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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA (PHOENIX DIVISION)

WildEarth Guardians,
Plaintiff,

v.

Sally Jewell, in her official capacity as United States Secretary of the Interior, *et al.*,
Defendants,

Board of County Commissioners of the County of Gunnison, Colorado; and American Petroleum Institute and Western Energy Alliance,
Defendant-Intervenors.

No. 2:14-cv-00833-JWS
(Assigned to the Honorable John W. Sedwick)

AMERICAN PETROLEUM INSTITUTE AND WESTERN ENERGY ALLIANCE REPLY IN SUPPORT OF THE FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. Introduction

WildEarth Guardians ("WEG") steadfastly ignores the crucial facts that undermine its case: the population and range of the Gunnison's Prairie Dog ("GPD") has been stable for over five decades. WEG's attempt to rely on conditions that existed over 50 years ago, and its tangled references to various regulatory listing principles, do not support WEG's theory that the GPD is threatened or endangered today. WEG has simply failed to meet its high burden of establishing that the U.S. Fish and Wildlife Service's ("FWS" or "Service") decision not to list the GPD was arbitrary and capricious. The Service concluded, after a thorough and detailed analysis that spanned eleven years, that the GPD is not in danger of extinction or threatened with becoming so endangered. 78 Fed. Reg. 68,660 (Nov. 14, 2013) ("Finding"); AR 013806. Based on this analysis, the application of the five factors set forth in the Endangered Species Act ("ESA" or the "Act"), and the administrative record before this Court, the Service properly found that listing of both subspecies of GPD is not warranted under the Act.

One of the underpinnings of the Service's Finding, as this Court has already noted, is the conclusion that the GPD has co-existed with a variety of human activities, including oil and gas activities, for the past 50 years. Order and Opinion at 3-4 (Dec. 31, 2014), ECF No. 70 ("Order") ("[T]he Service's decision was based in part on a finding that oil and gas activities do not affect the GPD…."); *see also* AR 013816, 013819. The American Petroleum Institute ("API") and the Western Energy Alliance ("Alliance") (collectively, "Defendant-Intervenors") focus in this brief (as they did in their opening brief) on the Service's relevant findings and legal arguments supporting those findings, as

informed by the oil and gas industry's experience with the implementation and impacts of this area of law. To avoid unnecessary duplication, API and the Alliance once again coordinated with the Federal Defendants and Gunnison County prior to filing this brief.[1]

API and the Alliance specifically address three points in this Reply brief. First, the GPD population and its range is stable. The Service analyzed the species for over a decade and, based on a proper application of the five statutory factors and the best available scientific and commercial information, reached the thorough and well-reasoned conclusion that the GPD is not in danger of extinction or threatened with extinction. The Service's decision is entitled to deference. Second, WEG's Significant Portion of Range ("SPR") arguments rely on a flawed notion of "range." Their theory that the GPD is now threatened or endangered in a "significant portion of its range" based on declines in GPD abundance that occurred over 50 years ago rests on a false premise, and is not supportable by science or as a matter of law. The Service's analysis fully considered both historical and current range, and historical declines in abundance, in its determination that the GPD

[1] WEG claims that API and the Alliance failed to "focus on arguments related to the potential impacts of oil and gas activities," and that "only about two pages of API's brief even arguably address the impacts of oil and gas activities on [GPDs]." Pl.'s Reply Mem. in Supp. of Pl.'s Mot. for Summ. J. & in Resp. to the Fed. Defs.' Mot. for Summ. J. at 3 n.4 (June 26, 2015), ECF No. 85 ("WEG Reply"). But the plain language of this Court's Order granting intervention to API and the Alliance does not preclude Defendant-Intervenors from making any particular arguments. Rather, the Court simply noted that API and the Alliance "should focus" their brief "on arguments *related to the potential impacts* of oil and gas activities," which is precisely what API and the Alliance did in their opening brief and this reply brief. Order at 6 (emphasis added). WEG concedes that API and the Alliance have presented arguments separate from those of the Federal Defendants. Pl.'s Resp. to Fed. Defs.' Mot. to Strike Pl.'s Reply Mem. in Part or, in the Alternative, to File an Overlength Br. at 6 (July 20, 2015), ECF No. 92.

population is stable and not "threatened" or "endangered." Third, WEG's claims about the Service's Finding fail to account for the facts and analysis that is actually in the administrative record. A reviewing court appropriately relies on the administrative record as a whole when reviewing agency actions, not just selected portions presented by opponents. In light of the administrative record supporting the Service's decision, WEG has failed to meet its high burden to show that the decision was arbitrary and capricious.

API and the Alliance respectfully request the Court deny Plaintiff's Motion for Summary Judgment and grant the Federal Defendants' Cross-Motion for Summary Judgment.

II. Argument

A. The Gunnison's Prairie Dog's Population and Range Has Remained Stable Despite Outbreaks of the Plague and the Presence of Various Human Activities, Including Oil and Gas Exploration.

WEG's reply offers virtually no response to arguments made by API and the Alliance. Instead, WEG reiterates its assertion that the Service alternated between overall and predicted range when considering how much and what percentage of range will be affected by agriculture, urbanization, and oil and gas development,[2] and alleges that the Service failed to explain whether the six percent of the GPD's range impacted by oil and gas development is overall or predicted range. WEG Reply at 22 (citing AR 013819). Neither of these arguments has merit.

[2] Notably, in its opening brief, WEG concedes that the Service relied on predicted range when evaluating whether oil and gas and urbanization presented threats to the species. Pl.'s Mem. of Law in Supp. of Its Mot. for Summ. J. at 17 (Jan. 30, 2015), ECF No. 76; *see also* AR 013817-19.

The Service provided a reasonable and rational explanation for its identification and use of "predicted range" in its analysis. AR 013811. Relying on GPS data, the Service first mapped the overall distribution of the GPD to depict an approximate "overall range." *Id.*; *see also* AR 13810 (Figure 1 in the Finding). The overall range contains about 70 million acres. Fed. Defs.' Statement of Additional Material Facts ¶ 58 (May 8, 2015), ECF No. 82 ("DSOF"). However, this is a gross estimate that encompasses the species' range and includes areas not actually occupied by the species, such as wetlands and forests. *See id.* ¶¶ 58 to 67. Predicted range, on the other hand, is designed to be a more precise representation of land actually occupied by the GPD. AR 13811. Predicted range is derived from an assessment of characteristics of suitable GPD habitat, including vegetation and slope. *Id.* Predicted range provides a more accurate representation of GPD range because it excludes certain types of habitat, such as forests, dense shrubland, wetlands, and marshland, that are not appropriate for colonial species, like the GPD. *Id.;* DSOF ¶ 59. The predicted range model estimated that the GPD could occupy 23.4 million acres across four States.[3] Naturally, when conducting its threats analysis, the Service considered those areas (the predicted range) in which the species is likely to actually occur. For the SPR analysis, as well, the Service considered predicted range. The Service was consistent and rational in its explanation and use of "range"

[3] Based on the best available information, the Service estimated that the GPD historically occupied approximately 24.3 million acres across its range in 1916. AR 013814. Thus, there is less than a four percent difference between the historically occupied range and predicted range.

throughout the Finding. Fed. Defs.' Mem. in Supp. of Their Opp'n to Pl.'s Mot. for Summ. J. & Their Cross-Mot. for Summ. J. at 6 n.6 (May 8, 2015), ECF No. 81-1.

In its evaluation of impacts, the Service applied the ESA's five listing factors to determine whether the GPD is threatened or endangered.[4] The Service considered a number of potential impacts under Factor A to the GPD subspecies' habitat, including agricultural land conversion, grazing, invasive plant species, urbanization, and oil and gas exploration. AR 013817-19. With respect to oil and gas exploration, FWS concluded that there was no information demonstrating that these activities adversely impact the species. AR 013819.

WEG hinges its oil and gas arguments on a single sentence in the Finding, which states that six percent of GPD range is authorized or pending Federal lease for oil and gas development. WEG complains that the Service did not specify whether the "range" it was referring to was "predicted" or "overall." WEG Reply at 22 (citing AR 013819 (citing Seglund and Schnurr 2010, p. 117)). The Service, however, was simply providing an approximate percentage of GPD range in Colorado where certain activities would occur to determine potential threats to the species. AR 012310. WEG does not explain how distinguishing between overall or predicted range would materially alter the analysis of the potential impacts of these activities, much less how the absence of such a

[4] ESA Section 4 sets forth five factors the Secretary must evaluate to determine whether a species is endangered or threatened: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1)(A)-(E).

distinction renders the Finding arbitrary and capricious. The facts demonstrate that such a distinction is not material to the analysis. Specifically, based on best available scientific and commercial information, the Service reached the conclusion that "[GPD] are [not] negatively impacted by oil and gas activities at the population, subspecies, or landscape levels," and "oil and gas exploration and development are not threats to either subspecies of [the GPD] now or likely to become so in the future." AR 013819. WEG points to no evidence in the record to the contrary.

The APA specifies a narrow and highly deferential standard for review of federal agency action: the action must be reviewed based on the "whole" administrative record and must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. "'[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Ariz. Cattle Growers Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1020 (D. Ariz. 2008) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985)). There is no evidence in the record that the GPD is negatively impacted by oil and gas activities at the population, subspecies, or landscape levels. To the contrary, the record demonstrates that the GPD's range and population have remained stable since 1961 – despite outbreaks of the plague, and in the presence of various human activities, including oil and gas exploration. Viewed as a whole, the Service's conclusions are proper, and do not turn on whether the six percent of

the GPD range in Colorado authorized or pending Federal lease for oil and gas development constitutes "overall" or "predicted" range.[5]

B. The Service Properly Applied and Interpreted the Statutory Term "Significant Portion of Range."

WEG continues to press four claims pertaining to the Service's SPR analysis. First, WEG argues that the Service improperly relied on a SPR policy that did not exist at the time the Service issued the Finding in order to ignore the GPD's historic range. WEG Reply at 4-5. Second, WEG repeats its assertion that the GPD is no longer viable in 95 percent of the range it once occupied. *Id.* at 7-11. Third, WEG argues that the Service did not adequately consider "lost" range once occupied by the GPD. *Id.* at 12-15. Finally, WEG claims the Service failed to conduct the required SPR analysis. *Id.* at 15-17. Each of WEG's SPR claims continues to fail as a matter of fact and law.

WEG first argues that the Service improperly relied on its Final Policy interpreting the SPR phrase, 79 Fed. Reg. 37,578 (July 1, 2014) ("Final SPR Policy"), to justify its approach to considering historic range. WEG Reply at 4. This claim is belied by the record. The Service did not rely on either the Draft SPR Policy, which was still under review at the time the Service issued the GPD Finding, or the Final SPR Policy. AR 013806. Rather, in the Finding, the Service applied its longstanding interpretation of the

[5] Even if the lack of a distinction between overall or predicted range constituted error in this context, any such error would be harmless. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (harmless error doctrine "may be employed … 'when a mistake of the administrative body is one that clearly had no bearing on the … substance of [the] decision reached.'") (internal citations and emphases omitted).

Act, which is consistent with the ESA's plain language and context, and which has now been memorialized in the Final SPR Policy. Under this interpretation, the Service's inquiry into whether a species is threatened or endangered in a significant portion of its range is present and forward-looking, and (naturally) does not analyze whether a species is threatened or endangered in range that it no longer occupies. To the extent the Service is required to consider historical range, it reasonably does so – and did so here – as part of its five-factor assessment of the species' status.[6]

WEG's second argument is that the GPD no longer occupies 95 percent of its historical range, and thus requires listing. WEG Reply at 7-8. WEG places significant emphasis on historic acreages of range occupied by the GPD, but does little to explain

[6] WEG claims that the Service failed to address "the two most recent cases affirming that the Service must consider historic range in its SPR analysis." WEG Reply at 7 (citing *Rocky Mountain Wild v. U.S. Fish & Wildlife Serv.,* No. CV 13-42-M-DWM, 2014 WL 7176384 (D. Mont. Sept. 29, 2014) and *Humane Soc'y of the U.S. v. Jewell*, No. 13-186 (BAH), 2014 WL 7237702, at *44 (D.D.C. Dec. 19, 2014) ("*HSUS*")). API and the Alliance distinguished *Rocky Mountain Wild*, noting that although the court remanded the Service's decision, it specifically found that "'[h]ad the Finding explained its historical range determination, the agency's conclusion would be entitled to deference.'" API & Alliance Mem. of Law in Supp. of the Fed. Defs.' Cross-Mot. for Summ. J. & in Opp'n to Pl.'s Mot. for Summ. J. at 12 n.8 (May 29, 2015), ECF No. 84 ("Def.-Intervenors' Mem.") (quoting *Rocky Mountain Wild*, 2014 WL 7176384, at *5). API and the Alliance also distinguished *HSUS,* in which the court vacated the Service's finding for a distinct population segment of the gray wolf, where the Service failed to provide an adequate explanation for the contraction of the gray wolf's historical range. 2014 WL 7237702, at *44; *see also* Def.-Intervenors' Mem. at 13 n.10. Unlike *HSUS,* the record here makes clear that the Service considered predicted range for the GPD, which it believes is the best representation of where the species actually occurs. The predicted range for the GPD is approximately 23.4 million acres, while the GPD's historical range is approximately 24.3 million acres. AR 013814. Thus, in analyzing distribution of GPDs across the current range, the Service rationally concluded that there has not been any significant change in distribution from the species' historical range. *Id.*

why the Service should have found the GPD in danger of being extinct or threatened with becoming so endangered despite decades of population stability. Placed in proper context, WEG's percentage of range arguments are based on estimates that GPD abundance – and, correspondingly, the number of acres actually occupied within the GPD range – declined by 95 percent between 1916 and 1961. AR 013816. This long-past reduction in abundance (or occupied acres) does not mean that the species is threatened or endangered today, as the Service explained in its decision. WEG otherwise spends much of its argument tilting at windmills – arguing with itself about whether the GPD can be considered "viable" in specific areas that it could, but does not presently, occupy.

Consistent with the ESA's statutory language, the Service interprets the word "range" to refer to the range in which a species currently exists – not to the historical range of the species where it once existed. The Service does not consider historical range (where the species previously but does not presently occur) when it is determining whether a species is currently threatened or endangered in a "significant portion of its range." Data about historical range, and whether the species no longer occurs in a particular location, may be relevant in understanding species trends or otherwise determining whether a species is "in danger of extinction." But the fact that the species has ceased to occur in some portions of its historical range does not necessarily mean that it is "in danger of extinction" or threatened with becoming so endangered.

WEG characterizes various district court decisions as holding that "range" in the SPR phrase includes a species' historic range. WEG Reply at 9-10. WEG's reading of these cases is incorrect as a matter of law. *See* Def.-Intervenors' Mem. at 12-15

(distinguishing cases cited by WEG). Moreover, the Service has explained that the Ninth Circuit's holding in *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001), is likely based on an inadvertent misquote of the relevant statutory language. 79 Fed. Reg. at 37,584-85. Finally, the Service's interpretation of the phrase is based on the language of the statute. *Id.* at 37,583 (concluding that because the Act defines a species as endangered "only if it '*is* in danger of extinction' throughout all or a significant portion of its range," and "'*is* in danger' denotes a present-tense condition of being at risk of a current or future undesired event"; the term "'range' must mean 'current range,' [and] not 'historical range'") (emphases added).

Third, WEG claims that the Service ignored 23 million acres of historic range where prairie dogs occurred before 1961, and additional range occupied by the species between 1961 and 2005. WEG Reply at 12. The record proves otherwise. The Service specifically analyzed the historical and occupied range of the species, abundance of GPD, and trends. AR 013816. It concluded that historical estimates of abundance indicate a rangewide 95 percent decline in the acres occupied by the GPD between 1916 and 1961. *Id.* However, best available information indicates that population numbers have been stable since that time, and current occupancy modeling indicates that the GPD occupies 20 percent of its available habitat, which provides sufficient redundancy for continued stability. *Id.* Moreover, the GPD continues to populate much of its historical range. Any loss of density is not due to habitat loss, but is a result of disease and historical poisoning. Thus, WEG's claim that the Service ignored the species' historic range is simply wrong.

Finally, WEG questions the Service's SPR analysis. WEG Reply at 15. The record amply shows that the Service undertook and rationally performed the required SPR analysis. The Service only undertakes a SPR analysis where, as is the case here, it has first determined that the species at issue is *not* endangered or threatened throughout its range. In that case, the Service analyzes whether any threats are geographically concentrated in areas and, if so, whether these threats warrant further review to determine whether those areas constitute a significant portion of the species' range. If so, the Service would then determine whether there is substantial information indicating that "(1) [t]he portions may be 'significant,' *and* (2) the species may be in danger of extinction there or likely to become so within the foreseeable future." AR 013830-31 (emphasis in original).

Here, the Service's review determined that there are not any concentrations of threats in any part of the ranges occupied by the GPD subspecies. AR 013831. Because there are no concentrations of threats in any portion of the range of either subspecies, the Service did not evaluate whether any portions met the definition of "significant." *Id.* Thus, WEG's "range" arguments are irrelevant. Regardless of how much habitat is impacted by, for example, agriculture, oil and gas activities, or urbanization, there must be evidence showing that the impacts on the habitat are actually affecting the species. Here, the evidence shows that the GPD's population is stable, and WEG has not pointed to any evidence to the contrary.

The Service's interpretation of the SPR phrase is consistent with the purposes and the plain meaning of the key terms in the statute; it does not conflict with established past

agency practice; and it is consistent with the case law on this issue. As applied here, the Service's conclusion that there are no concentrations of threats in any portion of either GPD subspecies' range was based upon its expertise, the best available scientific and commercial data, and is entitled to deference.

C. WEG Has Failed to Meet Its Burden to Show That the Service's Decision Was Arbitrary and Capricious.

WEG's motion for summary judgment on its assertion that the Service's decision was arbitrary and capricious is subject to a narrow and deferential standard of review, and the Service's decision is "entitled to a presumption of regularity." *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (internal quotation marks and citation omitted); 5 U.S.C. § 706(2)(A). "[R]eview is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). As the moving party, WEG bears the burden of proving that the Service's decision was arbitrary and capricious. *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 97 (D.D.C. 2010).

WEG has raised no new arguments nor points to any additional support in the record for its claim that the Service erred in finding that the GPD is not threatened or endangered. WEG's factual arguments are inconsistent with the record, and its legal arguments fail as a matter of law. The Service's Finding is entitled to deference and should be upheld.

III. Conclusion

For the reasons stated above, API and the Alliance respectfully request that this Court grant the Federal Defendants' Cross-Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 12th day of August, 2015.

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I hereby certify that on the 12th day of August, 2015, I electronically transmitted the foregoing document to the Clerk's Office using the CM/CF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants.

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