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SUPERIOR COURT OF CALIFORNIA

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COUNTY OF SAN DIEGO

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11 CALIFORNIA CATTLEMEN'S ASSOCIATION
and CALIFORNIA FARM BUREAU
12 FEDERATION,

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Petitioners and Plaintiffs,

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v.

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CALIFORNIA FISH AND GAME
16 COMMISSION,

16

Respondent and Defendant,

17

and

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

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Respondent-Intervenors.

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

**MEMORANDUM IN SUPPORT
OF PETITIONERS AND PLAINTIFFS'
MOTION FOR JUDGMENT
ON THE PEREMPTORY WRITS,
AND FOR SUMMARY
ADJUDICATION
(CCP §§ 437c, 1060, 1085, 1094,
& 1094.5; Gov't Code § 11350)**

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Department C-67

Honorable Eddie C. Sturgeon

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1 **Introduction**

2 “This is probably the stupidest decision that this Commission ever made all the time I’ve
3 been here.” Administrative Record (AR) at 0012292. So opined Commissioner Kellogg at the final
4 hearing of Respondent and Defendant California Fish and Game Commission approving the listing
5 of the gray wolf as an endangered species under the California Endangered Species Act, Fish &
6 Game Code §§ 2050-2115.5. Petitioners and Plaintiffs California Cattlemen’s Association and
7 California Farm Bureau Federation agree with Commissioner Kellogg that the gray wolf’s listing—
8 which was opposed by the Department of Fish and Wildlife, AR0005738 (Dep’t status review), as
9 well as the Commission’s own counsel, AR0012183-84 (Comm’n hrg. trans.)—is bad policy,
10 because it thwarts a multi-year, collaborative process among governmental and private parties to
11 develop a reasonable wolf management plan. Prior to the listing, it was possible to envision a plan
12 that would adequately protect livestock and other private property from wolf depredation. *See* Fish
13 & Game Code §§ 4150, 4152 (generally prohibiting the take of nongame mammals, such as the
14 wolf, unless necessary to protect crops or other property). But the wolf’s listing triggers the Act’s
15 generally unbending protections for listed wildlife. *See id.* § 2080 (prohibiting “take” of listed
16 species); *id.* § 2081 (authorizing direct take only for scientific, educational, or wildlife management
17 purposes). These regulatory burdens will make a balanced and flexible approach to wolf
18 management exceedingly difficult to achieve, thereby threatening the livelihoods and safety of
19 California’s ranching families. Thus, the Cattlemen and Farm Bureau have brought this action to
20 challenge the wolf’s listing.

21 As set forth in greater detail below, the Commission’s decision to list the gray wolf is illegal
22 for three reasons. First, the Commission’s listing is illegal because it is based on the presence within
23 the state of a non-native subspecies of gray wolf, *e.g.*, AR0005741 (Dep’t status review), and
24 thereby exceeds the Act’s express limitation to native species and subspecies, Fish & Game Code
25 §§ 2062, 2067. Second, the listing is illegal because it is based on the wolf’s condition in California
26 alone, AR0010074 (Comm’n findings), whereas the Act requires an analysis of the wolf’s condition
27 based on its natural “range,” *see* Fish & Game Code §§ 2062, 2067. Third, the listing is illegal
28 because it is based on the intermittent presence of a single wolf. AR0010076 (Comm’n findings).

1 Such evidence is insufficient as a matter of law to establish that the wolf’s range extends to this
2 state. The listing should therefore be set aside.

3 **Statement of Law and Facts**

4 The gray wolf (*canis lupus*) is the largest member of the canid family. AR0005740 (Dep’t
5 status review). Depending on the subspecies and the sex, the gray wolf varies from 40 to 175 pounds
6 in weight, from 4.5 to 6.5 feet in length, and from 27 to 32 inches in height. *Id.* The wolf is an “apex
7 carnivore” that preys on elk, moose, bison, and deer. *Id.* It also consumes livestock and family pets.
8 AR0005744 (Dep’t status review). Found throughout North America and Eurasia, the gray wolf is
9 not in danger of extinction on a range-wide basis. *See* U.S. Fish & Wildlife Serv., *Removing the*
10 *Gray Wolf (Canis lupus) From the List of Endangered and Threatened Wildlife*, 78 Fed. Reg.
11 35,664, 35,678 (June 13, 2013) (“We have found no substantial evidence to suggest that gray
12 wolves are at risk of extinction throughout their global range now or are likely to become so in the
13 foreseeable future.”).

14 The gray wolf species comprises many subspecies, although the precise number is subject
15 to much scientific debate. *See* AR0005740-41 (Dep’t status review); 78 Fed. Reg. at 35,669. The
16 Department’s wolf status review observes that there are three still-extant subspecies of gray wolf
17 in the United States: the Northwestern or timber wolf (*Canis lupus occidentalis*), the Great Plains
18 wolf (*Canis lupus nubilus*), and the Mexican wolf (*Canis lupus baileyi*). *See* AR0005741. Some
19 evidence suggests that the Great Plains wolf and the Mexican wolf once were present in California.
20 *See id.* *See also* AR0002811 (Dep’t pet’n eval.). There is no substantial evidence, however, that the
21 Northwestern wolf ever dwelt in the state.¹ *See* AR0005741-43 (Dep’t status review). *Cf.*

22 ¹ One of the Department’s peer reviewers noted that his unpublished “preliminary genetic analysis,”
23 based on “a small sample size” of specimens from “the West Coast,” suggested that the Mexican
24 wolf and the “Rocky Mountain wolf” (a subset of the Northwestern wolf, 78 Fed. Reg. at 35,672),
25 once were found in California. AR0012848-50 (Wayne Peer Review). Such a tentative analysis
26 cannot qualify as substantial evidence supporting a finding that the Northwestern wolf is a
27 subspecies native to California. *See Rocky Mountain Helicopters, Inc. v. FAA*, 971 F.2d 544, 548
28 (10th Cir. 1992) (“[A] vague reference to questions rather than answers, or even preliminary study
results, cannot satisfy the substantial evidence requirement.”). And even if it could, the Commission
has made no finding to that effect. It may not do so now in briefing. *Laurel Heights Improvement*
Ass’n v. Regents of Univ. of Cal., 47 Cal. 3d 376, 425 (1988) (“We will not accept *post hoc*
rationalizations for actions already taken”); *World Business Acad. v. Cal. State Lands Comm’n*,
234 Cal. Rptr. 3d 277, 299 (2018) (“The agency must weigh the evidence before it and make a
finding based upon the weight of the competing evidence.”).

1 AR0010178 (gray wolf listing petition) (“The most likely subspecies occupying California was
2 *C. l. nubilus*”). In any event, by the late 1920s, all gray wolves (of whatever arguable
3 subspecies) had been extirpated from California. AR0010076 (Comm’n findings).

4 In the mid-1990s, the United States Fish and Wildlife Service introduced gray wolves into
5 Idaho. *See id.* *See also* U.S. Fish & Wildlife Serv., *Establishment of a Nonessential Experimental*
6 *Population of Gray Wolves in Central Idaho and Southwestern Montana*, 59 Fed. Reg. 60,266
7 (Nov. 22, 1994). This wolf population, which ultimately expanded into Oregon, is part of the
8 Northwestern wolf subspecies. *See* AR0005741 (Dep’t status review). In December, 2011, a wolf
9 from the Oregon population—known as OR-7—crossed the border into California. AR0010076
10 (Comm’n findings). Subsequently, OR-7 repeatedly re-crossed the border over a period of several
11 months. *Id.*

12 In March, 2012, following OR-7’s initial sortie into the state, a group of environmental
13 organizations petitioned to list the gray wolf as an endangered species under the California
14 Endangered Species Act. *See* AR0002808 (Dep’t pet’n eval.). *Cf.* Fish & Game Code § 2071
15 (authorizing interested persons to petition the Commission to list populations). The Act defines an
16 endangered species as “a native species or subspecies . . . which is in serious danger of becoming
17 extinct throughout all, or a significant portion, of its range.” *Id.* § 2062. The gray wolf meets this
18 standard, argued the environmental groups, because of the presence of OR-7, AR0010072 (gray
19 wolf listing pet’n), and the alleged likelihood of the establishment of a California breeding
20 population “in the near future,” AR0010086 (listing pet’n).

21 In August, 2012, the Department determined that the petition may be warranted.
22 AR0002811-12 (Dep’t pet’n eval.). *Cf.* Fish & Game Code § 2073.5 (requiring the Department to
23 recommend to the Commission, within 90 days of receipt of a petition, whether the same presents
24 sufficient information to indicate that the petitioned action may be warranted). The Department
25 acknowledged that “the Petition on its face does not include sufficient information, scientifically
26 or otherwise, to indicate that the petitioned action may be warranted.” AR0002814. But the agency
27 nevertheless recommended moving forward with the proposal, on the basis of the possibility that a
28 breeding population may eventually be established within the state. AR0002814-15.

1 At its October, 2012, meeting, the Commission agreed with the Department and designated
2 the gray wolf as a candidate species. *See* AR0012189-90 (Comm’n hrg. trans.). *Cf.* Fish & Game
3 Code § 2074.2(e) (requiring the Commission to determine whether the petition presents sufficient
4 information to indicate that the petitioned action may be warranted and, if so, directing that the
5 species be considered a “candidate” for listing). In February, 2014, the Department completed its
6 status review of the gray wolf, concluding that the wolf should *not* be listed. AR0005765. *Cf.* Fish
7 & Game Code § 2074.6 (requiring the Department to produce a full status review of the candidate
8 species within 12 months of the candidate species determination). The agency explained that,
9 because only one individual wolf had been found in the state, and because the establishment of a
10 species’ “range” depends on the presence of at least one “breeding population,” AR0005748,
11 therefore “the gray wolf is not currently facing or enduring any threat in California at this time,”
12 AR0005764.

13 In June, 2014, notwithstanding the Department’s recommendation, the Commission voted
14 3 to 1 to proceed with the listing of the gray wolf as an endangered species. *See* AR0012076-79
15 (Comm’n hrg. trans.). The Commission therefore directed the Department to produce revised
16 findings justifying the decision. At its October, 2014, meeting, the Commission formally adopted
17 findings (voting 2 to 1) to support its decision to proceed with the listing of the gray wolf. *See*
18 AR0012271-73 (Comm’n hrg. trans.). The Commission then commenced rule-making under the
19 California Administrative Procedure Act, Gov’t Code §§ 11340-11361, to add the gray wolf to the
20 list of protected wildlife. *See* AR0010071-80 (Comm’n findings). *Cf.* Fish & Game Code
21 § 2075.5(e) (requiring the Commission to pursue rule-making under the Administrative Procedure
22 Act after having determined that listing is warranted).

23 At its December, 2015, hearing, the Commission, by a vote of 3 to 1, formally adopted the
24 regulation to list the gray wolf, based on OR-7’s intermittent presence in the state. *See* AR0012294-
25 95 (Comm’n hrg. trans.), AR0010076 (Comm’n findings). In October, 2016, the Commission
26 submitted the listing regulation to the Office of Administrative Law for its review under the
27 Administrative Procedure Act. *See* AR0010087-88. *Cf.* Gov’t Code § 11349.1(a) (requiring the
28 Office of Administrative Law to review all proposed regulations). Shortly thereafter, the Office

1 approved the regulation, which went into effect January 1, 2017. *See* AR0010151-55 (Office of
2 Admin. L. approval).

3 Throughout the administrative process, the Cattlemen and Farm Bureau objected to the gray
4 wolf’s proposed listing. *See* Wilbur Decl. ¶ 5; Cremers Decl. ¶ 5.² They explained that the wolf’s
5 listing would impede the development of an effective wolf plan, AR0010541, AR0012143, because
6 the Act “is a rather blunt tool to use for wildlife management,” relying on simple prohibitions rather
7 than “population objectives [and] a wide range of tools to achieve those objectives.” AR0011874.
8 Indeed, listing would even preclude a rancher “from chasing [a] wolf to the border of his or her
9 property.” AR0011008. The Cattlemen and Farm Bureau underscored that “wolves are
10 extraordinarily deleterious to the health and life of cattle,” both by direct kills as well as by the
11 increase of stress, which in turn reduces fecundity and meat quality. AR0010664. *Accord*
12 AR0011009. Acknowledging that their members “work daily with wildlife,” that they “value
13 wildlife,” and that they “want to continue to see wildlife,” the Cattlemen and Farm Bureau
14 nevertheless underscored that “wolves are dangerous predators” and ranchers “want the ability to
15 protect their livestock.”³ AR0012423.

16 The Cattlemen and Farm Bureau also repeatedly highlighted to the Commission the legal
17 errors in a wolf listing. They noted that the evidence for the historical presence of any gray wolves
18 in California is quite thin, AR0011963, AR0011847-50, while also demonstrating that a listing
19 would be improperly based on the presence of a non-native subspecies of wolf, AR0010964-65.
20 Further, they pointed out that the wolf is not endangered throughout its natural range, which is the
21 appropriate reference point for the listing analysis. AR0010867-68. Finally, they explained the
22 difference between range and dispersal, and how the mere fact of a single animal’s intermittent
23 adventuring to an area is not sufficient to establish that the “range” of the population of which the

24 ² Because the Cattlemen and Farm Bureau submit the Wilbur, Cremers, and DeForest Declarations
25 solely to establish their standing to bring this action, *see* SUF ¶¶ 1-20, the general rule prohibiting
26 consideration of extra-record evidence in challenges to administrative agency decision-making
does not apply. *See* California Administrative Mandamus § 4.2 (4th ed. Cal. CEB) (observing that
the “standing” exception to the prohibition on extra-record evidence is “well established”).

27 ³ As one of the Department’s peer reviewers put it, “[p]eople that have experience living with
28 wolves and have lost livestock, horses, dogs, etc. have a good understanding of wolves and what
they can do; [t]hese attitudes aren’t derived from fairy tales.” AR0012823 (Johnson Peer Review).

1 animal is a member now extends to that area. AR0011854. The Cattlemen’s and Farm Bureau’s
2 pleas to the Commission not to list the wolf went unheeded; this lawsuit ensued.

3 **Standard of Review**

4 The Commission’s determination that a species’ listing is warranted is subject to
5 administrative mandamus review. *See* Fish & Game Code § 2076. Pursuant to that review, the
6 Commission’s decision must be set aside if, among other things, the Commission has acted outside
7 of its jurisdiction or has prejudicially abused its discretion. Code Civ. Proc. § 1094.5(b). An abuse
8 of discretion occurs when an agency has not proceeded according to law, its decision is not
9 supported by the findings, or its findings are not supported by the evidence. *Id.*

10 The Commission’s adoption of a regulation implementing its determination that a species’
11 listing is warranted is a quasi-legislative act subject to traditional mandamus review, Code Civ.
12 Proc. § 1085, as well as review under the California Administrative Procedure Act, Gov’t Code
13 § 11350(a). The Commission’s rule-making must therefore be set aside if, among other things, it is
14 arbitrary or capricious, or if the Commission failed to consider the relevant factors and to draw a
15 rational connection between them and its final decision. *See McGill v. Regents of Univ. of Cal.*, 44
16 Cal. App. 4th 1776, 1786 (1996). Similarly, the Commission’s regulation must be declared invalid
17 if, among other things, it is not necessary to effectuate the California Endangered Species Act’s
18 purpose.⁴ *See* Gov’t Code § 11350(b)(1).

19 In reviewing an agency’s interpretation of a statute it administers, a court must
20 “independently judge the text of the statute, taking into account and respecting the agency’s
21 interpretation of its meaning.” *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 7
22 (1998). That meaning, depending on the context, can be “helpful, enlightening, even convincing,”
23 *id.* at 8, but an interpretation that amounts to an agency’s legal opinion “commands a

24
25 ⁴ The Cattlemen and Farm Bureau’s motion for summary adjudication pertains solely to the cause
26 of action for declaratory relief under the Administrative Procedure Act, Gov’t Code § 11350(a).
27 The Cattlemen and Farm Bureau acknowledge that, typically, such a cause of action is resolved
28 based on the agency rule-making file. Here, however, the Cattlemen and Farm Bureau appropriately
adduce evidence outside of the rule-making file because it is “relevant to whether a regulation used
by an agency is required to be adopted under [the Administrative Procedure Act].” *Id.*
§ 11350(d)(4). This extra-record evidence going to the merits of the action therefore necessitates
the use of the summary adjudication procedure.

1 commensurably lesser degree of judicial deference,” *id.* at 11. *See Cent. Coast Forest Ass’n v. Fish*
2 *& Game Comm’n*, 18 Cal. App. 5th 1191, 1229 (2018) (“[A]n interpretation of a statute and its
3 application to the undisputed facts . . . is a question of law . . . review[ed] de novo.”).

4 **Argument**

5 **I.**

6 **The Gray Wolf’s Listing Is Illegal Because It** 7 **Is Based on the Presence of a Non-Native Subspecies of Wolf**

8 The California Endangered Species Act authorizes the listing and protection of any
9 “endangered species,”⁵ *see* Fish & Game Code §§ 2062, 2080, which is defined, in relevant part,
10 as “a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in
11 serious danger of becoming extinct throughout all, or a significant portion, of its range,” *id.* § 2062.
12 *See Cent. Coast Forest Ass’n*, 18 Cal. App. 5th at 1230 (“[T]he term ‘native’ means native to
13 California.”). The Commission’s listing of the gray wolf as an “endangered species” is based on
14 the intermittent presence in the state of a single wolf—namely, OR-7—and the Commission’s
15 speculation that other wolves from Oregon have traveled or will travel to California.⁶ AR0010236-
16 38 (Comm’n findings); SUF ¶ 21. OR-7, as well as the wolf population in Oregon, are derived from
17 the Northwestern wolf subspecies of the gray wolf species. AR0005741 (Dep’t status review),
18 AR0008350 (Siskiyou County comment letter), AR0012708 (Baldwin Peer Review); SUF ¶ 22.
19 The Northwestern wolf is not a subspecies of gray wolf native to California. *See* AR0012708
20 (Baldwin Peer Review); SUF ¶ 23. Hence, the Commission’s listing of the gray wolf is illegally
21 based on the presence of a non-native subspecies of gray wolf.

22 It is no answer to the foregoing that some subspecies of gray wolf may have been native to
23 California. *Cf.* AR0005740-41 (Dep’t status review). The California Endangered Species Act’s
24 limitation to native flora and fauna would be frustrated if the same animals that would be ineligible
25 for protection as members of a non-native subspecies nevertheless could be fully protected using

26 ⁵ The Act does the same for any “threatened species.” *See* Fish & Game Code §§ 2067, 2080.

27 ⁶ At the Commission’s June, 2014, hearing, the Department testified that it is “still speculation at
28 this point” whether OR-7 had been accompanied into California by a she-wolf, and whether the
pair had reproduced or would successfully reproduce. AR0012464-65.

1 the artifice of a native species designation. *Cf. People v. Alvarado*, 87 Cal. App. 4th 178, 187 (2001)
2 (“[A court] must avoid statutory interpretations that would frustrate the purpose of a statute . . .”).
3 Moreover, allowing the listing of an otherwise non-listable, non-native subspecies, simply because
4 it is part of a native species, would undermine the right of affected parties to petition for a “carve-
5 out” to an existing listing, on the basis that the carved-out population does not itself qualify for
6 listing. *See Cent. Coast Forest Ass’n*, 18 Cal. App. 5th at 1239 (agreeing with the proposition that
7 “a population may be ‘carved out’ and delisted only if it can be defined as a separate species,
8 subspecies, or [evolutionarily significant unit], and if the determination can be made that said
9 species, subspecies, or [evolutionarily significant unit] is not endangered”).

10 The interpretive legerdemain upon which the wolf’s listing depends also could have severe
11 biological consequences. The non-native timber wolf is substantially larger and more voracious
12 than the subspecies of wolves that may have been present historically in California. *See, e.g.*,
13 AR0012708 (Baldwin Peer Review) (observing that the timber wolf is larger than any native
14 subspecies, and expressing concern that “a historically larger subspecies present in the state would
15 put added pressure on this prey base to support these wolves”); AR0012043 (testimony of John
16 Rice, Humboldt County rancher) (“The wolf that is introduced from Canada is a major predator
17 [that] can take down an elk by itself”); AR0012204 (testimony of Brandon Criss, Siskiyou
18 County supervisor) (“[T]his proposed action will result in [the] introduction of a non-native apex
19 predator into California [which] will upend both the natural and human balance in the north state.”);
20 AR0012241 (testimony of Kevin Ward) (“The gray wolf spreading into California is not the same
21 wolf that was here historically. . . . It is 30 percent bigger than even the subspecies that was
22 originally found in Yellowstone. . . . [¶] Because of our much warmer climate, the few wolves that
23 we may or may not have ever had here in California would have been much smaller than those
24 originally living in Yellowstone. These huge Canadian wolves are much different than those that
25 would have originally lived here.”). The timber wolf’s establishment in California—which the
26 Commission’s listing facilitates—threatens to upset, rather than to restore, the state’s ecological
27 balance. *See* AR0012708 (Baldwin Peer Review). Thus, the Commission’s interpretation of the
28 Act’s “native” limitation to justify the wolf’s listing based on OR-7 and his kin is inconsistent with

1 the Act’s purpose. *See* Fish & Game Code § 2052 (“[I]t is the policy of the state to conserve, protect,
2 restore, and enhance any endangered species or any threatened species and its habitat . . .”). *See*
3 *also Cent. Coast Forest Ass’n*, 18 Cal. App. 5th at 1230 (a population is “not native” if it “ha[s]
4 been transplanted from outside California”).

5 Moreover, the flawed interpretation of the Act that the wolf’s listing embodies fails to give
6 full effect to the limitations the Legislature inserted into the Act in light of its dissatisfaction with
7 the predecessor Endangered Species Act of 1970, which had no “native” limitation, *see* Cal. Stats.
8 1970, ch. 1510, § 3, at 2998. Similarly, such a reading gives no regard to the differences between
9 the California Endangered Species Act and the federal Endangered Species Act. The latter, passed
10 in 1973, also contains no “native” limitation. *See* 16 U.S.C. § 1532(6), (20). Because the Legislature
11 modeled the California Act after the federal Act, when the two Acts diverge, the divergence is
12 purposeful; interpretations of the California Act should maintain that divergence. *See San*
13 *Bernardino Valley Audubon Soc’y v. City of Moreno Valley*, 44 Cal. App. 4th 593, 604 (1996). An
14 interpretation of the Act’s “native” limitation that would support the wolf’s listing fails to do so.

15 In summary: Because the listing is based on the presence of a non-native subspecies of wolf,
16 the listing exceeds the Commission’s jurisdiction. *Cf.* Code Civ. Proc. § 1094.5(b). For the same
17 reason, the decision is arbitrary and capricious, *cf. id.* § 1085; *McGill*, 44 Cal. App. 4th at 1786,
18 and therefore necessarily fails to reasonably effectuate the California Endangered Species Act’s
19 purposes, *cf.* Gov’t Code § 11350(b)(1).

20 II.

21 **The Gray Wolf’s Listing Is Illegal Because It Is Based** 22 **on the Commission’s Incorrect Interpretation of the Statutory Term “Range”**

23 The Act directs that the determination of whether a population merits listing as endangered
24 must be based on its status “throughout all, or a significant portion, of its range.” Fish & Game
25 Code § 2062. If a statute’s meaning is plain, that interpretation controls. *County of L.A. v. Fin.*
26 *Casualty & Surety, Inc.*, 216 Cal. App. 4th 1192, 1196 (2013). The plain meaning of “range” is a
27 population’s natural, geographic range. *See Webster’s 3d New Int’l Dictionary 1880* (1993)
28 (“range: . . . [3c] the region throughout which a kind of organism or ecological community naturally

1 lives or occurs”). *Cf. Hammond v. Agran*, 76 Cal. App. 4th 1181, 1189 (1999) (“[I]n the absence
2 of specifically defined meaning, a court looks to the plain meaning of a word as understood by the
3 ordinary person, which would typically be a dictionary definition.”). Thus, the Act requires the
4 Commission to make listing determinations based on a population’s status throughout its current
5 range, not just the California portion of that range. The Commission’s decision to list the gray wolf
6 was based, however, on its interpretation of the Act as requiring an analysis only of the California
7 segment of the gray wolf’s range. AR0010074 (Comm’n findings); SUF ¶ 24.

8 Although the Commission’s interpretation of the Act may be entitled to judicial deference
9 in some circumstances, such deference is never appropriate if the interpretation amounts to an
10 “underground regulation,” *i.e.*, a regulation that has not been adopted pursuant to the California
11 Administrative Procedure Act. *See* Gov’t Code § 11340.5(a); *Tidewater Marine Western, Inc. v.*
12 *Bradshaw*, 14 Cal. 4th 557, 576-77 (1996). Such is the Commission’s practice of interpreting
13 “range” to mean “California range.”

14 The agency’s “range” policy constitutes a “regulation” within the meaning of the Act for
15 two reasons. First, the Commission routinely applies that policy⁷ in many different cases, *see* Resp.
16 Br., *Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n*, 2007 WL 2321651, at 36 (Cal. Ct. App.
17 June 13, 2007) (“Respondents have adopted this interpretation ever since [the California
18 Endangered Species Act] was enacted in 1984”); Pet’rs & Pls’ RJN, Tauber Decl., Exh. E at 5,
19 Exh. O at 6, Exh. P at 5, Exh. S at 6, Exh. T at 6, Exh. U at 6 (Commission findings on listing
20 decisions since 2007 which reflect a consistent interpretation of “range” as “California range”);
21 SUF ¶ 25. Second, the policy makes specific the law—namely, the meaning of “range” within the
22 California Endangered Species Act—that the Commission administers. *See* Gov’t Code
23 § 11342.600; *Tidewater Marine*, 14 Cal. 4th at 571. Thus, because the Commission’s interpretation

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27 ⁷ That the Commission may not have reduced to writing its policy of interpreting “range” to mean
28 “California range” does not make the regulation any less “underground.” *See Cal. Advocates for
Nursing Home Reform v. Bonta*, 106 Cal. App. 4th 498, 528, 532 (2003) (allowing an underground
regulation challenge to “written and unwritten policies and practices” to proceed to trial).

1 of range qualifies as a regulation, but has never been subjected to rule-making, it is entitled to no
2 deference from this Court.⁸

3 For related reasons, the Third District’s decision in *California Forestry Association v.*
4 *California Fish & Game Commission*, 156 Cal. App. 4th 1535 (2007), upholding the Commission’s
5 interpretation is distinguishable.⁹ In that case, the court of appeal ruled that the California
6 Endangered Species Act’s use of “range” is ambiguous. *See id.* at 1549. The Court went on to hold
7 that the Commission’s interpretation of “range” was reasonable, and therefore merited deference.
8 *See id.* at 1550-52. But the Court did not address whether the Commission’s interpretation
9 constitutes an underground regulation, and thus did not decide whether, without deference, the
10 Commission’s interpretation would prevail. *Cf. People v. Knoller*, 41 Cal. 4th 139, 155 (2007) (“An
11 opinion is not authority for propositions not considered.”) (quoting *Kinsman v. Unocal Corp.*, 37
12 Cal. 4th 659, 680 (2005)). The decision is therefore inapposite.

13 Even if the Act’s use of “range” were ambiguous, interpreting that word to mean a species’
14 current and full geographic range would be the most reasonable interpretation, and therefore
15 controlling. *See Watts v. Oak Shores Cmty. Ass’n*, 235 Cal. App. 4th 466, 476 (2015) (“The ‘golden
16 rule’ for statutory interpretation is that where several alternative interpretations exist, the one that
17 appears the most reasonable prevails.”). To begin with, the Commission’s contrary interpretation
18 frustrates the Act’s purpose. *Cf. Alvarado*, 87 Cal. App. 4th at 187 (interpretation should not
19 frustrate statute’s purpose). The Act’s ultimate concern is to prevent extinction. *See Cal. Forestry*
20 *Ass’n*, 156 Cal. App. 4th at 1545-46 (citing Fish & Game Code § 2051(a)-(b)). But adopting the
21 Commission’s interpretation of range may perversely facilitate rather than avoid extinction. For
22 example, if a species is endangered outside of California, then protection of the species in California
23

24 ⁸ None of the Act’s exemptions applies to the Commission’s “range” policy. *Cf. Gov’t Code*
25 *§ 11340.9(a)-(i)*. The only even arguably relevant exemption is that for a regulation “that embodies
26 the only legally tenable interpretation of a provision of law,” *id.* § 11340.9(f), which applies to a
27 rule that merely restates, or is patently compelled by, existing law, *Ctr. for Biological Diversity v.*
Dep’t of Fish & Wildlife, 234 Cal. App. 4th 214, 263 (2015). But as demonstrated in the text, the
Commission’s interpretation of “range” to mean “California range” is hardly a plausible reading of
the statutory language, much less one that is patently compelled by it.

28 ⁹ If the Court determines that *California Forestry Association* cannot be distinguished, the
Cattlemen and Farm Bureau preserve for appeal whether that decision is correctly decided.

1 may be required to sustain the population, even though, within the state’s borders, the species is
2 doing well. But the Commission’s interpretation precludes it from looking beyond a species’
3 California range. Thus, in this example, the Commission’s interpretation would contribute to the
4 species’ demise: the Act’s protections would be inapplicable within California notwithstanding the
5 species’ endangerment outside of California and the corresponding need for those anticipatory
6 protections within the state, again because the extra-California portion of the species’ range would
7 be legally irrelevant.

8 Moreover, the Commission’s interpretation is inconsistent with federal case law interpreting
9 the same language in the federal Endangered Species Act. *Cf. San Bernardino Valley Audubon*
10 *Soc’y*, 44 Cal. App. 4th at 604 (observing that the state Act follows the federal act in many respects);
11 *Cent. Coast Forest Ass’n*, 18 Cal. App. 5th at 1239 (relying on federal practice to interpret “range”
12 as used in the state Act). In *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001), the
13 Ninth Circuit held that the Interior Secretary had improperly limited her endangerment analysis of
14 the flat-tailed horned lizard to the publicly owned portions of the reptile’s range. *See id.* at 1141.
15 Part of the reason for why that blinkered analysis was improper was the court’s related
16 determination, “consistent[] with the Secretary’s historical practice,” that the relevant segments of
17 a species’ range “need not coincide with national or state political boundaries.” *Id.* at 1145.
18 Similarly here, that a species may not be doing well within California may be informative, but
19 surely is not always dispositive, to its status “throughout all, or a significant portion, of its range.”
20 Fish & Game Code §§ 2062, 2067.

21 Finally, the Commission’s interpretation would be inconsistent with the California
22 Endangered Species Act’s statutory history. *Cf. In re Marriage of Davis*, 61 Cal. 4th 846, 865
23 (2015) (interpreting statutory language consistent with, among other things, “the statutory history
24 of the provision”). The original 1970 Act, unlike its 1984 replacement, did not depend on “range”
25 in any respect. *See* Cal. Stats. 1970, ch. 1510, § 3, at 2998. It is therefore a strained inference to
26 draw from this history—as the Commission purports to—that the Legislature in 1984 intended by
27 “range” for the Commission to analyze only a population’s “California range,” when there had been

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1 no prior requirement to examine “range” at all. The more reasonable conclusion to be drawn is that
2 the Legislature meant precisely what it said.

3 In summary: Because the Commission failed to analyze the status of the gray wolf
4 throughout all of its natural range, the Commission failed to proceed in the manner required by law,
5 thereby prejudicially abusing its discretion. *Cf.* Code Civ. Proc. § 1094.5(b). For the same reasons,
6 the Commission’s decision is arbitrary and capricious, because the agency failed to consider a
7 relevant factor—namely, the wolf’s status throughout its natural range. *Cf. id.* § 1085; *McGill*, 44
8 Cal. App. 4th at 1786. Finally, the Commission’s interpretation of “range,” because it is incorrect
9 and because it may perversely thwart state conservation policy, fails to reasonably effectuate the
10 California Endangered Species Act’s purposes. *Cf.* Gov’t Code § 11350(b)(1).

11 III.

12 **The Gray Wolf’s Listing Is Illegal Because It Is** 13 **Based on the Intermittent Presence of a Single Animal**

14 The Commission’s listing of the gray wolf is based on the intermittent presence of a single
15 wolf and speculation about the intermittent presence of other wolves. *See* AR0010236-38 (Comm’n
16 Initial Statement of Reasons); SUF ¶ 26. The agency’s focus on the wanderings of individual
17 wolves implicitly acknowledges that a species must have an active range within the state to be
18 listed.¹⁰ But a species cannot have an active, *i.e.*, occupied, range in the state unless members of
19 the species use that range with sufficient regularity that they are likely to be present during any
20 reasonable span of time. *See Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1165 (9th Cir.
21 2010) (holding that, under the federal Endangered Species Act, an area is not occupied by the
22 species unless the species “uses [the area] with sufficient regularity that it is likely to be present
23 during any reasonable span of time”); U.S. Fish & Wildlife Serv. & Nat’l Marine Fisheries Serv.,
24 *Implementing Changes to the Regulations for Designating Critical Habitat*, 81 Fed. Reg. 7414,
25 7421 (Feb. 11, 2016) (observing that the areas “occupied by the species” which make up its range

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27 ¹⁰ It is implied as well by the Commission’s *deletion* of a proposed finding that asserted, based on
28 practice under the 1970 California Endangered Species Act, that the Commission can list a species
even if none of its members is currently present within the state. *Compare* AR0008329 with
AR0010074.

1 do not include areas occupied “solely by vagrant individuals”). *Cf. Cent. Coast Forest Ass’n*, 18
2 Cal. App. 5th at 1239 (the California Act’s use of “range” means current not historical range).

3 In fact, the Department itself repeatedly explained that, without a resident breeding
4 population, the wolf is functionally absent from the state and therefore ineligible to be listed. *See*
5 AR0005728 (Dep’t Dir. Bonham mem. to Comm’n) (“[I]t may be argued that listing is legally
6 inappropriate because the gray wolf remains functionally ‘extinct’ in California in the absence of a
7 resident breeding population.”); AR0005748 (Dep’t status review) (“The Department believes,
8 based on best available scientific information, that a distribution and range occurs at a breeding
9 population or species level . . . and should be based on successful reproduction and recruitment of
10 the species, rather than the home range or dispersal travels of individual animals.”); AR0012091-
11 92 (testimony of Dep’t wolf expert) (“The range of the species is typically referred to as area
12 inhabited by a population of a species. . . . [¶] And we believe that it actually would be premature
13 to say that the travels of OR7 constitute[] range. We think it’s more appropriate for a population
14 that has actually been successful and established a range rather than at this point a lone
15 individual.”); AR0012613 (June, 2014, Department PowerPoint slide) (“There is no scientific basis
16 for range and distribution in CA at this time.”). *Cf. Cent. Coast Forest Ass’n*, 18 Cal. App. 5th at
17 1206 (“The Commission . . . must accord substantial deference to the conclusions of the department
18 staff . . .”).¹¹

19 Further, even if “range” could be established by the mere presence of a single wolf, the
20 Commission erred by conflating range with dispersal. *See* AR0011854 (Cal. Cattlemen’s Ass’n
21 comment). That is, a wolf may disperse to various areas to seek out a new range, but the ultimate
22 “range” of the animal may end up being quite different from the areas to which it initially dispersed.
23 *See* AR0005746 (Dep’t status review) (“[M]ost [wolves] eventually disperse [¶] [U]nable to
24 establish a territory locally, the animal is predisposed to travel in a certain direction for some

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26 ¹¹ *Central Coast Forest Association* also holds that the Act “contains no . . . express requirement”
27 that a species or subspecies “be self-sustaining, and if so for what period of time,” before it can be
28 “deemed to be a native species capable of being listed.” *Cent. Coast Forest Ass’n*, 18 Cal. App. 5th
at 1226-27. The decision does not, however, address the extent to which a population’s ability to
sustain itself is relevant to the delineation of the population’s range (as opposed to its “native”
status), which is the issue relevant to this action.

1 particular distance or time *before looking to settle . . .*”) (emphasis added). Indeed, OR-7 himself
2 eventually established a range in Oregon, not California. *See* AR0012205 (testimony of Patrick
3 Griffin, Siskiyou County agricultural commissioner) (“During OR7’s dispersal behavior he was
4 present in California However, since he found his mate, he’s been confined to a much smaller
5 area, a much smaller range, in Oregon.”); SUF ¶ 27. Thus, the Commission had no evidentiary
6 basis to conclude, as the statute requires, that the gray wolf had established a range within the state.
7 The wolf’s listing therefore exceeds the Commission’s jurisdiction, or is otherwise arbitrary and
8 capricious, and fails to serve the California Endangered Species Act’s purposes, and should be set
9 aside. *Cf.* Code Civ. Proc. §§ 1085, 1094.5(b); *McGill*, 44 Cal. App. 4th at 1786; Gov’t Code
10 § 11350(b)(1).

11 **Conclusion**

12 The Commission’s decision to list the gray wolf is based on the intermittent presence in
13 California of one individual of a non-native subspecies of wolf. Whether one agrees with
14 Commissioner Kellogg’s judgment that the listing “is the dumbest thing that’s been done by this
15 Commission,” AR0012293-94 (statement of Comm’r Kellogg), the Commission’s decision
16 exceeds the agency’s authority under the California Endangered Species Act. And by facilitating
17 the establishment of non-native fauna, the decision directly undercuts the Act’s purpose, thereby
18 violating the Administrative Procedure Act as well. The listing should be set aside.

19 DATED: August 6, 2018.

Respectfully submitted,

20 DAMIEN M. SCHIFF
21 ANTHONY L. FRANÇOIS

22
23 By  _____
24 DAMIEN M. SCHIFF

25 Attorneys for Petitioners and Plaintiffs
26
27
28

1 **Declaration of Service**

2 I, Tawnda Elling, declare as follows:

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

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

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

6 On August 6, 2018, true copies of MEMORANDUM OF POINTS AND AUTHORITIES
7 IN SUPPORT OF PETITIONERS' MOTION FOR JUDGMENT ON THE PEREMPTORY WRIT
8 (CCP §§ 1085, 1094, 1094.5) were placed in envelopes addressed to:

9 Michael P. Cayaban
10 Supervising Deputy Attorney General
11 Joshua M. Caplan
12 Deputy Attorney General
13 Department of Justice
14 600 West Broadway, Suite 1800
15 San Diego, CA 92101

E-mail: Josh.Caplan@doj.ca.gov

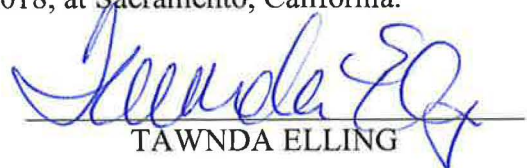
14 Gregory C. Loarie
15 Heather M. Lewis
16 Earthjustice
17 50 California Street, Suite 500
18 San Francisco, CA 94111

E-mail: gloarie@earthjustice.org

E-mail: hlewis@earthjustice.org

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

19 I declare under penalty of perjury that the foregoing is true and correct and that this
20 declaration was executed this 6th day of August, 2018, at Sacramento, California.

21 
22 TAWNDA ELLING