

1 Brian Segee (Bar No. 200795)
Center for Biological Diversity
2 660 S. Figueroa Street, Suite 1000
Los Angeles, CA 90017
3 Tel: (805) 750-8852
Email: bsegee@biologicaldiversity.org
4

5 Kristine Akland (MT Bar No. 13787)
Center for Biological Diversity
6 P.O. Box 7274
Missoula, MT 59807
7 Tel: (406) 544-9863
Email: kakland@biologicaldiversity.org
8 *Pro Hac Vice Application Pending*

9 Attorneys for Plaintiffs

10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13
14 **CENTER FOR BIOLOGICAL**
15 **DIVERSITY; ENVIRONMENTAL**
16 **PROTECTION INFORMATION**
17 **CENTER; and KLAMATH-SISKIYOU**
18 **WILDLANDS CENTER,**

19 Plaintiffs,

20 v.

21 **U.S. FISH AND WILDLIFE SERVICE;**
22 **MARTHA WILLIAMS, in her official**
23 **capacity as Director of the U.S. Fish and**
24 **Wildlife Service; and DEBRA**
25 **HAALAND, in her official capacity as**
26 **Secretary of the Interior**

27 Defendants.

Case No.: 3:22-cv-5216

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTION

1
2 1. Plaintiffs Center for Biological Diversity (“Center”), Environmental Protection
3 Information Center, and Klamath-Siskiyou Wildlands Center challenge the U.S. Fish and
4 Wildlife Service’s (“Service”) latest decision denying protections for the West Coast fisher
5 (*Pekania pennanti*) as a threatened or endangered species under the Endangered Species Act
6 (“ESA”).

7 2. The fisher is a mid-sized forest carnivore that is associated with closed-canopy,
8 late-successional forests throughout its West Coast range in California, Oregon, and
9 Washington. A combination of logging, historic trapping, and other factors led to a severe
10 contraction of the fisher’s range by the mid-20th century, while new threats including
11 rodenticide poisoning and climate change have emerged in recent decades.

12 3. Fishers were extirpated from all of Washington, most of Oregon, and half their
13 range in California. The fisher’s remaining native populations are limited to northern
14 California/southern Oregon (the Klamath-Siskiyou ecoregion) and the southern Sierra Nevada,
15 while additional populations have been reintroduced by translocation in Washington State, the
16 southern Oregon Cascades, and the northern Sierra Nevada.



26 *Photo credit: Washington Department of Fish and Wildlife*

1 4. In 2000, Plaintiffs and other organizations petitioned the Service to list the West
2 Coast fisher throughout its range, including the Cascade Mountains and all areas west to the
3 coast in Oregon and Washington, and the Sierra Nevada, North Coast, and Klamath-Siskiyou
4 region of northern California and southern Oregon.

5 5. Following litigation to compel the Service's overdue response to that petition,
6 the Service determined in 2004 that the West Coast fisher population warranted listing as a
7 threatened species but that such protection was precluded by higher priorities, a conclusion it
8 would annually repeat for the next decade. 69 Fed. Reg. 18,770 (Apr. 8, 2004).

9 6. After the Center again sued to compel action, the Service finally proposed listing
10 the West Coast fisher as a "Distinct Population Segment" (DPS) in 2014, and defined the
11 boundaries of the DPS to encompass all known historical and current West Coast fisher
12 populations in Washington, Oregon, and California. 79 Fed. Reg. 60,419 (Oct. 7, 2014).

13 7. In 2016, the Service reversed course and withdrew the proposed listing rule
14 based on a flawed determination that the stressors to the species do not threaten its continued
15 existence. 81 Fed. Reg. 22,710 (Apr. 18, 2016).

16 8. Plaintiffs successfully challenged the withdrawal decision. *Ctr. for Biological*
17 *Diversity v. U.S. Fish & Wildlife Serv.*, 342 F. Supp. 3d 968 (N.D. Cal. 2018). In vacating and
18 remanding the withdrawal decision, the court found that the Service's conclusion that the West
19 Coast fisher population is stable was not supported by the best available scientific information,
20 and that the Service arbitrarily relied on an assumption of population stability to wrongly
21 dismiss the threat of toxicant exposure. *Id.* at 979.

22 9. On remand, the Service issued a new proposed rule to list the West Coast fisher
23 DPS as threatened on November 7, 2019. 84 Fed. Reg. 60,278. However, after 15 years of
24 defining the West Coast DPS fisher as a unitary boundary encompassing *all* fisher populations
25 in Washington, Oregon, and California, the Service instead redefined the DPS as two separate
26 and isolated boundaries around the remaining native fisher populations in northern
27 California/southern Oregon and southern Sierra Nevada, thereby limiting potential ESA
28

1 protections to a portion of the fisher’s current range, and also excluding all of the species’
2 historical range.

3 10. On May 15, 2020, the Service issued a Final Rule. The agency again revised its
4 approach, this time eliminating the West Coast DPS, and redefining the northern
5 California/southern Oregon, and southern Sierra Nevada populations as separate DPS. The
6 Service listed the southern Sierra Nevada DPS as threatened, while denying protections to the
7 northern California/southern Oregon DPS. 85 Fed. Reg. 29,523.

8 11. The Service has again acted in an arbitrary and capricious manner in denying
9 ESA protections to the West Coast fisher DPS. The Service failed to make a lawful
10 determination on the entire scope of the 2000 petition to list the West Coast fisher DPS, instead
11 reducing the scope of the petitioned entity to two individual populations. The Service made no
12 determination as to whether the existing fisher populations and historical range outside of these
13 two new DPS—including all of Washington, most of Oregon, and the central Sierra Nevada in
14 California—warrant ESA protection.

15 12. The Service’s decision to deny protections to the northern California/southern
16 Oregon DPS was also arbitrary and counter to the best available scientific information. Fishers
17 in the Klamath-Siskiyou make up the species’ largest remaining population, but are particularly
18 imperiled by increasing fire and associated salvage logging, as well as rodenticide use. In the
19 twenty years since Plaintiffs petitioned to list the species, these threats have not abated, and in
20 some cases are increasing. The Service’s denial of protections was counter to the evidence
21 before the agency and relies on rationales already rejected in previous litigation.

22 13. To remedy these violations, Plaintiffs seek declaratory relief declaring the
23 Service’s failure to address the entire scope of Plaintiffs’ petition and determination that listing
24 the northern California/southern California DPS is not warranted to be unlawful under the ESA,
25 and an order remanding the matter (while keeping the May 15, 2020 Final Rule and its
26 protection of the southern Sierra DPS in place) to the Service with direction to promptly issue a
27 new determination by date-certain.

1 **JURISDICTION AND VENUE**

2 14. Plaintiffs bring this action under the ESA citizen-suit provision, 16 U.S.C. §
3 1540(g), and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. This Court has
4 jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-
5 2202 (declaratory judgments and further relief), 16 U.S.C. § 1540(c), (g)(1)(C) (ESA citizen
6 suit provision), and 5 U.S.C. § 702 (APA).

7 15. As required by the ESA, 16 U.S.C. § 1540(g), Plaintiffs provided sixty days’
8 notice of intent to sue the Service for its unlawful May 15, 2020 Final Rule on June 2, 2021.

9 16. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C.
10 § 1540(g)(3)(A) because Plaintiff Environmental Protection Information Center maintains their
11 principal place of business in this District, Plaintiff Center for Biological Diversity maintains an
12 office and is incorporated here, and all Plaintiffs have members who reside in the Northern
13 District with protectable interests in conservation of the fisher, and because the range of the
14 West Coast fisher DPS includes portions of this District, including Del Norte, Humboldt, and
15 Mendocino counties.

16 **INTRADISTRICT ASSIGNMENT**

17 17. This case is properly assigned to the San Francisco Division or the Oakland
18 Division under Civil L.R. 3-2(c) because a substantial part of the events and omissions giving
19 rise to the claims herein occurred in counties assigned to the San Francisco Division, and
20 because many of the Plaintiffs and their members are located in counties within these districts.

21 **PARTIES**

22 18. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a
23 nonprofit organization dedicated to the protection of endangered species and their habitats
24 through science, policy, and environmental law. The Center is headquartered in Tucson,
25 Arizona, with offices throughout the country, including Oakland. The Center has more than
26 84,000 members. The Center has been involved for decades in species and habitat protection
27 throughout the western United States. For more than 20 years, the Center has worked to secure
28

1 protection under both state and federal laws for the West Coast fisher DPS and its habitat in
2 Washington, Oregon, and California.

3 19. Plaintiff ENVIRONMENTAL PROTECTION INFORMATION CENTER
4 (“EPIC”) is a non-profit public benefit corporation with approximately 3,000 members
5 incorporated under the laws of the State of California with its main office in Arcata, in close
6 proximity to one of California’s remaining populations of West Coast fishers. EPIC’s purpose is
7 to protect and restore the biological diversity and ecosystem health of California’s rivers and
8 forests. To this end, EPIC monitors state and federal environmental management activities to
9 ensure compliance with current law and works to protect and restore ancient forests, watersheds,
10 coastal estuaries, and native species throughout Northwestern California, including both public
11 and industrial forestlands. EPIC also serves as a community resource center for members of the
12 public working to protect forest ecosystems. EPIC has a long history of working to conserve
13 Pacific fishers and their forest habitat in California.

14 20. Plaintiff KLAMATH-SISKIYOU WILDLANDS CENTER (“KS Wild”) is a
15 non-profit corporation organized under the laws of the State of Oregon. KS Wild’s main offices
16 are in Ashland, Oregon. KS Wild has 3,500 members in 30 states, with most members
17 concentrated in southern Oregon and northern California. On behalf of its members, KS Wild
18 advocates for the forests, wildlife, and waters of the Rogue and Klamath Basins and works to
19 protect and restore the extraordinary biological diversity of the Klamath-Siskiyou region of
20 southwest Oregon and northwest California. KS Wild uses environmental law, science,
21 education, and collaboration to help build healthy ecosystems and sustainable communities.
22 Through its campaign work, KS Wild strives to protect biological diversity of the Klamath
23 region. KS Wild routinely participates in commenting, monitoring, and litigation of federal
24 actions impacting wildlife, and has long worked to protect and restore West Coast fishers in the
25 Pacific Northwest.

26 21. Plaintiffs bring this action on behalf of their organizations, and their staff and
27 members who derive ecological, recreational, aesthetic, educational, scientific, professional, and
28

1 other benefits from the West Coast fisher and its habitat. Plaintiffs’ members and staff live near
2 and/or regularly visit areas where West Coast fishers are known or believed to exist, in hopes of
3 viewing this elusive and rare species.

4 22. Center member Noah Greenwald is the primary author of the 2000 Petition to list
5 the West Coast Coast fisher. He has seen fishers in Washington, where he participated in a
6 release of the species, and in the southern Sierra, where he accompanied a Forest Service
7 researcher studying fishers. He plans to visit southwest Oregon, in the vicinity of Crater Lake,
8 and Washington State, in the vicinity of Mt. Rainer, in an effort to observe fishers in their
9 natural habitat next spring.

10 23. The Service’s decision to deny ESA protections to the West Coast fisher DPS
11 has caused Plaintiffs and their members to suffer a concrete and particularized injury that is
12 actual and imminent. Plaintiffs and their members will continue to suffer injury unless the relief
13 requested herein is granted. Plaintiffs’ injuries would be redressed by the relief requested in this
14 complaint.

15 24. Defendant U.S. FISH AND WILDLIFE SERVICE is the administrative agency
16 within the U.S. Department of the Interior responsible for implementing the ESA with respect to
17 terrestrial mammals including the West Coast fisher.

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

21 26. Defendant MARTHA WILLIAMS is the Director of the Service. She is sued in
22 her official capacity.

23 **LEGAL BACKGROUND**

24 **The Endangered Species Act**

25 27. The ESA, 16 U.S.C. §§ 1531–1544, “represent[s] the most comprehensive
26 legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley*
27 *Auth. v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes are “to provide a means
28

1 whereby the ecosystems upon which endangered species and threatened species depend may be
2 conserved [and] to provide a program for the conservation of such endangered species and
3 threatened species.” 16 U.S.C. § 1531(b).

4 28. Section 4 of the ESA requires the Service to protect imperiled species by listing
5 them as “endangered” or “threatened.” *Id.* § 1533(a)(1). An “endangered” species is “in danger
6 of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A “threatened”
7 species is “likely to become an endangered species within the foreseeable future.” *Id.* §
8 1532(20).

9 29. The definition of “species” includes “subspecies” and “distinct population
10 segments [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.”
11 16 U.S.C. § 1532(16). When considering whether a population segment qualifies as a DPS
12 under the Act, Service policy requires the agency to determine whether that population is
13 “discrete” and “significant.” If the Service determines that a population segment is both discrete
14 and significant, then the population segment qualifies as a DPS and meets the ESA’s definition
15 of a “species” that may be classified as threatened or endangered.

16 30. The ESA requires the Service to “determine whether any species is an
17 endangered species or a threatened species because of any of the following factors:

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

25 *Id.* § 1533(a)(1).

26 31. The ESA requires the Service to make its listing determinations “solely on the
27 basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

28 32. The ESA’s substantive protections generally apply only once the Service lists a
species as endangered or threatened. For example, section 7 of the ESA requires all federal
agencies to ensure that their actions do not “jeopardize the continued existence” of any listed

1 species or “result in the destruction or adverse modification” of a species’ “critical habitat.” *Id.*
2 § 1536(a)(2). Section 9 of the ESA prohibits, among other things, “any person” from
3 intentionally or incidentally taking listed species without a lawful authorization from the
4 Service. *Id.* §§ 1538(a)(1)(B), 1539. Other provisions require the Service to designate critical
5 habitat for listed species, *id.* § 1533(a)(3); to develop and implement recovery plans for listed
6 species, *id.* § 1533(f); authorize the Service to acquire land for the protection of listed species,
7 *id.* § 1534; and authorize the Service to make federal funds available to states to assist in efforts
8 to preserve and protect endangered and threatened species, *id.* § 1535(d).

9 33. To ensure the timely protection of species at risk of extinction, Congress set forth
10 a detailed process whereby citizens may petition the Service to list a species as endangered or
11 threatened. The process includes mandatory, nondiscretionary deadlines that the Service must
12 meet. The three required findings, described below, are the 90-day finding, the 12-month
13 finding, and for species that the Service determines warrant protection, the final listing
14 determination.

15 34. Upon receipt of a listing petition, the Service must “to the maximum extent
16 practicable, within 90 days” make an initial finding as to whether the petition “presents
17 substantial scientific or commercial information indicating that the petitioned action may be
18 warranted.” *Id.* § 1533(b)(3)(A). If the Service finds that the petition does not present
19 substantial information indicating that listing may be warranted, it rejects the petition and the
20 process ends.

21 35. If on the other hand, as in this case, the Service determines that a petition does
22 present substantial information indicating that listing may be warranted, then the agency must
23 publish that finding and proceed to conduct a full scientific review of the species’ status. *Id.* §
24 1533(b)(1)(A); 50 C.F.R. § 424.14(h)(2).

25 36. Upon completion of this status review, and within twelve months from the date
26 that it receives the petition, the Service must make one of three “12-month findings”: (1) the
27 petitioned actions is “warranted”; (2) the petitioned action is “not warranted”; or (3) the
28

1 petitioned action is warranted, but listing is presently “precluded” by other proposals to list,
2 delist, or reclassify the status of listed species. 16 U.S.C. § 1533(b)(3)(B)(i)-(iii).

3 37. If the Service issues a 12-month finding that listing the species is “warranted,” it
4 must promptly publish in the Federal Register a listing determination, i.e., the 12-month finding
5 and a “general notice and the complete text of a proposed regulation” to list the species as
6 endangered or threatened. *Id.* § 1533(b)(3)(B)(ii). Within one year of publishing a “warranted”
7 finding and proposed rule, the Service must publish the final regulation listing the species.

8 38. If, on the other hand, as in this case, the Service issues a 12-month finding that
9 listing the species is “not warranted,” the Service rejects the petition, and the process ends. A
10 “not warranted” decision is subject to judicial review. *Id.* § 1533(b)(3)(C)(ii).

11 **Administrative Procedure Act**

12 39. While the ESA provides for judicial review of listing decisions, *id.* § 1540(g), the
13 APA generally governs the standard and scope of judicial review. 5 U.S.C. §§ 701–706.

14 40. Under the APA, a reviewing court “shall hold unlawful and set aside agency
15 action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or
16 otherwise not in accordance with law.” *Id.* § 706(2)(A).

17 41. An agency’s action is arbitrary and capricious if the agency has relied on factors
18 that Congress has not intended it to consider, entirely failed to consider an important aspect of
19 the problem, offered an explanation for its decision that runs counter to the evidence before the
20 agency, or is so implausible that it could not be ascribed to a difference in view or the product
21 of agency expertise. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,
22 43 (1983).

23 **FACTUAL BACKGROUND**

24 **The West Coast fisher and threats to its continued existence**

25 42. A close relative of the mink, otter, and marten, the fisher is a house-cat sized
26 predator with a long slender body and short legs, a triangular head with a sharp muzzle, large
27 rounded ears, and dark brown fur.

1 43. Quick on land and agile climbers, fishers are fierce hunters, and one of the few
2 predators of porcupines. They also prey on snowshoe hares, mountain beavers, and birds, as
3 well as insects, mushrooms, and berries.

4 44. In its West Coast range, the fisher is a habitat specialist. Its occurrence is closely
5 associated with low- to mid-elevation late-successional and mature forests with a coniferous
6 component. Fishers generally avoid clearcuts, forested stands with low canopy cover, and
7 landscapes that have been extensively fragmented by timber harvesting. Fishers avoid high-
8 elevation forests, likely because of their inability to hunt or travel efficiently in deep snowpack.
9 Female fishers give birth and raise kits in cavities within large-diameter live trees, snags, and
10 logs, and use these structures and large platform branches for rest sites.

11 45. Prior to extensive European settlement, the West Coast fisher occupied most
12 coniferous forest habitats in Washington, Oregon, and California. Two major factors
13 contributed to the historical decline of West Coast fishers: direct mortality via commercial
14 trapping; and loss, degradation, and fragmentation of its forested habitat, primarily from
15 logging. Although trapping restrictions were instituted in the 1940s, the fisher did not recover.

16 46. More recently, new threats to the West Coast fishers' continued existence have
17 emerged including increasing incidence and severity of wildfire, poisoning from rodenticides
18 and other toxicants frequently associated with cannabis grow operations, and climate change.

19 47. West Coast fishers have been extirpated from the large majority of their
20 historical range, leaving only two remaining native fisher populations, in northern
21 California/southern Oregon and the southern Sierra Nevada.

22 48. The northern California/southern Oregon population is centered in the Klamath-
23 Siskiyou region, a global hotspot for biodiversity. The Klamath-Siskiyou supports the largest
24 extant population of West Coast fishers—the only population estimated to number in the
25 thousands rather than the hundreds.

26 49. The southern Sierra Nevada population extends from Yosemite National Park
27 southward to the Kern River Canyon, although its historical range was likely larger. The
28

1 southern Sierra Nevada population is estimated to number between 100 and 500 adult
2 individuals.

3 50. Efforts to establish new West Coast fisher populations by translocation have
4 been conducted for nearly 60 years. Between 1961 and 1981, the timber industry attempted
5 numerous translocations of fishers from British Columbia and Minnesota to timber plantation
6 lands in southern Oregon in an effort to control porcupine populations. Although these efforts
7 were not monitored, some fishers survived and are now referred as the Southern Oregon
8 Cascades population. There is no estimate for the size of this population.

9 51. In California, Sierra Pacific Industries translocated 40 fishers on to an area of its
10 land known as the “Stirling Management Unit.” This population has not yet demonstrated short-
11 term stability or long-term viability and is referred to as the Northern Sierra Nevada population.

12 52. In Washington, the National Park Service, Washington Department of Fish and
13 Wildlife, and nongovernmental partners beginning in 2008 have translocated fishers to three
14 locations within the state: the Olympic Peninsula, North Cascades, and South Cascades. There
15 are indications that these populations may be able to eventually achieve stability and viability.

16 **Petition and Listing History**

17 53. In 2000, Plaintiffs petitioned to list West Coast fishers as a threatened or
18 endangered species.

19 54. In 2004, the Service published a 12-month finding recognizing the West Coast
20 fisher population as a DPS that warranted ESA protection as a threatened species, finding that
21 fisher populations are “low or absent throughout most of their historical range in Washington,
22 Oregon, and California,” and that “[b]ecause of small population sizes and isolation, fisher
23 populations on the West Coast may be in danger of extirpation.” 69 Fed. 18,770, at 18,792 (Apr.
24 8, 2004).

25 55. Rather than provide the warranted protection to the West Coast fisher, the
26 Service concluded it was precluded by listing of other species.

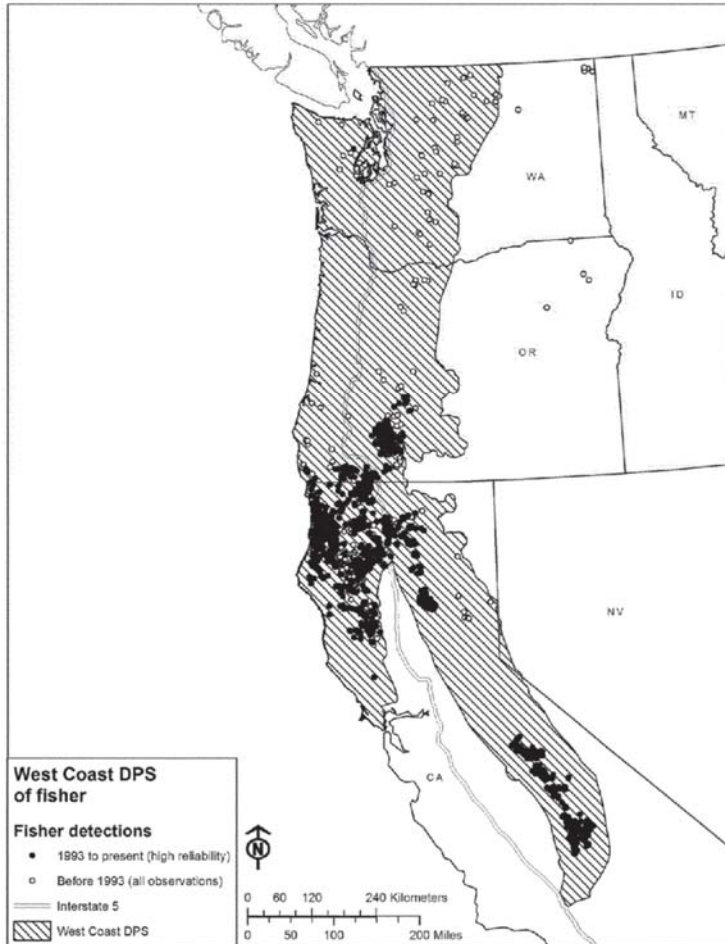
1 56. Through 2014, the Service reaffirmed that listing the West Coast fisher remained
2 warranted in annual candidate notices of review, but that listing continued to be precluded. 84
3 Fed. Reg. at 60,280.

4 57. In 2010, the Center sued the Service for lack of expeditious progress on the West
5 Coast fisher DPS listing petition. *Ctr. for Biological Diversity v. Salazar*, No. 3:10-cv-01501-
6 JCS (N.D. Cal.). In 2011, the parties reached a settlement requiring the Service to issue a
7 proposed rule or “not warranted” finding by September 30, 2014. *In re Endangered Species Act*
8 *Section 4 Deadline Litig.*, Misc. Action No. 10-377-EGS, MDL Docket No. 2165 (D.D.C.).

9 58. On October 7, 2014, the Service proposed listing the West Coast fisher DPS,
10 including *all* fishers found on the West Coast, both native and reintroduced, in western
11 Washington, western Oregon, and California, finding that the “main threats to the West Coast
12 DPS of fisher are habitat loss from wildfire and vegetation management, toxicant (including
13 anti-coagulant rodenticides) exposure; and the cumulative and synergistic effects of these and
14 other stressors acting on small populations.” 79 Fed. Reg. 60,419, at 60,424. The boundary of
15 the DPS is depicted in the image below.

16
17
18
19
20
21
22
23
24
25
26
27
28

Figure 1. West Coast DPS of fisher (historical range and 2004 Finding range boundary). The black dots represent high reliability fisher detections from 1993 to present, and the white circles represent all fisher observations (low, moderate, and high reliability) before 1993. Please note that the ONP population here is represented by a single black dot, and this representation is based on the information we received from the Washington Department of Fish and Wildlife.



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

59. The Service estimated the size of the Klamath-Siskiyou northern California/southern Oregon population as ranging from 258 to 4,018 animals and the southern Sierra Nevada population as approximately 300 animals. 79 Fed. Reg. at 60,436. The Service noted that available data did not demonstrate a clear population trend for either population, concluding that both appear to “have persisted but do not appear to be expanding.” *Id.*

60. Noting that “fisher habitat is highly fragmented in many parts” of the Klamath-Siskiyou region, the Service found that the northern California/southern Oregon population is particularly vulnerable to wildland fire and vegetation management, because “even temporary

1 losses of habitat may impede dispersal and increase fragmentation of the resident fisher
2 population.” 79 Fed. Reg. at 60,429.

3 61. The Service concluded in the 2014 Proposed Rule that the West Coast fisher
4 DPS “meets the definition of a threatened species” because “it is too early to determine if the
5 reintroduced populations will persist,” fishers are “still absent over much of their historical
6 range,” the “threats at the time of the 2004 Finding are still in place,” and “some threats since
7 the time of the 2004 Finding have increased or are new.” *Id.* at 60,436.

8 62. On April 18, 2016, the Service withdrew the proposed listing of the West Coast
9 fisher DPS. Reversing course on more than a decades’ worth of findings beginning in 2004, the
10 Service concluded that the threats to the species did not warrant listing under the ESA. 81 Fed.
11 Reg. 22,710. The Service’s withdrawal recharacterized the previously recognized threats—
12 including habitat loss from wildfire and vegetation management, toxicants, and the cumulative
13 and synergistic effects of these and other impacts on small populations—as “stressors” that “are
14 not of such imminence, intensity, or magnitude” to warrant listing. 81 Fed. Reg. at 22,714.

15 63. Plaintiffs successfully challenged the Service’s withdrawal in *Ctr. for Biological*
16 *Diversity v. U.S. Fish & Wildlife Service*, 342 F. Supp. 3d 968 (N.D. Cal. 2018). The Court
17 concluded that the withdrawal was unlawful in two primary respects. First, the Service erred
18 because “simply asserting the uncertainty as to the precise effects” of toxicants on the fisher
19 population “does not serve as a rational connection to the Service’s conclusion that [its]
20 increasing exposure to toxicants no longer rises to the level of a threat.” *Id.* at 976. Second, the
21 Service “arbitrarily and capriciously relied on [two] population studies [the Hoopa study and the
22 Eastern Klamath study] to conclude Pacific fisher stability,” when both studies were in fact
23 inconclusive. *Id.* at 978. Accordingly, the court held that “the Service failed to make a rational
24 connection between the population trend data and its conclusion that the Pacific fisher
25 population is stable (which, in turn, was used to support its conclusion on toxicant exposure.”).
26 *Id.* at 979. The court vacated the withdrawal and remanded it to the Service with instruction “to
27 prepare a revised rule that comports with this order.” *Id.* at 980.

The 2019 Proposed Listing Rule

1
2 64. In response to the court’s remand, on November 7, 2019, the Service published a
3 proposed rule listing the West Coast DPS as threatened and providing a 30-day public comment
4 period. 84 Fed. Reg. 60,278. On December 19, 2019, the Service reopened the comment period
5 for an additional 15 days. 84 Fed. Reg. 69,712.

6 65. In the proposed rule, the Service redefined the scope of the West Coast fisher
7 DPS boundary to instead com two separate areas around the remaining native populations in
8 northern California/southern Oregon and the southern Sierra Nevada. *Id.* at 60,283.

9 66. This redefinition narrowed the boundaries of the West Coast DPS, excluding
10 both present fisher populations and historical habitat through all of Washington, northern
11 Oregon, and the central Sierra Nevada in California. The new boundaries are depicted in the
12 image below.

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

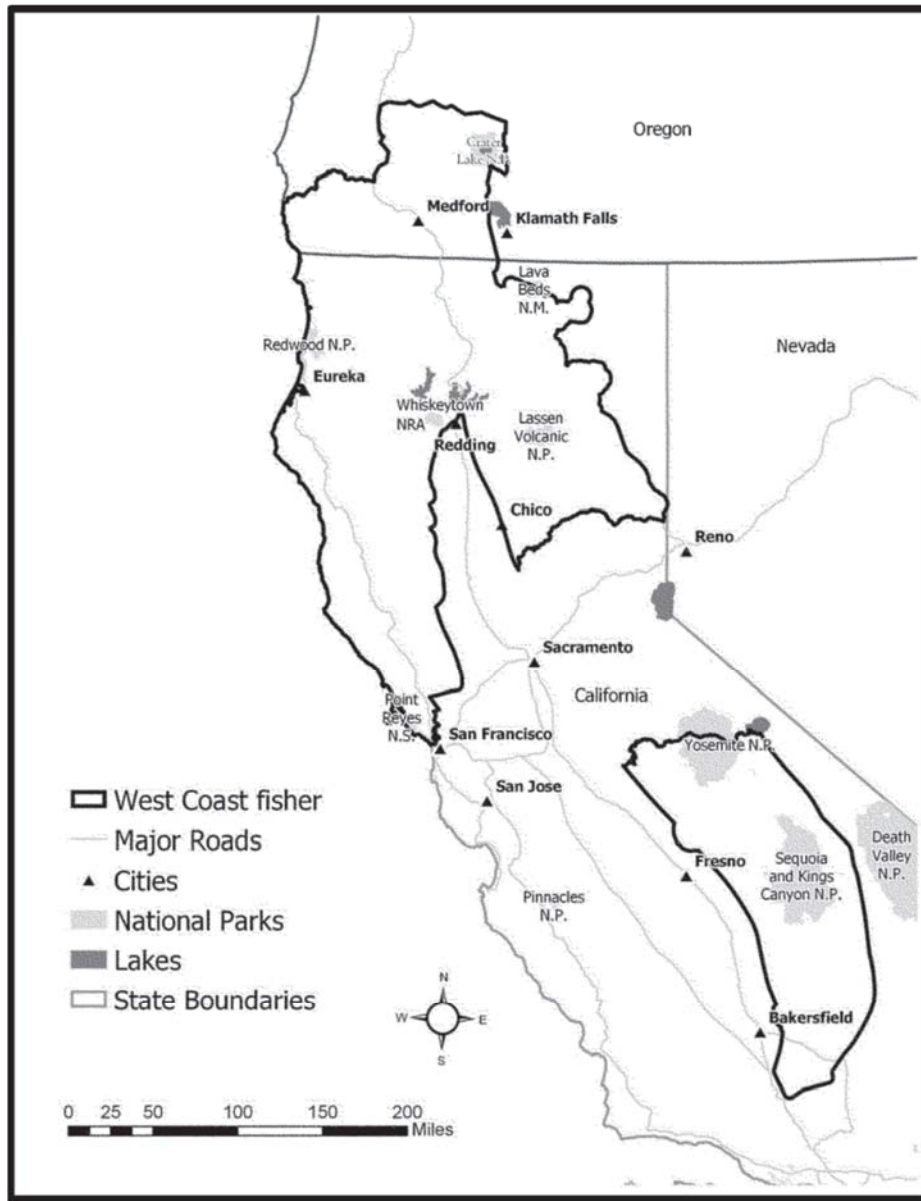


Figure 2. Current distribution of the West Coast DPS of fishers. (The northernmost boundary of the Southern Sierra Nevada (SSN) subpopulation, per current camera survey information, indicates fishers are south of the Tuolumne River in Yosemite National Park.)

67. The 2019 Proposed Rule proposed listing this smaller West Coast DPS as threatened. 84 Fed. Reg. at 60,280. The Service found that “considering the best available science and information at this time, it is likely that the resiliency of the DPS is likely to decrease in the near-future given the cumulative impacts” associated with climate change, “predictions of continued and increased intensity of wildfires across southern Oregon and

1 northern California,” and “the low likelihood that a significant proportion of existing toxicants
2 on the landscape would be removed in the near-term future.” *Id.* at 60,299.

3 68. The Service noted that researchers observed a 40 percent reduction in the fisher’s
4 population within the Klamath-Siskiyou region—the geographic center of the southern
5 Oregon/northern California population and the largest extant population of West Coast fishers
6 anywhere—following two large wildfires in 2014. *Id.* at 60,287.

7 69. Although the Service had previously estimated 4 to 8 percent of West Coast
8 fisher habitat would be lost over the next 40 years, it found that fire data from 2008-2018
9 “indicates [its] earlier estimates . . . may have been an underestimate.” *Id.*

10 **The Challenged 2020 Final Listing Rule**

11 70. On May 15, 2020, the Service issued a final listing rule that was based on
12 another new delineation of DPS which entirely eliminated the West Coast DPS and instead
13 established two separate DPS around the northern California/southern Oregon and southern
14 Sierra Nevada populations. 95 Fed. Reg. at 29,532.

15 71. The Service defined the northern California/southern Oregon DPS to include the
16 Klamath-Siskiyou region native population, as well as the two reintroduced populations in the
17 southern Oregon Cascades (with which the native population has interbred) and northern Sierra
18 Nevada (Sierra Pacific Industries Stirling Management Unit). *Id.* at 29,533.

19 72. The Service acknowledged that the northern California/southern Oregon DPS
20 “represents a large portion of the taxon’s range along the Pacific coast, and its loss would leave
21 a significant gap between the [southern Sierra Nevada] DPS and all fisher populations to the
22 north . . . an even greater break in the west coast range of fishers than what currently exists.” *Id.*
23 at 29,537.

24 73. A loss of the northern California/southern Oregon DPS “would mean the
25 majority of the fishers in the West Coast States would be lost.” *Id.*

26 74. Reversing course from the 2019 Proposed Rule, the Service denied ESA
27 protections to the northern California/southern Oregon DPS. 85 Fed. Reg. at 29,532.

1 82. As a result, the Service provided only a partial response to Plaintiffs’ listing
2 petition, which specifically requested listing of all fisher populations throughout western
3 Washington, Oregon, and California.

4 83. Accordingly, the Service’s 2020 Final Rule violates the ESA, and is arbitrary,
5 capricious, an abuse of discretion, and not in accordance with law, in violation of the APA, 5
6 U.S.C. § 706(2)(A).

7 **SECOND CLAIM FOR RELIEF**

8 **Violation of ESA and APA**
9 ***The Service Arbitrarily Concluded that the***
10 ***Northern California/Southern Oregon DPS Does Not Warrant Listing Under the ESA***

11 84. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

12 85. Even if the Service’s failure to address the entire scope of the petition to list the
13 West Coast fisher DPS was legal, the Service’s decision that the northern California/southern
14 Oregon DPS does not warrant listing is unlawful in numerous respects.

15 86. The best available scientific information demonstrates that fishers in the
16 Klamath-Siskiyou region and other two populations comprising the Northern
17 California/Southern Oregon DPS are under significant threat. As the Service has acknowledged,
18 these threats have not been abated and, in some cases, are increasing.

19 87. In the 2014 Proposed Rule, the Service stated that the northern
20 California/southern Oregon population is particularly vulnerable to wildland fire and vegetation
21 management, because “even temporary losses of habitat may impede dispersal and increase
22 fragmentation of the resident fisher population.” 79 Fed. Reg. at 60,429.

23 88. This statement proved prescient, as that year two major wildfires resulted in a 40
24 percent reduction of the fisher’s core population in the Klamath-Siskiyou region—a significant
25 loss in the geographic center of the larger fisher population in the western United States.
26 Numerous additional wildfires have burned through the range of the northern
27 California/southern Oregon fisher population since that time.
28

1 89. The Service fails to offer any rational explanation for its new, about-face
2 conclusion that wildland fire does not threaten the continued existence of the northern
3 California/southern Oregon DPS, particularly since the best available scientific information
4 demonstrates that the Service’s earlier predictions were correct.

5 90. The Service also fails to address available scientific information showing that
6 salvage logging of burned forests within the Klamath-Siskiyou region is further worsening the
7 impact of wildland fire on the species.

8 91. The 2020 Final Rule’s treatment of population trend is also arbitrary and
9 internally inconsistent. In one place, the Service states that the best available information “does
10 not indicate” whether the population is “increasing, stable, or declining.” 85 Fed. Reg. at
11 29,555-29,556.

12 92. However, in another portion of the Final Rule, the Service relies on the Hoopa
13 and Eastern Klamath studies to not only characterize the northern California/southern Oregon
14 DPS population as stable, but as “healthy populations” that are “naturally fluctuat[ing] around
15 their upper limit . . . consistent with populations at or near carrying capacity.” *Id.* at 29,548.

16 93. The Service’s inconsistent and contradictory statements regarding the northern
17 California/southern Oregon fisher population status render its determination that the population
18 does not warrant listing as arbitrary and capricious.

19 94. In addition, the Service’s reliance on the Hoopa and Eastern Klamath studies to
20 demonstrate population “stability” was already struck down in *Center for Biological Diversity v.*
21 *U.S. Fish & Wildlife Service*. Here, the Service is even going further, arbitrarily relying on the
22 studies to characterize the Klamath-Siskiyou population as “near carrying capacity.”

23 95. The Service’s consideration of toxicant exposure is also, once again, arbitrary
24 and capricious. The 2020 Final Rule acknowledges that the “exposure rate of 75 percent of
25 fisher carcasses tested in the [northern California/southern Oregon] DPS has not declined
26 between 2007 and 2018.” 85 Fed. Reg. at 29,554. The Service again relies on the Hoopa and
27 Eastern Klamath studies to conclude that “[i]n spite of the widespread nature of illegal grow
28

1 sites and their known association with illegal rodenticide use, as well as the prevalence of
2 toxicants occurring in tested fishers,” the Klamath-Siskiyou population “may be demonstrating
3 an ability to withstand this threat with regard to population growth.” *Id.* This same analysis was
4 also rejected in *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 342 F. Supp. 3d
5 at 976 (“In other words, the Service used alleged stability as circumstantial evidence supporting
6 its position that toxicant exposure, as well as other identified stressors, were not ‘operative
7 threats.’”).

8 96. For these and other reasons, the 2020 Final Rule is arbitrary and capricious, and
9 violates the ESA’s substantive mandate that the Service make listing decisions “solely on the
10 basis of the best scientific . . . data available.” 16 U.S.C. § 1533(b)(1)(A).

11 **REQUEST FOR RELIEF**

12 WHEREFORE, Plaintiffs respectfully request that this Court:

- 13 A. Declare that the Service’s failure to make a determination on the entire scope of
14 the petition to list the West Coast fisher DPS violates the ESA and APA;
- 15 B. Declare that the Service’s determination that listing of the southern
16 Oregon/northern California fisher DPS is not warranted violates the ESA and
17 APA;
- 18 C. Maintain the 2020 Final Rule, and its listing of the southern Sierra Nevada DPS
19 as Endangered, but remand the 2020 Final Rule to the Service for further
20 analysis and: (1) a 12-month determination on the petition to list the West Coast
21 Fisher DPS; and/or (2) a new 12-month determination regarding the southern
22 Oregon/northern California by a date certain, that are consistent with the ESA,
23 APA, and this Court’s Order;
- 24 D. Award Plaintiffs their reasonable fees, costs, and expenses, including attorney
25 fees and expert witness fees; and
- 26 E. Grant Plaintiffs such further and additional relief as this Court may deem just and
27 proper.
- 28

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

Respectfully Submitted September 13, 2022.

/s/ Brian Segee
Brian Segee (Cal. Bar No. 200795)
Center for Biological Diversity
660 S. Figueroa Street, Suite 1000
Los Angeles, CA 90017
Phone: (805) 750-8852
bsegee@biologicaldiversity.org

/s/ Kristine Akland
Kristine Akland
Center for Biological Diversity
P.O. Box 7274
Missoula, MT 59807
Phone: (406) 544-9863
Email: kakland@biologicaldiversity.org
Pro Hac Vice Application Pending

Attorneys for Plaintiffs