

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY,
ENVIRONMENTAL PROTECTION
INFORMATION CENTER, KLAMATH-
SISKIYOU WILDLANDS CENTER, and
SIERRA FOREST LEGACY,

No. C 16-06040 WHA

Plaintiffs,

v.

U.S. FISH & WILDLIFE SERVICE; RYAN
K. ZINKE, in his capacity as Secretary of the
Interior; and GREG SHEEHAN, in his
capacity as Principal Deputy Director of the
U.S. Fish & Wildlife Service,

Defendants.

**ORDER GRANTING IN PART
MOTION TO ALTER OR
AMEND JUDGMENT AND
VACATING HEARING**

INTRODUCTION

In this action for declaratory and injunctive relief under the Endangered Species Act, the Service seeks to modify the court-ordered deadline for preparing a new rule. For the reasons stated below, the motion is **GRANTED IN PART**.

STATEMENT

This case concerns the Pacific fisher — a medium-sized brown mammal in the weasel family found in Washington, Oregon, and California. A prior order on the parties' cross-motions for summary judgment set forth the detailed background of this case (*see* Dkt. No. 80).

1 In October 2014, the Service proposed to list the Pacific fisher as “threatened” after a
2 fourteen year long effort by various organizations to list the population as such. In the proposed
3 rule, the Service concluded that the main threats or stressors to the Pacific fisher were “habitat
4 loss from wildfire and vegetation management; toxicants (including anticoagulant rodenticides);
5 and the cumulative and synergistic effects of these and other stressors acting on small
6 populations” (Dkt. No. 1 ¶ 2; AR 000677).

7 In April 2016, the Service reversed course and withdrew the proposed rule after
8 concluding that, in light of public comments and new information, the Pacific fisher population
9 was stable such that none of the identified stressors amounted to a “threat” under the Act.

10 In October 2016, plaintiffs Center for Biological Diversity, Environmental Protection
11 Information Center, Klamath-Siskiyou Wildlands Center, and Sierra Forest Legacy filed the
12 instant action, seeking judicial review of the Service’s final rule withdrawing the Pacific
13 fisher’s proposed listing.

14 An order dated September 21 on the parties’ cross-motions for summary judgment held
15 that the Service had arbitrarily and capriciously withdrawn the proposed listing under the
16 Administrative Procedure Act (Dkt. No. 80). That order found that the Service failed to make a
17 rational connection between studies suggesting the adverse impact of toxicant exposure (one of
18 the previously identified threats in the proposed rule) on the Pacific fisher population and the
19 Service’s conclusion that toxicant exposure did not ultimately pose a threat. It further found
20 that the Service’s use of the then-available population trend studies failed to support such a
21 conclusion. Although that order did not (and did not need to) reach plaintiffs’ arguments as to
22 the other identified stressors, it advised the Service to “consider and address those further points
23 made by plaintiffs as well” (*id.* at 7–16).

24 Accordingly, the order vacated the Service’s withdrawal, remanded the action, denied
25 the Service’s request for supplemental briefing on the question of remedy in the event of
26 remand, and gave the Service six months (a March 22, 2019 deadline) to prepare a new rule in
27 light of the order (*id.* at 17).
28

1 The Service now seeks to amend the judgment under Rule 59(e) to modify the remedy.
 2 It argues that, following the summary judgment order, the Service reviewed its available
 3 staffing, budget, and competing project priorities (which include other court-ordered deadlines)
 4 and accordingly determined the March 2019 deadline infeasible. The Service now seeks to
 5 modify the deadline for a new rule to July 21, 2020 (Dkt. No. 86 at 1).¹ Plaintiffs oppose,
 6 arguing that the six-month deadline is reasonable (Dkt. No. 87).

7 This order follows full briefing. Pursuant to Civil Local Rule 7-1(b), this order finds the
 8 Service's motion suitable for submission without oral argument and hereby **VACATES** the
 9 hearing scheduled for November 29.

10 ANALYSIS

11 1. LEGAL STANDARD.

12 Rule 59(e) allows a party to move to amend or alter a judgment within twenty-eight days
 13 of its entry. A Rule 59(e) motion is generally granted on four basic grounds: "(1) if such
 14 motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2)
 15 if such motion is necessary to present newly discovered or previously unavailable evidence; (3)
 16 if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by
 17 an intervening change in controlling law." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111
 18 (9th Cir. 2011) (citation omitted). Because the rule does not list the specific grounds for the
 19 motion, however, "the district court enjoys considerable discretion in granting or denying the
 20 motion." *Ibid.*

21 2. REMEDY IN LIGHT OF NEW INFORMATION.

22 The Service argues that at the time of summary judgment motion briefing, information
 23 required to fully address the issue of remedy was not available. Specifically, the Service
 24 explains that without an order on the scope of remand, it was difficult to gauge an appropriate
 25 timeline required to address the Court's findings on the Service's errors (Dkt. No. 86 at 2). An
 26 appropriate timeline is further affected by the Service's current staffing, workloads, budget, and
 27 competing agency priorities, including other court-ordered deadlines (*id.* at 2–3).

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¹ The Service has not indicated that it plans to appeal the summary judgment order.

1 Now armed with newly available information gathered in light of the summary judgment
2 order, the Service explains that it “has prepared an aggressive, but reasonably achievable
3 schedule for addressing the errors identified in” the summary judgment order. This proposed
4 schedule, the Service asserts, accounts for requirements under the Act and new and current
5 information on the Service’s staffing levels, workload, budget, and competing priorities (Dkt.
6 No. 86 at 3–4).

7 The summary judgment order found that the Service failed to adequately consider
8 information on toxicant exposure and population trend studies in reversing the proposed listing
9 (Dkt. No. 80 at 7–8, 13–15). That order further suggested that the Service reexamine its
10 conclusions criticized by plaintiffs as to the other identified stressors that the order did not
11 reach, including wildfire and small population size (*id.* at 16). The Service therefore contends
12 that the order’s findings “reinforce the need for the Service’s remanded final determination to
13 be based on the best available scientific and commercial information” and that it “cannot simply
14 convert” the proposed rule into a new final listing termination (Dkt. No. 86-1 ¶¶ 4, 25).

15 For example, the Service explains that the wildfire issue has attracted “a great deal of
16 attention” — and unsurprisingly so, given the frequency and intensity of wildfires in the
17 northern California-southern Oregon area in recent years (*see id.* ¶ 4). The Service notes that
18 new information exists relating to the Pacific fishers’ immediate response to post-fire
19 landscapes in that area, as over one million acres of forest have experienced wildfires since the
20 fall of 2015, with over 700,000 acres of forest burned in 2018 alone (*ibid.*).

21 As such, the Service now intends to undertake a number of specified steps to gather and
22 analyze new information of this type “to ensure that the listing decision is made on the best
23 available data” — all of which combined result in the Service’s requested July 2020 deadline
24 (Dkt. No. 86 at 1, 4).

25 This order agrees that new information since the proposed rule, such as that on wildfires,
26 should be considered as part of the best available information. Accordingly, an extension
27 beyond the original deadline is warranted — though not the full extension the Service seeks.
28

1 The Service explains it intends to reopen the comment period on the 2014 proposed rule
 2 (and has already begun this process) to obtain public input on the issues identified in the
 3 summary judgment order and any new information since the time of the proposed rule. This
 4 process, according to the Service, will require five months — three months to draft the notice,
 5 obtain management approval, and publish the notice, and two months for public comment (Dkt.
 6 No. 86-1 ¶ 8). The Service then states that, after reviewing the best available information and
 7 the public comments thereto, drafting and reviewing the Final Register document reflecting the
 8 listing determination will take an additional two months to complete (*id.* ¶¶ 13–14). Next,
 9 required reviews of the Final Register document by the Service managers and Department of
 10 the Interior and the publication of the notice in the Final Register will take, according to the
 11 Service, a minimum of three months (*id.* ¶ 15).

12 The Service next explains that three possible scenarios may occur at the time of
 13 publication of the notice: if the Service (1) finds listing is not warranted, the Final Register
 14 document will be a withdrawal of the proposed rule (and will constitute the final
 15 determination); (2) finds listing is warranted and “such finding follows logically from” the
 16 proposed rule, the Final Register document will be a final listing rule; or (3) finds that listing is
 17 warranted, but “that determination does not follow logically from the proposed rule,” the Final
 18 Register document will constitute a revised proposed rule to list the Pacific fisher as endangered
 19 or threatened (*id.* ¶ 16).

20 Under the third scenario, the Service further explains that it would be required to
 21 provide a public comment period of thirty days (*id.* ¶ 17). At the end of the comment period,
 22 another six months would be required to publish a final determination (*id.* ¶ 18).

23 This order finds that, under these circumstances, deadlines consistent with Section
 24 1533(b)(6) is warranted in order to provide sufficient time, in light of competing priorities, to
 25 assess the best available information and to engage in meaningful public notice and comment.²

26
 27 ² The Service notes that the region responsible for this action currently has thirty-eight petition findings scheduled,
 28 as well as an additional eight 12-month findings, two final listing determinations, and one final critical habitat determination
 from new 90-day petition findings, new litigation-related work, and carryover work from prior fiscal years (Dkt. No. 86-1
 ¶ 20).

1 That is, the Service shall have one year from the date the withdrawal was vacated (until
2 September 21, 2019) to publish a notice of withdrawal, final listing, or revised proposed rule
3 (pursuant to Dkt. No. 86-1 ¶ 16). In the event the Service chooses to file a revised proposed
4 rule, then it shall have six months (until March 21, 2020) to publish a final determination.

5 The Service, however, has not sufficiently shown a compelling need for the requested
6 additional four months beyond the statutory mandate — especially given, as plaintiffs point out,
7 the already long, drawn-out listing history for the Pacific fisher. The Service states that it
8 wishes to perform a “species status assessment” — the agency’s new process (unavailable at the
9 time of the 2014 proposed rule) developed to help inform listing decisions by providing
10 “essential scientific underpinnings and analyses of the best available data about the species and
11 its status” — on remand (*id.* ¶ 9). It asserts that using the species status assessment “generally
12 leads to stronger assessments and improved and more transparent decisions” (*ibid.*).

13 The Service, however, offers no persuasive reason as to why the species status
14 assessment must be performed at this time or why a standard assessment would be inadequate.
15 Instead, the Service simply states that it “would like to have time to complete one” this time
16 (*ibid.*). This, by itself, is insufficient to justify the additional four months required by this
17 process alone — two months from the end of the public comment period to complete the draft
18 species status assessment, one month to complete peer review of the species status assessment,
19 and one month to incorporate said peer review input into the species status assessment (*id.* ¶¶
20 9–11). Without the four months apparently needed to complete the species status assessment,
21 the Service should be in a position to publish one of the three possible Federal Register
22 documents (withdrawal, final listing, or revised proposed rule) within one year.³

23 CONCLUSION

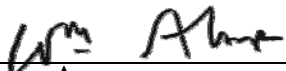
24 For the foregoing reasons, the Service’s motion is **GRANTED IN PART**. The Service shall
25 have until **SEPTEMBER 21, 2019** to publish a notice in the Federal Register (of withdrawal, final
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27 ³ This is not to say that the Service *cannot* perform a species status assessment. Rather, this order simply does not
28 grant extra time beyond the statutory deadlines for the sake of performing it.

1 listing, or revised proposed rule). In the event the Service chooses to publish a revised
2 proposed rule, then it shall have until **MARCH 21, 2020** to publish a final determination.

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4 **IT IS SO ORDERED.**

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6 Dated: November 20, 2018.

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8 WILLIAM ALSUP
9 UNITED STATES DISTRICT JUDGE
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