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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

CALIFORNIA CATTLEMEN'S ASSOCIATION and CALIFORNIA FARM BUREAU FEDERATION,

Petitioners and Plaintiffs,

v.

CALIFORNIA FISH AND GAME COMMISSION,

Respondent and Defendant,

and

CENTER FOR BIOLOGICAL DIVERSITY; ENVIRONMENTAL PROTECTION INFORMATION CENTER; KLAMATH-SISKIYOU WILDLANDS CENTER; and CASCADIA WILDLANDS,

Respondent-Intervenors.

No. 37-2017-00003866-CU-MC-CTL

PETITIONERS AND PLAINTIFFS' REPLY TO OPPOSITIONS TO MOTION FOR JUDGMENT ON THE PEREMPTORY WRITS AND FOR DECLARATORY JUDGMENT, AND TO EVIDENTIARY OBJECTIONS

[IMAGED FILE]

Date: January 18, 2019
Time: 1:30 p.m.
Department C-67
Honorable Eddie C. Sturgeon

Action Filed January 31, 2017

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Introduction

Petitioners California Cattlemen's Association and California Farm Bureau Association bring this action to challenge the listing of the gray wolf under the California Endangered Species Act. This case is not, however, about whether the gray wolf should be protected. AR0010092 (Dep't Dir. Mem. to Comm'n) (the gray wolf is already protected under the federal Endangered Species Act as well as under the Fish and Game Code as a nongame mammal).[1] But it is about ensuring that a reasonable wolf management plan can still be accomplished in this state,[2] a worthy goal that the gray wolf's listing materially inhibits. *See* AR0010094 (Dep't Dir. Mem. to Comm'n) ("[T]he Department disagrees . . . that . . . listing is the best means to achieve the ends [of wolf conservation]."); AR0012318 (testimony of Dep't Dir.) ("We're a 'no' on . . . whether the listing itself is the right tool to handle the task ahead of us.").

The wolf's listing is illegal, the Cattlemen and Farm Bureau contend, for three reasons. First, because the Act limits the Commission's listing authority to "native species or subspecies," *see* Fish & Game Code § 2062, the Commission may not use its listing power to protect non-native subspecies. Yet that is the de facto consequence of the Commission's action: the protection of a non-native subspecies of wolf—and only that non-native subspecies. Second, because the California Endangered Species Act predicates "endangered species" status on a population's condition throughout all or a significant portion of its "range," *see id.*, and because that term is most reasonably interpreted to mean a species's natural range, the Commission acted illegally by limiting

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[1] Given the significant federal and state protections that apply to the wolf regardless of the Commission's listing, it is hard to take seriously the agency's contention that the listing is necessary so that wolves will not be "shot on sight." Comm'n Br. 11. Such hyperbole does, however, substantiate the Cattlemen and Farm Bureau's concern that listing makes reasonable discussion about wolf management much more difficult.

[2] The Intervenors contend that the Cattlemen and Farm Bureau's concerns are overblown, citing the wolf management plans that have been implemented in Washington and Oregon. Int. Br. 7 n.2 But these examples are inapposite, given the California Endangered Species Act's more stringent wildlife protections. *Compare* Wash. Rev. Code §§ 77.12.240, 77.36.030 (authorizing direct management of depredating "wildlife"); *id.* § 77.08.010(17) (defining "Endangered species" as a type of wildlife); Or. Admin. Code § 635-110-0010 (authorizing direct management of depredating wolves otherwise protected by the Oregon Endangered Species Act); *with* Fish & Game Code § 2081(a) (authorizing direct take only for scientific, educational, or wildlife health purposes).

its listing analysis solely to the wolf's status in the California portion of its range. Third, because the Act makes "endangered species" status a function of a species's condition in its "range," the Commission has no authority to list a species if it has not established a "range." And, as the Department itself recognized, the mere intermittent presence of a single animal is inadequate to establish a "range" for that animal's population. Thus, the Commission acted illegally by listing a "species" with no "range."

As set forth below, none of the Commission's and Intervenors' defenses to these arguments has merit.

I. The California Endangered Species Act does not authorize a "native species" listing based solely on the presence of a non-native subspecies.

The California Endangered Species Act limits the Commission's listing power to "native species or subspecies." Fish & Game Code § 2062. The Commission therefore has no authority to list non-native species or subspecies. *See Cent. Coast Forest Ass'n v. Fish & Game Comm'n,* 18 Cal. App. 5th 1191, 1230 (2018). The Cattlemen and Farm Bureau contend that the Commission may not avoid the Act's "native species or subspecies" limitation by listing and protecting members of a non-native subspecies simply because other subspecies within the same species were once native to the state but are no longer present. Opening Br. 12-14.

The Commission and Intervenors argue to the contrary, principally on the grounds that the Act allows for the listing of native species, and the gray wolf species—of which OR-7 is a member[3] —is native to California. Comm'n Br. 22-25; Int. Br. 8-9. This defense misses the point. The Cattlemen and Farm Bureau do not contend that the Commission generally lacks the authority to list wildlife at the "species" level. *Cf.* Comm'n Br. 24-25. Rather, their argument is that the Commission cannot misuse this authority to nullify the Act's limitation to native flora and fauna

[3] The Commission contends that the Cattlemen and Farm Bureau improperly rely just on the presence of OR-7, rather than on the presence of his mate or other wolves. Comm'n Br. 22 n.8. But the improper reliance (if any) is immaterial to the "native" argument, because all of the wolves in Oregon, including OR-7, are derived from the same subspecies. *See, e.g.,* AR0012654 (Dep't status review) (explaining that the Oregon wolf population derives ultimately from "translocated wolves (Canis lupus occidentalis) captured in" Canada).

by protecting members of a non-native subspecies through the leapfrogging artifice of a "native species" listing, especially when no member of a native subspecies is present within the state.

That the Commission may generally have the discretion to decide at which taxonomic level to protect a population, Comm'n Br. 24-25, is irrelevant. "[A]n administrative agency has only such authority as has been conferred on it." *Ass'n for Retarded Citizens v. Dep't of Development Servs.*, 38 Cal. 3d 384, 391-92 (1985). Thus, the issue is not the Commission's discretion to select among a menu of permissible taxonomic options but rather the scope of the menu itself—*i.e.*, whether the agency has the authority in the first place to protect members of a non-native subspecies. Nothing in *California Forestry Association v. California Fish & Game Commission*, 156 Cal. App. 4th 1535 (2007), or *Central Coast Forest Association*, which the Commission and Intervenors call upon, is to the contrary. In pertinent part, these decisions address the criteria that the Commission may use to determine whether a given population qualifies as a listable "species" or "subspecies." *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1544-49; *Cent. Coast Forest Ass'n*, 18 Cal. App. 5th at 1235-38. Neither gives any support to the Commission's interpretation of *native* species or subspecies. In fact, these decisions actually cut against the Commission's position by emphasizing the importance of the Act's native limitation, *see Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1550; *Cent. Coast Forest Ass'n*, 18 Cal. App. 5th at 1229-30, which limitation the Commission's view would undermine.[4]

The Commission and Intervenors further argue that it was appropriate for the Commission not to address the wolf's sub-specific taxonomy, given the uncertainty and controversy surrounding the issue. Comm'n Br. 26-27; Int. Br. 9. But if, as the Cattlemen and Farm Bureau contend, the Act does not allow for the listing of a native species based solely on the presence of a non-native subspecies, then the Commission had no choice but to decide—in the course of determining whether to list—if OR-7 is part of a native subspecies. *See Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (explaining that an agency cannot "avoid its statutory obligation by noting the

[4] The Commission's reliance on the Act's conservation purpose, Comm'n Br. 26, is misplaced, because it presumes that the Act's purpose is furthered by protecting members of a non-native subspecies. As explained in the text, that is contrary to the statute's actual purpose—the protection of native flora and fauna. *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1550.

uncertainty surrounding" scientific questions).

On that score, the Commission and Intervenors contend that the administrative record does in fact support a finding that OR-7 is part of a native subspecies. Comm'n Br. 27; Int. Br. 9-10. But the main evidence they cite is a preliminary genetic study by one peer reviewer. Such tentative evidence is insufficient as a matter of law to support a native subspecies finding. Opening Br. 7 n.1. The Commission also cites evidence attesting to some genetic similarity between OR-7's subspecies and a subspecies that used to dwell in California. Comm'n Br. 27. But none of that evidence suggests that the subspecies distinction between the two is baseless or should be erased. For example, the Commission cites a comment from the California Wolf Center. Comm'n Br. 27. That comment, however, just states that "the number of gray wolf subspecies in North America [is] more properly confined to five" and that "the wolf inhabiting northeastern and eastern California was . . . *Canis lupus nubilis*," AR0010835 (citing Nowak (1995)). *Accord* AR0010179 (wolf listing pet'n) (reproducing a map from Nowak (1995) showing *Canis lupus nubilis* to be the only subspecies historically present in California). But OR-7 and his relatives are part of *Canis lupus occidentalis*, not *Canis lupus nubilis*. *See* AR0010105 (Dep't status review). Moreover, that there may be genetic overlap among wolf subspecies does not undercut the propriety of the subspecies divisions; substantial genetic similarity between valid subspecies is to be expected. *See* Julie S. Thrower, *Ranching with Wolves: Reducing Conflicts Between Livestock and Wolves through Integrated Grazing and Wolf Management Plans*, 29 J. Land Resources & Envtl. L. 319, 321 (2009) ("[B]reaks in gene flow . . . . , with a species as geographically widespread as the wolf historically was, . . . can be small, yet may be important enough to warrant subspecific listing under the [Endangered Species Act]."). In any event, the quality or quantity of the record evidence pertaining to wolf subspecies is irrelevant. During the administrative process, the Commission made no subspecies finding, *see* AR0010075-76 (Comm'n findings discussing the gray wolf species), and thus its listing decision cannot be saved by a determination made only now in briefing. *See Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n*, 163 Cal. App. 4th 215, 244 (2008) ("Findings are not supposed to be a post hoc rationalization for a decision already made.") (internal quotation omitted).

With no compelling argument based on the statute's text or the administrative record, the Commission resorts to policy, contending that adoption of the Cattlemen and Farm Bureau's approach—namely, a "native species" may not be listed if based solely on the presence of members of a non-native subspecies—would hamstring the Commission into listing only at the lowest taxonomic level available. Comm'n Br. 28. That is not so. The only thing that the Commission would be prevented from doing is undoing the Legislature's prohibition on the listing of non-native subspecies. Nothing would preclude the Commission from listing a native species comprising native subspecies (or, arguably, a mixture of native and non-native subspecies), so long as the listing would not have the effect—as it does here—of solely protecting individuals of a non-native subspecies. And contrary to the Commission's contention, Comm'n Br. 29, nothing in the Cattlemen and Farm Bureau's interpretation would require agreement among the entire scientific community before the Commission could act. *See Cadiz Land Co., Inc. v. Rail Cycle, L.P.*, 83 Cal. App. 4th 74, 97 (2000) (disagreement among experts does not invalidate agency action otherwise supported by substantial evidence). Rather, the agency would merely need to make a finding, backed by substantial evidence, that a listing would not have the effect of protecting individuals—and thus be the functional equivalent of the listing—of a non-native subspecies.

Ultimately, the Commission's argument is really not against the Cattlemen and Farm Bureau at all, but rather against the Legislature and its decision to authorize the protection of only "native species or subspecies," as opposed to just "species or subspecies," or simply "populations." *See, e.g.*, Comm'n Br. 29 n.13 (objecting to a definition of "native" that means "species or subspecies that were present in the state at a certain point in history"—what else possibly could "native" mean?). As a consequence of the Legislature's drafting decision, the Commission may at times be called upon to make hard taxonomic decisions. Wildlife agencies do that all the time, despite sometimes significant controversy. *See* Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 Wash. U. L.Q. 1029, 1105-12 (1997) (describing federal wildlife agency taxonomic practice). Moreover, the Commission has plenty of guidance in how to make those calls. *See, e.g.*, Anna L. George & Richard L. Mayden, *Species Concepts and the Endangered Species Act: How a Valid Biological*

Definition of Species Enhances the Legal Protection of Biodiversity, 45 Nat. Resources J. 369, 407 (2005) (arguing that the federal Endangered Species Act "is already prepared to accommodate a wide spectrum of biodiversity and no doubt it will benefit from a more inclusive definition of species without any codified change").

The Legislature's decision to limit the Act's protections to native species or subspecies also means that sometimes the Commission may not be able to list an endangered or threatened population, despite—as the Commission itself recognizes—the biological consequences of that regulatory disability. *See* Comm'n Br. 30. But again, that outcome is the result of the change the Legislature itself made from the 1970 California Endangered Species Act—which contained no "native" limitation—to the 1984 Act, which does. Opening Br. 14. It is not the Commission's prerogative to second-guess this policy determination. *See W. States Petrol. Ass'n v. Dep't of Health Servs.*, 99 Cal. App. 4th 999, 1009 (2002) (explaining that "administrative agencies . . . are not at liberty to second-guess the Legislature's determination" to employ a particular environmental standard).

Because the Commission's listing of the gray wolf is based solely on the presence of a non-native subspecies of wolf, the agency's action is the functional equivalent of the listing of a non-native subspecies, and therefore exceeds the Commission's authority.

II. The relevant "range" under the California Endangered Species Act is a population's full, natural range.

The Commission's decision whether to list a population under the California Endangered Species Act must be based on the status of a population "throughout all, or a significant portion, of its range." Fish & Game Code § 2062. The Cattlemen and Farm Bureau argue that "range" means a species's natural range. Opening Br. 14-18. The Commission and Intervenors contend otherwise, but their arguments do not convince.

The Commission begins its defense by objecting to the Cattlemen and Farm Bureau's alleged failure to raise the "range" issue during the administrative process.[5] Comm'n Br. 31-33.

[5] The Commission couches its objection in terms of administrative-remedy exhaustion, but it really amounts to an issue-exhaustion objection. *See* Jeffrey S. Lubbers, *Fail to Comment at Your Own*

There was no such failure: the Cattlemen and Farm Bureau did raise the gist of the matter. *See* AR0010868 (Nov. 2015 comment letter) ("To avoid running afoul of the [Administrative Procedure Act], we urge the Commission to reject the proposed amendment to the list of endangered species—rooted as it is in the legally deficient interpretation of 'range.'"). That their comment came after the close of the listing record (but not the Administrative Procedure Act record) is of no moment, for the Cattlemen and Farm Bureau do not adduce extra-record evidence to challenge any of the Commission's factual determinations. Rather, they advance a *legal* argument about how to interpret the California Endangered Species Act. For that reason, Section 2075.5 of the Fish and Game Code, on which the Commission relies and which generally prohibits the late submission of "information . . . for consideration on [a] petition," is inapposite. *See Koyo Seiko Co., Ltd. v. United States*, 955 F. Supp. 1532, 1544 (C.I.T. 1997) ("[W]hile documentary items not presented to or obtained by [the agency] are outside the administrative record, a party 'is free to offer whatever *legal* arguments it chooses.'") (citation omitted).

Moreover, even if the exhaustion doctrine otherwise applied, the Cattlemen and Farm Bureau would be entitled to an exemption under that doctrine's futility exception. *See Jonathan Neil & Assoc., Inc. v. Jones*, 33 Cal. 4th 917, 936 (2004) ("Failure to exhaust administrative remedies is excused if it is clear that exhaustion would be futile."). The Commission has never wavered from its view that "range" means California range, Opening Br. 15, and indeed it reaffirmed that legal position below, AR0010074 (Comm'n findings). Hence, raising the point during the comment process would have been futile. *See Jonathan Neil & Assoc.*, 33 Cal. 4th at 936 ("The futility exception requires that the party invoking the exception can positively state that the [agency] has declared what its ruling will be on a particular case.") (internal quotation marks omitted). *Cf.* Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 Admin. L. Rev. 109, 168-69 (2018) (arguing that an exhaustion requirement normally would not be appropriate for "[a]gency actions that raise purely

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Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?, 70 Admin. L. Rev. 109, 110-12 (2018) (discussing the difference between the two objections). The only administrative remedy available to the Cattlemen and the Farm Bureau was to participate in the rule-making process, which they did at every stage. Opening Br. 10.

legal questions that would not be aided by the agency's view" or when "the agency has in fact considered the issue"). In fact, precisely because it would have been futile, the Cattlemen directed their June, 2014, hearing comments, *discussed in* Comm'n Br. 32-33, on the assumption that the Commission would continue to follow its cramped view of "range," but only to show that the listing would still be improper. *See* AR0011965 ("Thus, under [the California Endangered Species Act] as written and interpreted by the courts, the gray wolf is *currently extinct* within California.") (emphasis in original).

On the merits, the Commission argues that its interpretation of "range" is compelled by the California Endangered Species Act's plain language; and, citing *California Forestry Association*, the agency contends that an interpretation of "range" to mean a species's natural range would be inconsistent with the Act's text. Comm'n Br. 36. But the first contention is belied by the ordinary meaning of "range." Opening Br. 14 (citing Webster's 3d New Int'l Dictionary (1993)). And the second is not supported by the court of appeal's decision. *California Forestry Association* did not hold that interpreting "range" to mean a species's natural range fails to comport with the statute's text. Rather, the court of appeal merely rejected the proposition that "[w]hat matters ultimately is whether the species goes extinct" *regardless* of its current location. *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1549-50 (citation omitted). The Commission also protests that an interpretation of "range" not limited to California would lead to the absurd result that the agency would be unable to protect dwindling populations of a species in California, so long as populations in other parts of the world were doing fine. Comm'n Br. 37-38. That is incorrect. Nothing in the interpretation advanced by the Cattlemen and Farm Bureau would preclude the Commission from determining in such an instance that the California portion of the species's range is itself "a significant portion" of its range, and to protect the species on that basis.

That the Commission and Intervenors' substantive defense of the agency's interpretation of "range" is based principally on its approval by *California Forestry Association* is not surprising. That case did indeed uphold the Commission's interpretation of "range" to mean only the California portion of the range of the pan-Pacific Coho salmon. *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1542, 1551. But that decision, the Cattlemen and Farm Bureau contend, is distinguishable because

its "range" holding is inextricably tied to the unchallenged deference that the court of appeal afforded the Commission's interpretation, a deference that is here not merited.[6]

The Commission, however, reads *California Forestry Association* as having nothing to do with deference but rather "a de novo question of law." Comm'n Br. 37. The Intervenors make a similar argument, arguing that the court of appeal's decision "turned on [the California Endangered Species Act]'s plain language and Legislative intent—not some undue deference to the Commission." Int. Br. 11. To be sure, the Commission and Intervenors are correct that *California Forestry Association* acknowledged that a court must always exercise its independent judgment when interpreting a statute. But that is true even when a court actually does defer to an agency's legal interpretation, a point that *California Forestry Association* expressly stated. *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1549 ("We exercise our independent judgment in interpreting a statute, but give deference to an agency's interpretation when warranted.").

In any event, *California Forestry Association* did not base its decision on the California Endangered Species Act's supposed plain meaning or any other "compelled" conclusion. To the contrary, because in its view the Act "does not state whether the range to be considered is a species' California range or worldwide range," the court concluded that "the statute is ambiguous." *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1549. It is true that the decision also held the Commission's interpretation to be "reasonable," based in part on the court's conclusion that the Commission's interpretation furthered the Act's purposes. *Id.* at 1551. But that reasonableness determination merely enabled the court of appeal to defer to the Commission's interpretation. *See Mateel Envtl. Justice Found. v. Office of Envtl. Health Hazard Assessment*, 24 Cal. App. 5th 220, 229 (2018) ("[A] court will not accept an agency interpretation that is clearly erroneous or unreasonable . . . .").

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[6] The Commission contends that, because its "range" interpretation is compelled by the statute, it is not an underground regulation. Comm'n Br. 34-38. *See Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 337 (2006) (a regulation is exempt if it is "patently compelled by . . . the statute's plain language"). The Cattlemen and Farm Bureau do not believe that the Commission's interpretation is a reasonable interpretation of, much less compelled by, the Act. Opening Br. 14-18. But the Commission's argument does amount to a tacit concession that judicial deference to the agency's interpretation would be inappropriate. *See Wolski v. Fremont Investment & Loan*, 127 Cal. App. 4th 347, 356 (2005) ("[D]eference is proper only if the language of the statute is ambiguous and susceptible to more than one reasonable meaning.").

The court of appeal certainly did not hold that the Commission's interpretation was the only or most reasonable interpretation. *See Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1551 ("[T]he Commission . . . ha[s] a wide degree of discretion in defining the phrase 'throughout all, or a significant portion, of its range' since that phrase is not defined in the statute."). Thus, the court did not address whether, without deference, it would have persisted in its allegiance to the Commission's interpretation or instead would have adopted another, more reasonable, interpretation. *Cf. Watts v. Oak Shores Cmty. Ass'n*, 235 Cal. App. 4th 466, 476 (2015) ("The 'golden rule' for statutory interpretation is that where several alternative interpretations exist, the one that appears the most reasonable prevails.").

No matter, argue the Commission and Intervenors, because even if deference did play a role in *California Forestry Association*, the Commission's interpretation of "range" is not an underground regulation—the basis on which the Cattlemen and Farm Bureau argue against deference—and thus deference to the Commission's interpretation remains appropriate.

The Commission starts off this line of argument with the contention that its interpretation falls within the Administrative Procedure Act's exemption for interpretations compelled by the statute's plain meaning. Comm'n Br. 35. Not even *California Forestry Association* supports that argument. *Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1549 (concluding that "range" is ambiguous).

Next, the Commission argues that, because its practice of interpreting "range" to mean solely a species's California range has not been reduced to writing as a stand-alone policy, it cannot constitute an underground regulation. Comm'n Br. 33-34. The Commission's position would create an easy way for agencies to avoid the Administrative Procedure Act's underground regulation barrier: just don't write anything down. That is not the law. As *California Advocates for Nursing Home Reform v. Bonta*, 106 Cal. App. 4th 498 (2003), makes clear, an underground regulation claim will lie against unwritten as well as written policies. *Id.* at 504, 532. The Commission contends that *California Advocates* is distinguishable because the court of appeal there relied on "internal directives or informal memoranda," the likes of which are not present here. Comm'n Br. 34. The Commission's distinction misses the mark because the Cattlemen and Farm Bureau *have* adduced written evidence of a consistent Commission practice of interpreting "range" to mean

California range. *See* Opening Br. 15. And just as the appellants in *California Advocates* appropriately relied on individual agency determinations to prove the existence of "written and unwritten policies and practices," *Cal. Advocates*, 106 Cal. App. 4th at 528-30, so too here the Cattlemen and Farm Bureau may rely on the Commission's individual listing determinations to establish the existence of an underground regulation.

The Commission and Intervenors also argue that the Commission's "range" interpretation does not qualify as a "regulation" under the Administrative Procedure Act. Comm'n Br. 34; Int. Br. 11. They are correct that interpretations that arise from case-specific adjudications are not regulations within the meaning of the Act. But that principle is inapposite here.

To begin with, although the Commission's interpretation of "range" has been expressed largely in the context of individual petitions, it has not been *created* in an adjudicatory manner. Rather, the Commission consistently has employed the same interpretation of "range" for decades, regardless of any petition-specific consideration. Opening Br. 15.

Moreover, even if the Commission had developed its interpretation of "range" petition-by-petition, that procedural history would still not exempt the interpretation from the underground regulation prohibition. For the end result of such petitions is not to establish the rights of particular parties, or to enforce existing regulations, but rather to create new regulations. *See* Fish & Game Code § 2075.5(e) (requiring the Commission to pursue rule-making under the Administrative Procedure Act after having determined that a petitioned action is warranted).[7] That is quintessential legislative action. *See Cal. Sch. Bds. Ass'n v. State Bd. of Educ.*, 240 Cal. App. 4th 838, 847 (2015) (an adjudicative decision "determines what the law is, and what the rights of parties are, with reference to transactions already had," whereas a legislative action "prescribes what the law shall

[7] As of January, 2019, the Commission will no longer be required to pursue rule-making under the Administrative Procedure Act when altering the status of an already validly listed species. Cal. Stats. 2018, ch. 329, § 6 (S.B. 473) (the Administrative Procedure Act "does not apply to the change in status of a species pursuant to this article."). Although this code change streamlines the rule-making process, it does not make the Commission's regulatory action any less quasi-legislative. Moreover, this code change will have no effect on any remand that the Court may order. For the Commission in that circumstance would be considering whether to list the wolf in the first instance, not whether to effect a "change in [its] status."

be in future cases arising under it") (quoting *Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal. App. 2d 271, 279-80 (1967)). A contrary rule would produce the awkward result that new rules developed in response to a rule-making petition, Gov't Code § 11340.6, would still be considered adjudicative and thus exempt from the Administrative Procedure Act. *Cf. Carmona v. Div. of Indus. Safety*, 13 Cal. 3d 303, 310 (1975) (distinguishing "a quasi-legislative judgment declining to promulgate a new regulation [from] the interpretation and application of an existing regulation").

Thus, because the Commission's "range" interpretation is an underground regulation—a point not considered by *California Forestry Association*—it is entitled to no deference. And because the most reasonable interpretation of "range" is a population's natural range, the Commission's California-centric listing analysis violated the statute.

III. A listing may not be based on the intermittent presence of a single animal.

The Cattlemen and Farm Bureau argue that the Commission's listing decision is based on inadequate evidence—namely, the presence of just one individual wolf. Opening Br. 18-20. The Commission and Intervenors raise a host of defenses to this unprecedented listing decision, *cf.* AR0012320 (testimony of Dep't Dir.) ("I reject the premise that gray wolf is not a unique situation for a species management in California. It is."), but none withstands scrutiny.

Starting off, the Commission argues that the California Endangered Species Act's plain language supports its view that the intermittent presence of a single animal can suffice for listing, focusing on the word "conserve." Comm'n Br. 40. But the Commission's argument puts the cart before the horse. The Act defines "conserve" in terms of remedial efforts directed towards "endangered species" and "threatened species." Fish & Game Code § 2061. In other words, the Act's definition of "conserve" relates to populations that have *already* been determined to be eligible for listing. *See id.* §§ 2062, 2067. It is therefore illogical to cite the Act's definition of "conserve" as evidence of what must be shown for a species to be listed in the first place.[8]

[8] Similarly unpersuasive is the Commission's reliance on the Guadalupe fur seal and other species listed under the 1970 California Endangered Species Act. Comm'n Br. 41. The 1970 Act did not reference "range" at all in its definition of "Endangered animal," Cal. Stats. 1970, ch. 1510, § 3, at 2998, and thus the question now presented was not relevant to the Commission's listing decisions for those animals. *See* AR0012264 (testimony of Dep't Dir.) ("Back then in the '70s around

If anything, the Act's plain language supports the Cattlemen and Farm Bureau's view. Although containing no express listing requirement that an animal be present for some minimum amount of time or to any particular degree, the Act certainly contains a necessary implied requirement, through its definition of "endangered species." That definition requires the Commission to analyze the status of a population "throughout all, or a significant portion, of its range." Fish & Game Code § 2062. Hence, a necessary element of "endangered species" status is the existence of a "range." Yet the mere intermittent presence of an individual of a species does not establish a "range" for that species. That is precisely the reason why the Department recommended against listing. *See* Opening Br. 19.

The Commission and Intervenors contest that characterization of the Department's position, but their cited authority does not support their gloss. They call attention to Director Bonham's June, 2014, hearing testimony that he and the Department "don't believe that a breeding population necessarily must exist before listing." Comm'n Br. 45; Int. Br. 13 (quoting AR0012319). But Director Bonham immediately thereafter added that "[b]reeding population is but one issue within the larger scientific inquiry related to population trend which Dr. Loft has reported on." AR0012319. And in that earlier presentation, Dr. Loft—the Department's wildlife branch chief—declared, as to "trends in current range and distribution," that "[o]ne individual does not constitute" range and distribution, and thus that "there is no scientific basis for range and distribution in California at this time." AR0012309. Hence, even granting that the Department has reserved judgment as to unpresented instances where listing would be warranted based on a single animal, Int. Br. 13, that cannot change the fact that here the Department determined that the wolf has not and could not establish a "range" within the state based on one individual. Opening Br. 19. Without a relevant "range," the wolf simply cannot be listed.

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wolverine and Guadalupe fur seal, the decision was about whether a species was rare, and there were four specific criteria, none of which are really related to the standard you made your decision in 2014.").

The Commission and Intervenors call upon *Central Coast Forest Association*, but that case does not help their cause. To be sure, the decision does affirm the unremarkable proposition that courts cannot employ criteria for listing that are not supported by the Act's text, such as a requirement that a population be self-sustaining for a given period of time. *Cent. Coast Forest Ass'n*, 18 Cal. App. 5th at 1226-27. But as demonstrated above, that a certain degree of presence in the state is a necessary requirement for listing follows from the Act's definition of "endangered species." That definition turns on a species's status in its "range," which in turn depends on an assessment of a species's presence in a given area. Indeed, neither the Commission nor the Intervenors offer any response to the Cattlemen and Farm Bureau's point that an individual wolf's dispersal areas are not equivalent to and do not necessarily establish its "range."[9] Opening Br. 19-20. For their part, the Intervenors cite *Central Coastal Forest Association*'s discussion of the U.S. Fish & Wildlife Service's policy on range. Int. Br. 14. But that policy is expressed *not* in terms of where the individual members of the species are found but rather in terms of where "*the species* is currently found." 81 Fed. Reg. 7414, 7421 (Feb. 11, 2016) (emphasis added). In fact, in the sentence immediately following the portion quoted by the Intervenors, the policy clarifies that areas are not considered to be occupied if they are populated "solely by vagrant individuals." *Id.*

Also on the point of federal authority, the Commission and Intervenors contend that the Ninth Circuit's decision in *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), is inapposite because the case addressed the designation of critical habitat, not the listing of a species. That is a distinction without a difference. The federal provision at issue in *Arizona Cattle Growers' Association* defines critical habitat as, in part, "the specific areas within the geographical range occupied by the species." 16 U.S.C. § 1532(5)(A)(i). The Ninth Circuit addressed what "occupied" means in the context of a mobile species, holding that it requires "sufficient regularity that [the species] is likely to be present during any reasonable span of time." *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1165. Presumably even the Commission and Intervenors would agree that a species cannot have an active range in California if it is not present in this state.

[9] The Commission's response is that its listing decision was not based just on a single wolf's presence. Comm'n Br. 45. That is incorrect. *See infra* at 21-22.

See AR0010080 (Comm'n findings) ("[T]he Commission has determined that the best information available indicates that the continued existence of the one or more gray wolves in California is in serious danger of extinction . . . ."); AR0010193 (wolf listing pet'n) (explaining that, "in recognition of the return of the gray wolf to California, a comprehensive recovery plan must be developed," the "first step [of which] is to list the gray wolf"). And whether a species is present in this state—that is, whether a species "occupies" any part of California, a point that *Arizona Cattle Growers' Association* speaks to—is directly relevant to whether the species has a "range," which, in turn, is an essential component of the definition of "endangered species," Fish & Game Code § 2062.

As for policy, the Commission and Intervenors contend that the interpretation advanced by the Cattlemen and Farm Bureau would be bad for wildlife because it would prevent the Commission from protecting imperiled populations that are in California only seasonally.[10] Comm'n Br. 41; Int. Br. 12. That is not so. The only thing that the interpretation would prevent is the listing of an entire species (that is otherwise doing quite well)[11] based on the unpredictable and intermittent presence of a single member of that species. That is hardly a significant limitation. Moreover, to accept the Commission and Intervenors' interpretation would mean that every day that OR-7 crossed the border back to Oregon, a delisting petition would have been appropriate, and every day he re-crossed, a relisting petition. A court should be reluctant to ascribe to the Legislature the intent to authorize such an arbitrary approach to wildlife conservation. *Cf.* AR0010091 (Dep't Dir. Mem. to Comm'n) ("The petition evaluation was intentionally focused . . . not on the vagaries of an

[10] The Commission believes that the Cattlemen and Farm Bureau would require the wolf to "perform an impossible task," namely, to maintain a regular presence in the state before being considered for listing. Comm'n Br. 41. The Department at least thinks otherwise. *See* AR0012317 (testimony of Dep't Dir.) ("California may have a functioning pack of wolves within ten years given the population dynamics in Oregon and dispersal patterns of OR7.").

[11] The Intervenors object, Int. Br. 3 n.1, to reliance on the U.S. Fish and Wildlife Service's proposed wolf delisting rule, which the Cattlemen and Farm Bureau cite, Opening Br. 7, for the proposition that, range-wide, the gray wolf is not in danger of extinction. But the critique of the proposed rule that the Intervenors highlight does not question that proposition; instead it focuses on other aspects of the proposed rule, such as the taxonomic status of wolf populations on the East Coast. *See* Nat'l Ctr. for Ecol. Analysis & Synthesis, *Review of Proposed Rule Regarding Status of the Wolf Under the Endangered Species Act* 8-9 (Jan. 2014), https://www.fws.gov/science/pdf/Peer-Review-Report-of-Proposed-rule-regarding-wolves.pdf.

individual of that species that may or may not occupy California at any given time.").

Finally, the Commission contends, principally citing itself and data adduced by outside wolf advocates, that the listing is supported not just by OR-7, but by the conjectured presence of his mate and other wolves as well. Comm'n Br. 45-46 (citing, inter alia, comments from the California Wolf Center, Center for Biological Diversity, Klamath Center for Conservation Research, and Society for Conservation Biology). *Accord* Int. Br. 6-7. Yet the Department testified at the Commission's June, 2014, hearing, in response to a Commissioner's question on whether OR-7 and his alleged mate had successfully reproduced, that "we're a long way off in determining whether or not if indeed it's a female, if indeed they had pups, . . . and more importantly, for first time breeders, if they will successfully recruit those young into a pack." AR0012464 (hearing trans.). The Department's conclusion[12]—which the Commission must accord "substantial deference," *Cent. Coast Forest Ass'n*, 18 Cal. App. 5th at 1206—was that it was "still speculation at this point."[13] AR0012465. The Commission's decision cannot stand without substantial evidence, and "[s]peculative possibilities are not substantial evidence." *Foltz v. Johnson*, 16 Cal. App. 5th 647, 662 (2017). Ultimately, however, what matters is not whether there was evidence of one or two or several intermittently present wolves. What matters is that there was insufficient

[12] The Intervenors appear to suggest that the Department actually changed its position. *See* Int. Br. 7 (quoting Director Bonham's statement at the Commission's October, 2014, hearing that "the Department is not in dispute with the Commission's decision," AR0012263). But in context it is clear that Director Bonham merely meant that, now that the Commission had made the decision, the Department would abide by the law and implement it, as it does with all Commission listing decisions. *See* AR0012263 ("You made the decision, and now we're about the business of implementing and perfecting the management plan.").

[13] The Commission repeatedly emphasizes that it received evidence on the gray wolf's status near the California border after the Department had submitted its February, 2014, wolf status report. Comm'n Br. 15, 17. But the Department was aware of this evidence at the final June, 2014, listing hearing, AR0011976-77 (June, 2014, hrg. trans.) (Department wolf expert noting the Oregon range of OR-7 "and now companions, it appears"), yet persisted in its conclusion that listing was not warranted, AR0011978-79. And contrary to the Commission's view, Comm'n Br. 46 n.22, that wolves have been spotted in California since the June, 2014, listing hearing does not confirm or corroborate the agency's listing decision. After all, OR-7 himself eventually established a range in Oregon not California. Opening Br. 20. And at least one alleged post-listing wolf pack—the so-called "Shasta Pack"—"no longer exists." *See* Cal. Dep't of Fish & Wildlife, *Currently Known Gray Wolves in California* 1 (Oct. 2018), *available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=161935&inline.

evidence for the Commission to conclude that the wolf had established a "range" within the meaning of the California Endangered Species Act. AR0012613 (June, 2014, Department PowerPoint slide) ("There is no scientific basis for range and distribution in CA at this time.") (underlining in original). Therefore, the Commission's listing of the wolf, despite its not having established a "range," exceeded the agency's statutory authority.

IV. A traditional writ of mandate and declaratory relief are merited.

The Cattlemen and Farm Bureau challenge the Commission's listing decision and listing regulation through administrative and traditional writ relief, as well as through an action for declaratory relief. In addition to the arguments addressed in the preceding sections, the latter two causes of action are, the Commission contends, without merit because of the "extremely deferential standard of review" applicable to quasi-legislative action, and because a regulation listing an endangered species under the California Endangered Species Act is always "necessary" within the meaning of the Administrative Procedure Act. Comm'n Br. 47.

The agency's attacks fail to acknowledge that, although very deferential, the standard of review of quasi-legislative action does not immunize agency decision-making when it is not within the scope of the authority conferred on the agency. *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 (1998). If the Cattlemen and Farm Bureau are correct that the gray wolf listing is effectively the listing of a non-native subspecies that has no "range" within the state, then it follows that the Commission's decision exceeds the agency's power to list only "native species or subspecies" that have established a "range." Therefore, under the Administrative Procedure Act, the listing cannot be necessary to effectuate the California Endangered Species Act's purpose.

V. The submission of extra-record materials is proper.

In conjunction with their motion for judgment, the Cattlemen and Farm Bureau requested judicial notice of Commission findings relating to the agency's listing decisions, and submitted several declarations to establish their standing to sue. The Commission objects to these materials, but the agency's concerns are without merit. To begin with, the Commission's reliance on the rule that challenges to agency decision-making are limited to the administrative record, Comm'n Evid.

Obj. 2-4, is misplaced, because the evidence has not been adduced to establish the truth or falsity of any factual question relevant to the Commission's decision to list the gray wolf. Rather, the evidence has been submitted because it is relevant to legal questions—namely, whether the Commission's interpretation of "range" is ineligible for judicial deference because it constitutes an underground regulation, and whether the Cattlemen and Farm Bureau have standing to sue, Opening Br. 10 n.2, 11 n.4, 15. Thus, the no-extra-record-evidence rule is irrelevant. *See Koyo Seiko Co.*, 955 F. Supp. at 1544 (allowing a party to rely on extra-record materials to "support[] its legal argument"); *Russell-Murray Hospice, Inc. v. Sebelius*, 724 F. Supp. 2d 43, 54 n.12 (D.D.C. 2010) (party may support standing with material from outside the administrative record).

Even if that were not so, the proffered evidence to be judicially noticed would still properly be considered as part of the Court's adjudication of the declaratory relief cause of action under the Administrative Procedure Act. That Act expressly authorizes the submission of extra-record material to establish the existence of an underground regulation. *See* Gov't Code § 11350(d)(1), (4) (authorizing a court to consider "[a]ny evidence relevant to whether a regulation used by an agency is required to be adopted under this chapter," in addition to the evidence contained in the "rulemaking file"). The Commission protests that the Cattlemen and Farm Bureau are not directly challenging any underground regulation, Comm'n Evid. Obj. 4-5, but the agency points to no case or statutory text that purports to limit the evidentiary right that the Administrative Procedure Act plainly establishes.

The Commission also misperceives the purpose of the proffered extra-record material. With respect to the request for judicial notice, the Cattlemen and Farm Bureau do not ask the Court to take notice of the truth of any of the factual allegations contained within the Commission's findings. *Cf.* Comm'n RJN Obj. 3-4. Rather, they request notice only of the fact that the Commission has consistently adhered to the legal interpretation of "range" that it employed in its decision to list the wolf—in other words, that the findings are appropriately attributed to the Commission. Judicial notice for that purpose is proper. *See Kao v. Holiday*, 12 Cal. App. 5th 947, 959 & n.4 (2017) (taking judicial notice of Division of Labor Standards Enforcement opinion letters to substantiate that agency's "consistently adopted" interpretation of state labor law). Similarly off-base are the

Commission's objections specific to the Cattlemen and Farm Bureau's standing declarations. These declarations are offered solely to establish the Cattlemen and Farm Bureau's standing to sue. Opening Br. 10 n.2. The Cattlemen and Farm Bureau appreciate the Commission's decision not to contest their standing, but because standing is jurisdictional and can be raised by any party at any time, *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 233 (2006), such a concession is not sufficient reason for this Court to strike the declarations. Moreover, to the extent that the Court determines that the declarations contain any material unnecessary to establish standing,[14] the Cattlemen and Farm Bureau respectfully request that the Court simply ignore such material, rather than take the extraordinary step of striking the declarations in their entirety.

Conclusion

The Commission's unprecedented decision, in the face of Department opposition, to list the gray wolf—a decision based on the intermittent presence within the state of a single animal derived from a non-native subspecies—exceeds the agency's authority under the California Endangered Species Act and the Administrative Procedure Act. The motion for judgment on the writs and for declaratory judgment should therefore be granted.

DATED: December 17, 2018.

Respectfully submitted,

DAMIEN M. SCHIFF
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By 
DAMIEN M. SCHIFF

Attorneys for Petitioners and Plaintiffs

[14] Contrary to the Commission's suggestion, Ms. DeForest's declaration is relevant to establishing the Cattlemen and Farm Bureau's standing to sue, according to the associational standing theory. *See Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th 993, 1003-04 (2009). Moreover, there is nothing improper with establishing standing through declaration as opposed to judicial notice. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing may be proved by "affidavit or other evidence").

Declaration of Service

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On December 17, 2018, true copies of PETITIONERS & PLAINTIFFS' REPLY TO OPPOSITIONS TO MOTION FOR JUDGMENT ON THE PEREMPTORY WRIT AND FOR DECLARATORY JUDGMENT, AND TO EVIDENTIARY OBJECTIONS were placed in envelopes addressed to:

Michael P. Cayaban
Supervising Deputy Attorney General
Joshua M. Caplan — Email: Josh.Caplan@doj.ca.gov
Deputy Attorney General
Department of Justice
600 West Broadway, Suite 1800
San Diego, CA 92101

Gregory C. Loarie — Email: gloarie@earthjustice.org
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Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 17th day of December, 2018, at Sacramento, California.

TAWNDA ELLING