, or demographic events." 70 Fed. Reg. at 60,433. The Service has found that "[f]ishers (in general) appear to have several characteristics related to small population size that increase the

species' vulnerability to extinction from stochastic events and other threats on the landscape." FSR at 136-37. The Service has explained:

> Small populations of low-density carnivores, like fishers, are more susceptible to small increases in mortality factors due to their relatively low fecundity and low natural population densities. Fishers may also be prone to instability in population sizes in response to fluctuations in prey availability. Low reproductive rates retard the recovery of populations from declines, further increasing their vulnerability.

Id. (citations omitted). Based on these and other facts, the Service has acknowledged that "[t]hree threat assessments completed in California for fishers in the analysis area identified the greatest long-term risk to fishers as the isolation of small populations and the higher risk of extinction due to stochastic events; and other research supports this conclusion. *Id.* at 133 (citations omitted).

34. Already in danger of extinction throughout all or a substantial portion of their remaining range due to their small population size and isolation, Pacific fishers face a multitude of additional threats to their continued existence. For example, ongoing logging and other "vegetation management" activities continue to degrade or destroy the Pacific fisher's remaining old forest habitat. The Service's has explained:

> Timber harvest and silvicultural techniques such as regeneration harvest; selective harvest of insect damaged and diseased trees; and thinning to promote vigorous stands of trees often removes the largest trees or focuses on the removal of older, diseased, or decadent trees. This [] results in the removal and/or limitation of future recruitment of rest and den trees. In addition, application of herbicides to reduce competition for conifers can remove the shrub and hardwood layer that provides understory cover, structural complexity, and a valuable mast crop for fisher prey, and over the long term removes hardwoods that would provide future fisher den and rest sites. Fuels reduction and fire suppression techniques that focus on the removal or salvage of snags and fire damaged trees may similarly diminish the distribution, abundance, and recruitment of den and rest sites across the landscape.

FSR at 58-59.

35. Climate change represents another ongoing and increasing threat to Pacific fishers and their remaining old forest habitat. While the precise impacts of climate change are inherently uncertain, the Service has concluded that "there is general scientific agreement that fisher habitat within the analysis area will be affected by changes in climate, including increased temperatures; changes in precipitation (increased drought in summer, or increased precipitation in winter, depending on the sub-region); increased disturbance from fire, disease, or insect outbreaks; and shifts in vegetative cover." FSR at 97.

36. Beyond further habitat loss and fragmentation, fishers face additional threats to their continued existence. For example, the Service has found that "[r]ecent research documenting exposure to and mortalities from anticoagulant rodenticides (ARs) and other toxicants in California fisher populations has raised concerns regarding both individual and population-level impacts." *Id.* at 141. According to the Service, the Pacific fisher's exposure to ARs in California "appears to be widespread, with residues found in 65 of 77 (84 percent) fisher carcasses tested." *Id.* "Although all sources of AR exposure in fishers have not been conclusively determined, large quantities of ARs have been found at illegal marijuana cultivation sites within occupied fisher habitat on public, private, and tribal lands in California." *Id.* at 149. "The proximity of a large number of marijuana cultivation sites to fisher populations in California and Oregon and the lack of other probable sources of ARs within occupied fisher habitat have led researchers to implicate marijuana cultivation sites as the source of AR exposure in the California fishers." *Id.*

37. According to the Service, "[c]ombinations of stressors accumulate and interact to increase the risk of extinction." FSR at 159. The Service has explained: "Any given source of mortality or habitat loss may affect a small proportion of individuals or of the range, but when all sources are added together, the effect may be substantial. Furthermore, some combinations of stressors may act together synergistically to cause effects greater than the sum of the individual effects of each stressor." *Id.*

PROCEDURAL BACKGROUND

38. In November 2000, a coalition of conservation organizations, including the plaintiffs herein, petitioned the Service to list Pacific fishers as endangered under the ESA. The petition described in detail substantial scientific evidence that fisher populations have declined dramatically throughout their west coast range and are at serious risk of extinction as a result of habitat loss, genetic isolation, and other factors.

39. When the Service failed to respond to the listing petition in accordance with the deadlines specified by the ESA, several of the petitioners, including several of the plaintiffs herein, brought suit in this United Stated District Court and ultimately secured an order directing the Service

to determine by April 2004 whether Pacific fishers warrant listing. *Ctr. for Biological Diversity v. Norton*, No. C 01-2106 SC (N.D. Cal., April 4, 2003).

40. On April 3, 2004, the Service announced its finding that the Pacific fishers warrant listing under the ESA. 69 Fed. Reg. 18,770 (Apr. 3, 2004). The Service concluded that "the overall magnitude of threats to the West Coast DPS of the fisher is high," but it nevertheless declined to publish a proposed listing rule, on the grounds that "an immediate proposal to list is precluded by other higher priority listing actions." *Id*. at 18,792.

41. By 2010, the Service had made no further progress toward listing the Pacific fisher under the ESA, forcing several of the petitioners, again including several of the plaintiffs herein, to file suit again. *Ctr. for Biological Diversity* v. *Salazar*, No. 3:10-cv-01501–JCS (N.D. Cal., filed Apr. 8, 2010). They dismissed that suit in October 2011, after the Service agreed to a court-ordered settlement in another case that required the agency to publish by no later than September 30, 2014, either a proposed rule listing Pacific fishers under the ESA or a final determination that listing Pacific fishers is not warranted. *In re Endangered Species Act Section 4 Deadline Litig.*, Misc. Action No. 10-377 (EGS), MDL Docket No. 2165 (D.D.C. Sept. 9, 2011).

42. On October 7, 2014, the Service published a proposed rule "to list the West Coast Distinct Population Segment of fisher (*Pekania pennanti*), a mustelid species from California, Oregon, and Washington, as a threatened species." 79 Fed. Reg. 60,419 (Oct. 7, 2014). The Service's Proposed Rule concluded that the Pacific fisher "is likely to become endangered throughout all of its range in the foreseeable future . . . based on multiple threats impacting the remaining two extant native populations and the cumulative and synergistic effects of the threats on small populations in the West Coast DPS of fisher." *Id*. at 60,436.

43. The Service's Proposed Rule found "that the main threats to the West Coast DPS of fisher are habitat loss from wildfire and vegetation management; toxicants (including anticoagulant rodenticides); and the cumulative and synergistic effects of these and other stressors acting on small populations." *Id.* at 60,420. Based on the best scientific and commercial data available, as detailed in the Service's accompanying draft Species Report, the Service's Proposed Rule explained:

- "We consider wildfire and fire suppression to be a threat to fisher habitat now and in the future because the frequency and size of wildfires is increasing; we expect this trend to continue into the future; and based on fishers outside of the West Coast range and other related species, we predict that large fires (particularly those of higher severity and larger scale) will cause shifts in home ranges and movement patterns, lower the fitness of fishers remaining in the burned area, and create barriers to dispersal." *Id*. at 60,429.

- "We found that vegetation management is a threat because activities that remove or substantially degrade fisher habitat through the removal of large structures and overstory canopy are projected to take place within the analysis area over the next 40 years." *Id.* at 60,430. "Within the Sierra Nevada, 15 percent of fisher habitat is expected to be affected by non-Federal vegetation management that downgrades or removes habitat. . . . Within the northwest California–southwest Oregon sub-region, 22 percent of fisher habitat is expected to be affected by non-Federal vegetation management that downgrades or removes habitat." *Id.*

- "We view toxicants as a newly identified threat because of reported mortalities of fishers from toxicants and a variety of potential sublethal effects. . . . Overall, ARs are likely a threat to fisher populations, although we do not have information about the population-level effects at this point in time." *Id*. at 60,433.

- "Fishers in the analysis area are currently restricted to two extant native populations and three reintroduced populations, most of which are known to be small in size. In general, researchers have identified the greatest long-term risk to fishers as the isolation of small populations and the higher risk of extinction due to stochastic events. We conclude that small population size constitutes a threat to fisher, now and in the future." *Id*. at 60,434 (citation omitted).

- "We found that several combinations of cumulative and synergistic stressors rose to the level of a threat in most fisher populations, although there is uncertainty surrounding our estimates of the cumulative and synergistic effects of stressors." *Id*. at 60,435.

44. The Service solicited an independent peer review of its draft Species Report and Proposed Rule, as well as public comments. The Service did not receive in response any information or analysis indicating that Pacific fishers do not warrant listing under the ESA.

45. On April 14, 2016, the Service withdrew its Proposed Rule to list Pacific fishers as threatened under the ESA and made available to the public its final Species Report. 81 Fed. Reg. 22,710. The Service's Rule Withdrawal does not identify new or better scientific or commercial information indicating that Pacific fishers do not warrant listing under the ESA. Instead, the Service's Rule Withdrawal asserts that the Service reevaluated the available evidence and "arrived at a different conclusion regarding the status of fishers in the west coast States." *Id*. at 22,731.

46. The Service's Rule Withdrawal characterizes the numerous threats to Pacific fishers identified in the Proposed Rule as "stressors." *Id*. at 22,713. The Rule Withdrawal asserts that a

stressor "rise[s] to the level of a threat to the species (or in this case the proposed West Coast DPS of fishers) if the magnitude of the stressor is such that it is resulting in significant impacts at either the population or rangewide scales to fishers or their habitat." *Id.* "[I]n considering what stressors might constitute threats," the Rule Withdrawal states that "we must look beyond the mere exposure of the DPS to the stressor to determine whether the DPS responds to the stressor in a way that causes actual negative impacts to the DPS." *Id.* at 22,713.

47. The Service's Rule Withdrawal "conclude[s] that the threats we identified [in the Proposed Rule] are not of such imminence, intensity or magnitude that they are manifesting in terms of significant impacts at either the population or range wide scales." *Id.* at 22,710. Thus, the Rule Withdrawal states summarily:

- "[T]he best available information does not suggest that fisher habitat will experience significant impacts at either the population or rangewide scales in the future as a result of wildlife fire and suppression activities" *Id.* at 22,719.
- "[V]egetation management do not rise to the level of a threat given the lack of information indicating that these activities are significantly affecting habitat currently at either the population or rangewide scales." *Id.* at 22,722.
- "[T]he best available information does not indicate that exposure to toxicants rises to the level of a threat, and this conclusion is supported by our finding that the proposed West Coast DPS of fisher is not experiencing significant impacts at either the population or rangewide scales." *Id.* at 22,725.
- "The best available information does not suggest any negative consequences in terms of population abundance or other indicators across the west coast States, or that small population size or isolation are likely to cause significant impacts at either the population or rangewide scales in the future." *Id.* at 22,726.
- "[T]he best available scientific and commercial data at this time do not show that combined impacts of the most likely cumulative impact scenarios are resulting in significant impacts at either the population or rangewide scales, including when taking into consideration small population sizes." *Id.* at 22,728.

48. "Absent evidence of significant impacts at either the population or rangewide scales," the Service's Rule Withdrawal claims, "we cannot conclude that the stressors acting on fishers or their habitat within the proposed West Coast DPS are so great that the DPS is currently in danger of extinction (an endangered species), or that it is likely to become an endangered species within the foreseeable future (definition of a threatened species)." *Id.* at 22,732.

49. The Service's Rule Withdrawal further concludes that "no portion of the range of the proposed West Coast DPS of fisher warrants further consideration to determine whether the West Coast DPS of fisher is endangered, or threatened throughout a significant portion of its range." *Id*. at 22,733. The Service's stated rationale for this conclusion is "currently and in the foreseeable future: (1) The stressors affecting the proposed West Coast DPS of fisher occur in most populations within the west coast States but are not having significant impacts at the population scale in any portion of the proposed DPS's range. . . . (2) The fisher is not exhibiting population declines in any portion of its range." *Id*.

FIRST CAUSE OF ACTION

(Violation of the ESA: Illegal Finding that Pacific Fishers Are Not Threatened Throughout All of Their Range)

50. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

51. The Service's Rule Withdrawal is subject to judicial review in accordance with the standard of review set forth in the Administrative Procedure Act ("APA"). Consistent with the APA, courts must hold unlawful and set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

52. The U.S. Supreme Court has clarified that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Stated differently, the Service "has an obligation to state a rational connection between the facts found and the decision made." *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 875 (9th Cir. 2009).

53. The Service's Rule Withdrawal is "not in accordance with law" for purposes of the APA if, for example, it is not based "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A).

54. The Service's Rule Withdrawal violates the ESA, because it is arbitrary, capricious, and not in accordance with law, within the meaning of the APA. The Service's finding that Pacific fishers are not threatened throughout all of their range is contrary to the best scientific and commercial data available, and the Rule Withdrawal fails to state a legally valid and rational connection between the facts found and the decision made.

55. The Service's Rule Withdrawal concludes improperly that the "the stressors acting upon the proposed West Coast DPS of fisher are not of sufficient imminence, intensity, or magnitude to indicate that they are singly or cumulatively resulting in significant impacts at either the population or rangewide scales." 81 Fed. Reg. at 22,710. The Service's conclusion in this regard is arbitrary, capricious, contrary to the best scientific and commercial data available, and otherwise not in accordance with the ESA.

56. The Service's Rule Withdrawal fails to articulate a valid, rational basis to support the agency's conclusion the impact of the various stressors acting on Pacific fishers is not "significant." For example, inconclusive evidence regarding the Pacific fisher's population status and trend and does not provide a rational basis for the Service's assertion that that the stressors' impacts are insignificant. *See Tucson Herpetological Soc'y*, 566 F.3d at 879. Instead, the best scientific and commercial data available indicate that the impact of the various stressors acting on Pacific fishers is significant and that Pacific fishers are "threatened" within the meaning of the ESA.

57. Moreover, the Service violated the ESA by demanding evidence that known stressors are currently "resulting in significant impacts at either the population or rangewide scales." 81 Fed. Reg. at 22,710. The ESA defines a species as threatened if it is likely to be in danger of extinction "*within the foreseeable future . . .*" 16 U.S.C. § 1532(20) (emphasis added). The ESA further directs the Service to determine whether a species is threatened due to "the present *or threatened* destruction, modification, or curtailment of its habitat or range." *Id.* § 1533(a)(1)(A) (emphasis added). Consistent with the plain language of the ESA, even if the Service were correct that stressors are not currently resulting in significant adverse impacts, Pacific fishers still warrant listing as "threatened," because the best scientific and commercial data available indicates that existing stressors are likely to have a significant impact on the fisher in the foreseeable future.

58. The best scientific and commercial data available indicates that Pacific fishers are at risk of extinction in the foreseeable future—*i.e.*, threatened—due to the stressors identified by the Service in its final Species Report. The Rule Withdrawal fails to articulate a valid, rational explanation for the Service's conclusions to the contrary. The Rule Withdrawal is therefore arbitrary, capricious, and not in accordance with law, in violation of the ESA.

SECOND CAUSE OF ACTION

(Violation of the ESA: Illegal Finding that Pacific Fishers Are Not Threatened Throughout Any Significant Portion of Their Range)

59. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

60. The ESA defines an "endangered" species as one that is "in danger of extinction throughout all *or a significant portion* of its range." 16 U.S.C. § 1532(6) (emphasis added). Similarly, a "threatened" species is defined as a species that is "likely to become an endangered species within the foreseeable future throughout all *or a significant portion* of its range." *Id.* § 1532(20) (emphasis added). Consistent with the plain language of these definitions, courts have made clear that the determination of whether a species is threatened or endangered "throughout a significant portion of its range" cannot be conflated with the question of whether it is threatened or endangered throughout its entire range. *See, e.g., Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001).

61. The Service has published a final policy that purports to interpret the phrase "significant portion of its range" for purposes of ESA listing decisions. *See* 79 Fed. Reg. 37,578 (July 1, 2014). Consistent with the plain language of the ESA, the Service's policy provides: "If the species is neither endangered nor threatened throughout all of its range, we will determine whether the species is endangered or threatened throughout a significant portion of its range." *Id.* at 37,585.

62. Having determined incorrectly and illegally that Pacific fishers are not at risk of extinction in the foreseeable future—*i.e.*, threatened—throughout all of their range, the Service's Rule Withdrawal further errors in concluding that "no portion of the range of the proposed West Coast DPS of fisher warrants further consideration to determine whether the West Coast DPS of

fisher is endangered, or threatened throughout a significant portion of its range." *Id*. at 22,733. The Service's stated rationale for this mistaken conclusion is: "currently and in the foreseeable future: (1) The stressors affecting the proposed West Coast DPS of fisher occur in most populations within the west coast States but are not having significant impacts at the population scale in any portion of the proposed DPS's range. . . . (2) The fisher is not exhibiting population declines in any portion of its range." *Id*.

63. The Service's conclusion that Pacific fishers are not threatened throughout any significant portion of their range is arbitrary, capricious, and not in accordance with law. As detailed above, the record does not support the Service's assertion that the stressors affecting Pacific fishers "are not having significant impacts at the population scale in any portion of the proposed DPS's range," nor does the record support the Service's assertion that "[t]he fisher is not exhibiting population declines in any portion of its range."

64. The Service's conclusion that Pacific fishers are not threatened throughout any significant portion of their range is contrary to the best scientific and commercial data available, and the Rule Withdrawal fails to state a legally valid and rational connection between the facts found and the decision made. The best scientific and commercial data available demonstrates that Pacific fishers are threatened throughout one or more significant portions of their range due to the stressors identified in the Service's final Species Report. The Rule Withdrawal fails to articulate a valid, rational explanation for the Service's conclusion to the contrary. The Rule Withdrawal is therefore arbitrary, capricious, and not in accordance with law, in violation of the ESA.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

A. Find and declare that the Service's Rule Withdrawal is arbitrary, capricious, an abuse of discretion, contrary to the best scientific and commercial data available, and otherwise not in accordance with law;

B. Set aside the Service's Rule Withdrawal;

C. Order the Service to reinstate immediately its proposed listing rule, 79 Fed. Reg. 60,419 (Oct. 7, 2014), and publish within six months a final rule listing the Pacific fisher as

"threatened" under the ESA;

D. Award plaintiffs their costs, including reasonable attorneys' fees and costs; and

E. Grant plaintiffs such other and further relief as this Court may deem just and proper.

Respectfully submitted,

STACEY P. GEIS (CA Bar No. 181444)
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Dated: October 19, 2016

/s/ Gregory C. Loarie

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Counsel for Plaintiffs

Exhibit A

EARTHJUSTICE

June 13, 2016

Via Certified U.S. Mail
Return Receipt Requested

Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Daniel M. Ashe, Director
U.S. Fish & Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

Re: Notice of Intent to Sue Regarding Withdrawal of Proposed Rule to List West Coast Distinct Population Segment of the Fisher (*Pekania pennanti*) as 'Threatened' Under the Endangered Species Act

Dear Secretary Jewell and Director Ashe:

On behalf of the Center for Biological Diversity, Environmental Protection Information Center, Klamath-Siskiyou Wildlands Center, and Sierra Forest Legacy, we hereby provide notice that the U.S. Fish and Wildlife Service ("Service") is in violation of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, and its implementing regulations, 50 C.F.R. § 402, *et seq*., with regard to the Service's withdrawal of its proposed rule to list the west coast distinct population segment of the fisher (the "Pacific fisher") as a threatened species. *See* 81 Fed. Reg. 22,710 (Apr. 18, 2016). This letter is provided pursuant to the sixty-day notice requirements of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2), to the extent such notice is deemed necessary by a court.

Over 12 years ago—after several years of illegal delay and in response to a judicial order—the Service determined that Pacific fishers warrant federal protection under the ESA. 69 Fed. Reg. 18,770 (Apr. 3, 2004). The Service's determination was based on evidence that "[f]isher populations are low or absent throughout most of their historical range in Washington, Oregon, and California," and the only remaining "fisher populations on the west coast may be in danger of extirpation." *Id*. at 18,792.

Unfortunately, it took a decade and another round of lawsuits before the Service finally published a proposed rule listing Pacific fishers as "threatened" under the ESA. 79 Fed. Reg. 60,419 (Oct. 7, 2014). The Service's proposed rule confirmed that there are only two isolated populations of fishers, likely numbering no more than a few hundred animals, still surviving on

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the west coast of the United States, the result of decades of deforestation, trapping, poisoning and other harmful human activities. Based on the best scientific data available, as set forth in detail in the draft species report that accompanied the Service's proposed rule, the Service concluded that the Pacific fisher is "likely to become endangered throughout all of its range in the foreseeable future . . . based on multiple threats impacting the remaining two extant [*i.e.*, surviving] native original populations and the cumulative and synergistic effects of the threats on small populations . . ." *Id.* at 60,436. Public comments and peer review overwhelmingly supported the Service's proposed listing rule.

On April 14, 2016, the Service abruptly and inexplicably reversed course and withdrew its proposed listing rule. 81 Fed. Reg. 22,710 (Apr. 18, 2016). In its notice of the withdrawal, the Service claims to have "reevaluated" the scientific record and "arrived at a different conclusion regarding the status of fishers in the west coast States." *Id.* at 22,731. According to the notice of withdrawal, "although stressors to one or more populations of fishers in the west coast States exist, they are not causing significant impacts at either the population or rangewide scales . . ." *Id.* at 22,710. "Absent evidence of significant impacts at either the population or rangewide scales," the Service claims mistakenly that it "cannot conclude that the stressors acting on fishers . . . are so great that the [species] is currently in danger of extinction . . . or that it is likely to become an endangered species in the foreseeable future." *Id.* at 22,732.

As set forth in detail below, the Service's finding that Pacific fishers are not in danger of extinction, either now or in the foreseeable future, throughout all or any significant portion of their range, is contrary to the best scientific and commercial data available, arbitrary, capricious, and otherwise not in accordance with law. The evidentiary record and the plain language of the ESA compel the opposite conclusion: Pacific fishers warrant immediate federal protection under the ESA. We therefore request that the Service reinstate its proposed rule and proceed to publish forthwith a final rule listing Pacific fishers as a threatened species. Should the Service fail to do so, we intend to bring suit once again in United States District Court to ensure that Pacific fishers receive the protection they warrant and require if they are to survive and recover in the 21st century.

I. The Pacific Fisher

Fishers (*Pekania pennanti*) are medium-sized mammals, closely related to minks, otters, martens, wolverines, and other members of the Mustelid family.[1] Fishers are closely associated with dense, old growth forests. According to the Service's Final Species Report ("FSR"), "[t]he key aspects and structural components of fisher habitat are best represented in areas that are comprised of forests with diverse successional stages containing a high proportion of mid- and late-successional characteristics." FSR at 16. Fishers are opportunistic carnivores; their prey includes birds, rodents, and other small animals.

[1] Until recently, taxonomists placed fishers in the genus *Martes*, alongside martens. Based on recent genetic research indicating that fishers are more closely related to wolverines than to martens, the Service now classifies fishers in the genus *Pekania*. FSR at 8.

Fishers are found only in North America. Historically, the species was relatively common and broadly distributed throughout the boreal forests of Canada, the deciduous and evergreen forests of the eastern United States, and the coniferous forests along the west coast. On the west coast of the United States, the Service describes the fisher's historic range as follows:

> In Washington, fishers historically occurred throughout densely forested areas both east and west of the Cascade Crest, on the Olympic Peninsula, and probably in southwestern and northeastern Washington. In Oregon . . . fishers occurred in the boreal forest zones of the Cascade Range from Washington to California, west to the coniferous coastal forests and cool humid Coast Ranges . . . . In the forested, higher mountain masses of California . . . fishers [ranged] from the Oregon border southward through the Coast Range to Lake and Marin Counties, east through the Klamath Mountains to Mount Shasta, and south throughout the main Sierra Nevada to Greenhorn Mountain in northern Kern County.

FSR at 28.

Many decades of deforestation, fur trapping, and other harmful human activities have reduced fishers to a faction of their historic range. Along the west coast in particular, "[a] scarcity of verifiable sightings in Washington, northern Oregon, and central Oregon suggests that these populations appear to be likely extirpated [*i.e.*, extinct], except on the Olympic Peninsula where they have been recently reintroduced." FSR at 37. Today, only two small fisher populations survive on the west coast: the Northern California-Southwestern Oregon ("NCSO") population and the "Southern Sierra Nevada ("SSN") population. According to the Service, the NCSO population estimates "range from a population size of 258 to 4,018." FSR at 43. The SSN is even smaller, and may consist of no more than 100 individual animals. These last two native fisher populations on the west coast occupy less that 15% of the Pacific fisher's historic range, and they are at serious risk of extinction due to continuing habitat loss, climate change, exposure to toxic compounds like anticoagulant rodenticides ("ARs"), and the dangers inherent for extremely small and isolated populations.

II. The Endangered Species Act

Congress enacted the Endangered Species Act in 1973 with the goal of protecting and recovering imperiled species. In the words of the Act, its purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). In the seminal case on the purpose of the Endangered Species Act, *Tennessee Valley Authority v. Hill*, the Supreme Court confirmed that it is "beyond doubt that Congress intended endangered species to be afforded the highest of priorities." 437 U.S. 153, 174 (1978).

Under Section 4 of the ESA, the Secretary of Interior, acting through the Service, is tasked with determining whether any terrestrial "species" warrants listing as "threatened" or

"endangered." 16 U.S.C. § 1533(a)(1). The term "species" is defined broadly by the statute to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."[2] 16 U.S.C. § 1532(16). A species is considered "endangered" if it "is in danger of extinction throughout all or a significant portion of its range" and "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20).

The ESA directs the Service to "determine whether any species is an endangered species or a threatened species because of any of the following factors:"

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). Notably, "[t]hese factors are listed in the disjunctive; any one or a combination can be sufficient for a finding that a particular species is endangered or threatened." *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, at 1164 (N.D. Cal. 2000).

Section 4 further requires the Service to make its listing determinations "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). "With [the] best available data standard, Congress required [the] agency to consider the scientific information presently available and intended to give the benefit of the doubt to the species." *Brower v. Evans*, 257 F.3d 1058, 1070 (9th Cir. 2001) (quoting *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988)). Accordingly, to the extent that the best available data is inconclusive, the Service must "err on the side of the species." *Endangered Species Act Oversight: Hearing on S. 321 Before the Senate Subcomm. on Envtl. Pollution of the Comm. on Env't & Pub. Works*, 97th Cong. 37 (1981) (remarks of Senator Chafee). By so doing, the agency gives effect to Congress' policy of "institutionalized caution," which "lies at the heart" of the ESA. *Tennessee Valley Auth.*, 437 U.S. at 178, 194.

The Service's listing decisions are subject to judicial review in accordance with the standard of review set forth in the Administrative Procedure Act ("APA"). *See Greater Yellowstone Coalition v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011). Specifically, the courts must hold unlawful and set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Supreme Court has clarified that an agency action is arbitrary and capricious "if the agency has relied on factors

[2] The ESA does not expressly define the term "distinct population segment." However, the Service adopted a policy in 1996 to guide its evaluation of whether a particular wildlife population qualifies as a DPS. *See* 61 Fed. Reg. 4,722 (Feb. 7, 1996). In short, the Service's DPS policy directs the agency to analyze the "discreteness of the population segment in relation to the remainder of the species to which it belongs" and the "significance of the population segment to the species to which it belongs." *Id*. at 4,725.

which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

III. Listing Background

A. The Listing Petition and the Service's "Warranted but Precluded" Finding

In November 2000, a coalition of conservation organizations—including the organizations on whose behalf this notice letter is sent—petitioned the Service to list the Pacific fisher as an endangered species under the ESA. The petition described in detail substantial scientific evidence that fisher populations have declined dramatically throughout their west coast range and are at serious risk of extinction as a result of habitat loss, genetic isolation, and other factors. When the Service failed to respond to the listing petition in accordance with the deadlines specified by the ESA, several of the petitioners brought suit in United Stated District Court and secured an order directing the Service to determine by April 2004 whether Pacific fishers warrant listing. *Ctr. for Biological Diversity v. Norton*, No. C 01-2106 SC (N.D. Cal., April 4, 2003).

On April 3, 2004, the Service announced its "12-month finding" in response to the listing petition. 69 Fed. Reg. 18,770 (Apr. 3, 2004). First, the Service concluded that the Pacific fisher is a "distinct population segment" or "DPS" of the fisher—and is therefore eligible for listing under the ESA—because "loss of the species from the west coast range in the United States would represent (1) a significant gap in the species' range, (2) the loss of genetic differences from fisher in the central and eastern United States, and (3) the loss of the species from a unique ecological setting."[3] *Id.* at 18,777-78. Second, the Service concluded that the Pacific fisher warrants listing under the ESA, finding that "the overall magnitude of threats to the West Coast DPS of the fisher is high." *Id.* at 18,792. Despite these findings, however, the Service ultimately declined to publish a proposed rule listing the fisher, on the grounds that "an immediate proposal to list is precluded by other higher priority listing actions." *Id*.

C. Further Litigation and the 2014 Proposed Listing Rule

By 2010, the Service had made no further progress toward listing the Pacific fisher under ESA, forcing several of the petitioners to file suit again. *Ctr. for Biological Diversity* v. *Salazar*, No. 3:10-cv-01501–JCS (N.D. Cal., filed Apr. 8, 2010). The petitioners dismissed that suit in October 2011, after the Service agreed to publish by no later than September 30, 2014 either a proposed rule listing Pacific fishers under the ESA or a final determination that listing Pacific fishers is not warranted.

[3] The Ninth Circuit Court of Appeals has affirmed the Service's finding that the Pacific fisher is eligible for listing as a DPS. *See Sierra Forest Products, Inc. v. Kempthorne*, 361 F. App'x 791, 792 (9th Cir. 2010).

On October 7, 2014, the Service published a proposed rule "to list the West Coast Distinct Population Segment of fisher (*Pekania pennanti*), a mustelid species from California, Oregon, and Washington, as a threatened species." 79 Fed. Reg. 60,419 (Oct. 7, 2014). In announcing the proposed rule, the Service "determined that the main threats to the West Coast DPS of fisher are habitat loss from wildfire and vegetation management; toxicants (including anticoagulant rodenticides); and the cumulative and synergistic effects of these and other stressors acting on small populations." *Id.* at 60,420. Among the Service's key findings:

- "We consider wildfire and fire suppression to be a threat to fisher habitat now and in the future because the frequency and size of wildfires is increasing; we expect this trend to continue into the future; and based on fishers outside of the West Coast range and other related species, we predict that large fires (particularly those of higher severity and larger scale) will cause shifts in home ranges and movement patterns, lower the fitness of fishers remaining in the burned area, and create barriers to dispersal." *Id*. at 60,429.
- "[V]egetation management is a threat because activities that remove or substantially degrade fisher habitat through the removal of large structures and overstory canopy are projected to take place within the analysis area over the next 40 years." *Id*. at 60,430.
- "We view toxicants as a newly identified threat because of reported mortalities of fishers from [anti-coagulant rodenticide] toxicants and a variety of potential sublethal effects." *Id.* at 60,433.
- "We conclude that small population size constitutes a threat to fisher, now and in the future." *Id*. at 60,434.
- "[T]he West Coast DPS of fisher is likely to become endangered throughout all of its range in the foreseeable future . . . based on multiple threats impacting the remaining two extant native original populations and the cumulative and synergistic effects of the threats on small populations in the West Coast DPS of fisher." *Id.* at 60,436.

The Service invited public comments on its proposed listing rule and the accompanying draft species report, and it indicated that it would solicit peer review from a team of fisher experts.

D. Withdrawal of the Proposed Listing Rule

On April 14, 2016—almost 12 years to the day after the Service initially concluded in 2004 that the Pacific fisher warranted protection under the ESA—the Service announced that it had decided to withdraw its proposed listing rule. The Service's notice of withdrawal states that the Service "reevaluated" the evidence and "arrived at a different conclusion regarding the status of fishers in the west coast States." 81 Fed. Reg. at 22,731. Characterizing some aspects of the fisher's status as "uncertain" or "inconclusive," the Service asserts incorrectly that "although stressors to one or more populations of fishers in the west coast States exist, they are not causing significant impacts at either the population or rangewide scales . . ." *Id*. at 22,710. "Absent evidence of significant impacts at either the population or rangewide scales," the Service claims mistakenly that it "cannot conclude that the stressors acting on fishers . . . are so great that the

[species] is currently in danger of extinction . . . or that it is likely to become an endangered species in the foreseeable future." *Id*. at 22,732. The Service claims that its decision to withdraw the proposed listing rule is supported by the agency's final species report for the fisher, which the Service characterizes as "a compilation of the best scientific and commercial data available concerning the biological status of the proposed West Coast DPS of fisher, including present and potential future stressors to fishers in this DPS." *Id.* at 22,713.

IV. Violations of Law

A. The Service Violated the ESA by Failing to Base Its Listing Decision Solely on the Best Scientific and Commercial Data Available and by Failing to Articulate a Rational Basis for Withdrawing Its Proposed Listing Rule.

As discussed above, the ESA requires the Service to determine whether a species warrants listing "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). In making its determination, the Service must consider the relevant factors and must "state a rational connection between the facts found and the decision made." *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 875 (9th Cir. 2009).

In violation of the ESA, the Service's conclusion that Pacific fishers are not in danger of extinction, either now or in the foreseeable future, throughout all or a significant portion of their range, is not based solely on the best scientific and commercial data available. In many instances, the Service's notice of withdrawal relies on conclusory findings that are contrary to the best available data and unsupported by any rational basis in the record. For example:

- The best scientific and commercial data available indicates that "[m]ixed- and high-severity fires can reduce or destroy key biological legacies and other structural habitat elements, like large snags or large downed wood," FSR at 64, especially "when followed by post-fire salvage logging." *Id*. at 68. "These elements, which are already uncommon in some areas, are used as resting and denning structures for fishers," and "the loss of these elements could render habitat unsuitable as resting or denning habitat for a century or more." *Id.* at 64. "Through much of the analysis area," the best available data projects that "fires are expected to increase in frequency and area burned." *Id.* at 91. Contrary to this best available data, the Service's notice of withdrawal asserts that "[f]uture wildfires are expected to continue at a similar rate and severity across the landscape as has been occurring in the recent past" and concludes without any rational basis that wildfire and subsequent salvage logging operations do not represent a threat to the fisher. 81 Fed. Reg. at 22,719.
- The best scientific and commercial data available indicate that logging and other vegetation treatments have significant negative effects on fisher habitat. For example, "when selecting microsites within their home ranges, fishers tended to avoid using sites within 200 meters of a mechanically thinned area." FSR at 68. "[G]iven the large home range of fishers and the extent of forest management throughout the analysis area," the best available data project that "a moderate portion of fisher individuals are likely

affected [by vegetation management]." *Id*. at 110. Contrary to this best available data, the Service's notice of withdrawal asserts without any rational basis that "there is no information on how different vegetation management activities affect fisher populations and their persistence within the west coast States." 81 Fed. Reg. at 22,722.

- The best data available shows that "first and second generation ARs [*i.e.*, anti-coagulant rodenticides] have been detected in a majority of fishers tested in California." FSR 150. AR exposure has been determined as the direct cause of death for numerous fisher mortalities in California, and "it is reasonable to conclude that the number of fishers killed [by ARs] exceeds the carcasses that have been recovered." *Id.* at 159. Moreover, the best available data indicates that "sublethal exposure to ARs likely results in sickness, which may increase the probability of mortality from other sources." *Id*. at 151. Contrary to this best available data, the Service's notice of withdrawal asserts without any rational basis that ARs do not "rise to the level of a threat." 81 Fed. Reg. 22,725.
- The best scientific data available confirms that "small, isolated populations are subject to an increased risk of extinction from stochastic, genetic, or demographic events." FSR at 133. By all accounts, the remaining two native fisher populations are small and isolated. Nevertheless, the Service's notice of withdrawal concludes without any rational basis that "small population size and isolation are not threats to the proposed West Coast DPS of fisher, currently or in the foreseeable future." 81 Fed. Reg. 22,726.
- The best available scientific data shows that "[c]ombinations of stressors accumulate and interact to increase the risk of extinction." FSR at 159. The best available data confirms "that fishers in the west coast States have been exposed to multiple stressors, in some cases over many decades." 81 Fed. Reg. at 22,728. Contrary to the best available data and without any rational basis in the record, the Service's notice of withdrawal nevertheless asserts without any rational basis that "the cumulative impacts of these potential stressors do not rise to the level of a threat, now or in the future." *Id*.

In these and other respects, the Service violated the ESA by failing to base its listing decision solely on the best scientific and commercial data available and by failing to articulate a rational basis for its key findings regarding threats to the Pacific fisher.

B. The Service Violated the ESA by Misconstruing Ambiguous Information as Affirmative Evidence that Listing the Pacific Fisher Is Not Warranted.

At several key junctures, the Service's notice of withdrawal relies on information regarding the fisher's status and viability that is, at best, inconclusive or uncertain as affirmative evidence that fishers are not threatened throughout all or a significant portion of their range. The Service's reliance on this ambiguous evidence is arbitrary and capricious. *See Pollinator Stewardship Council v. Envt'l Prot. Agency*, 806 F.3d 520, 531 (9th Cir. 2015) ("[A]n agency cannot rely on ambiguous studies as evidence of a conclusion that the studies do not support.").

For example, with respect to population trends, the Service's final species report concludes that "it is difficult to determine whether the [Northern California-Southern Oregon] population as a whole is increasing, decreasing, or stable," and that "there is no information on

whether or not the current population is near its equilibrium size." FSR at 43. Similarly, the Service finds that studies regarding population trends for the Southern Sierra Nevada population are "inconclusive." FSR at 50. At numerous key junctures, however, the Service's notice of withdrawal dismisses threats to the fisher on the mistaken grounds that fisher populations are stable and not in decline. *See, e.g.*, 81 Fed. Reg. at 22,733 ("The fisher is not exhibiting population declines in any portion of its range."); *id*. at 22,725 ("[T]he best available information does not suggest that any of the fisher populations where exposure [to ARs] has been documented are in decline . . ."); *id*. at 22,728 ("[T]he best available information does not suggest that current fisher populations in the west coast States are experiencing population declines. . .").

As the Ninth Circuit Court of Appeals held in an analogous case, "if the science on population size and trends is underdeveloped and unclear, the Secretary cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence." *See Tucson Herpetological Soc.*, 566 F.3d at 879. Here, however, the Service arbitrarily construed ostensibly ambiguous evidence regarding the fisher's population trends as evidence that fisher populations are stable. Along similar lines:

- The Service's final species report concludes that "there is great uncertainty with regard to the potential effects of climate change on fisher habitat." FSR at 97. The notice of withdrawal, however, arbitrarily construes this uncertainty as evidence that climate change is not "causing or contributing to significant habitat loss or range contraction." 81 Fed. Reg. at 22,720.
- The Service's final species report concludes that "the degree to which fire may affect fisher populations is unknown." FSR at 77. The notice of withdrawal, however, arbitrarily concludes that fishers are not experiencing "significant impacts at either the population or rangewide scales in the future as a result of wildlife [sic] fire . . ." 81 Fed. Reg. at 22,719.

In these and other instances, the Service acted arbitrarily and illegally by misconstruing ostensibly uncertain or ambiguous information regarding threats to the fisher as support for its conclusion that the fisher does not warrant listing. Characterizing the best available evidence as uncertain or inconclusive does not provide a rational basis for the Service's decision to withdraw its proposed listing rule.

C. The Service Violated the ESA by Construing "Stressors" as Threats Only If They Are "Resulting in Significant Impacts at Either the Population or Rangewide Scales."

When the Service proposed to list Pacific fishers as threatened in October 2014, it "determined that the main threats to the West Coast DPS of fisher are habitat loss from wildfire and vegetation management; toxicants (including anticoagulant rodenticides); and the cumulative and synergistic effects of these and other stressors acting on small populations." 79 Fed. Reg. at 60,420. In its notice of withdrawal, by contrast, the Service arbitrarily characterizes these threats

as "stressors," and states that while they "may be impacting some individual fishers or habitat in one or more populations," they are not "functioning as operative threats on the fisher's habitat, populations, or the proposed DPS as a whole . . ." 81 Fed. Reg. at 22,713. "Absent evidence of significant impacts at either the population or rangewide scales," the Service claims incorrectly that it "cannot conclude that the stressors acting on fishers or their habitat within the proposed West Coast DPS are so great that the DPS is currently in danger of extinction (an endangered species), or that it is likely to become an endangered species within the foreseeable future (definition of a threatened species)." *Id*. at 22,732.

The Service's view that "a stressor . . . rise[s] to the level of a threat to the species [only] if the magnitude of the stressor is such that it is resulting in significant impacts at either the population or rangewide scales to fishers or their habitat," *id.* at 22,713, is contrary to the plain language and intent of the ESA. As discussed previously, the ESA defines a species as "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). "The purpose of creating a separate designation for species which are 'threatened', in addition to species which are 'endangered', was to try to regulate these animals before the danger becomes imminent while long-range action is begun." *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.D.C. 1997) (quoting S.Rep. No. 307, 93d Cong. 1st Sess. 3 (1973)). "Congress repeatedly explained that it intended to require the FWS to take preventive measures *before* a species is conclusively headed for extinction." *Id*. Indeed, the ESA directs the Service to determine whether any species is threatened based on "the present *or threatened* destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1) (emphasis added).

In short, a species may be "threatened" within in the meaning of the ESA in the absence of "evidence of significant impacts at either the population or rangewide scales." 81 Fed. Reg. at 22,732. The relevant inquiry, which the Service failed to conduct here, is whether the species is likely to be in danger of extinction in the foreseeable future, throughout all or a significant portion of its range.

The Service's proposed listing rule for the Pacific fisher recognized correctly that the determination as to whether a species is threatened "does not necessarily require empirical proof of threat." 79 Fed. Reg. at 60,427. "The combination of exposure and some corroborating evidence of how the species is likely to be impacted could suffice." *Id*. For example, the proposed rule properly concluded that fishers are threatened by anti-coagulant rodenticides, based on the combination of evidence that fishers are frequently exposed to ARs and evidence that exposure to ARs results in indirect and direct mortality. *Id*. at 60,433.

In contrast to the proposed rule, the Service's withdrawal notice dismisses all existing and future "stressors" on the grounds that they are not currently "causing significant impacts at either the population or rangewide scales . . ." 81 Fed. Reg. at 22,710. As in a recent case involving a closely related species, "[r]ather than explain why these [stressors] are no cause for alarm, the Service simply stated there was no threat because there was no data confirming a threat." *Defenders of Wildlife v. Jewell*, No. 14-247-M-DLC, 2016 WL 1363865, at *25

(D. Mont. Apr. 4, 2016). The court in that case concluded that "such conclusory treatment based on a dearth of information is impermissible under the APA and ESA." *Id.*

The Service's wrongheaded insistence on conclusive evidence of existing impacts at the population or rangewide scales is evident from the Service's withdrawal notice. The Service's withdrawal purports to "use a qualitative approach to describe stressors (*i.e.*, stressors are categorized as low, moderate, or high, as defined in that Report)." 81 Fed. Reg. at 22,713. The final species report defines these categories as follows:

> Low-level impact: Stressor is impacting individual fishers within the West Coast DPS currently or in the future, or stressor is resulting in a minor amount of habitat impacts currently or in the future.
>
> Medium-level impact: Stressor is impacting fishers within the West Coast DPS at the population level (one or more of the five populations) currently or in the future, or stressor is resulting in more serious impacts to fisher habitat at the population level (as compared to a low-level impact) currently or in the future.
>
> High-level impact: Stressor is significantly impacting the West Coast DPS of fishers at the rangewide level currently or in the future, or stressor is causing significant impacts to fisher suitable habitat at the rangewide level currently or in the future.

FSR at 58.

As is clear from above, the Service's qualitative approach is inconsistent with the ESA, because a "medium" or "high" level impact is contingent on evidence that the stressor "is impacting" fishers "at the population level." As a practical matter, if the Service denies listing until a stressor is demonstrated to be having a significant impact on the population or rangewide scale, it may be too late to rescue the species from extinction. The Service's assessment of the stressors facing Pacific fishers was contrary to the ESA.

D. The Service Violated the ESA in Concluding that the Pacific Fisher Is Not Threatened Throughout a Significant Portion of Its Range.

Having concluded incorrectly that Pacific fishers are not threatened throughout all of their range, the Service further violated the ESA in concluding that Pacific fishers are not threatened throughout any significant portion of their range. 81 Fed. Reg. at 22,732.

In order to identify any portion of a species' range that may warrant listing under the ESA, the notice of withdrawal provides that the Service determines "whether there is substantial information indicating that (1) the portions may be significant and (2) the species may be in danger of extinction in those portions or likely to become so within the foreseeable future." *Id.* According to the Service, "a key part of this analysis is whether the threats are geographically concentrated in some way." *Id.* "If the threats to the species are affecting it uniformly

throughout its range, no portion is likely to warrant further consideration." *Id*. Applying these principles to the Pacific fisher, the Service's notice of withdrawal asserts:

> We have determined that currently and in the foreseeable future: (1) The stressors affecting the proposed West Coast DPS of fisher occur in most populations within the west coast States but are not having significant impacts at the population scale in any portion of the proposed DPS's range. . . . (2) The fisher is not exhibiting population declines in any portion of its range.

Id. 22,733. Both of these findings are arbitrary, capricious, contrary to the best scientific and commercial data available, and otherwise contrary to the ESA.

First, the best available data shows that the stressors facing the fisher are not uniform throughout its range. Elsewhere in the notice of withdrawal, the Service concedes that "the various stressors were not occurring in equal magnitude across the analysis area and that cumulative effects from these stressors may be occurring more in some sub-regions than others. *Id*. at 22,727. "For example, the population and habitat in the SSN population area likely will continue to be more susceptible to the various stressors than will the NCSO population area given SSN's smaller population size and more limited amount of unoccupied, suitable habitat available." 81 Fed. Reg. at 22,717l; see also FSR at 162 ("Just as stressors, as evaluated, are not occurring in equal scope and severity across range of the DPS, any potential cumulative and synergistic effects from these stressors may be occurring more in some sub-regions than others.").

Second, as set forth previously, the Service's assertion that "[t]he fisher is not exhibiting population declines in any portion of its range," is arbitrary and capricious, given the Service's finding that population trend data for the fisher is uncertain or inconclusive. *Tucson Herpetological Soc.*, 566 F.3d at 879. Contrary to the Service's finding, the best available data indicates that fishers are likely declining throughout all or a significant portion of their range.

In short, the Service violated the ESA in finding that Pacific fishers are not threatened throughout any significant portion of their range.

V. Conclusion

Unless the Service addresses immediately the violations set forth above, the organizations we represent intend to pursue legal action in federal court. Should you wish to discuss this matter, or if you believe any of the foregoing is in error, please do not hesitate to contact us.

Sincerely,

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