Appendix G

Summary of Court Rulings Related to 90-day Petition Findings

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Gila chub/Chiricahua leopard frog
CBD v. Babbitt
254 F.3d 833 (9th Cir. June 20, 2001)

Background and Summary:

The Plaintiff challenged the district court's conclusion that the Petition Management Guidance policy is consistent with the requirements of the ESA and the court's subsequent decision granting summary judgment in favor of the Secretary. At the heart of this case is the relationship between two methods prescribed in the statute for listing species for protection as endangered or threatened under the ESA. One method allows the Secretary to act on her own initiative to identify species for protection. The second allows interested citizens to compel the Secretary's consideration of a species by filing a petition. The end result in either case is the same: the Secretary must issue a final determination stating whether circumstances warrant listing a species as endangered or threatened. There are, however, important differences between the two methods that dictate how (and when) the Secretary reaches that conclusion.

In 1996, the Fish and Wildlife Service ("FWS") adopted a new policy governing its treatment of citizen-sponsored petitions. (The policy is described in the 1996 "Petition Management Guidance" manual and is hereafter referred to as the "PMG policy.") The policy provides that "[a] petition for an action on a species or critical habitat `identical' or `equivalent' to a petition still pending (or active) requires only a prompt (i.e., within 30 days) response informing the submitter of the prior petition and its status; Federal Register publication of this response is not required." (Emphasis in the original.) The PMG policy equates species identified as candidates for listing with those designated "warranted but precluded" under 16 U.S.C. §§ 1533(b)(3)(B)(iii). Candidate species are thus "consider[ed] . . . as under petition, " and a petition to list a candidate species is deemed "redundant." Consequently, the Secretary now treats petitions to list species already identified as candidates for protection as second petitions and does not -ever -fulfill the statutory obligations described above that ordinarily attach to initial petitions.

FWS argued that inclusion of species in the 1999 CNOR constituted 12-month findings on petitions. Court held that one-line entries in the CNOR did not comply with the technical requirements for 12-month findings because (1) they did not fulfill the requirement of section 4(b)(3)(B)(iii) that FWS publish "a description and evaluation of the reasons and data on which the finding is based"; (2) they did not provide an adequate basis for judicial review; and (3) FWS's policy (the Petition Management Guidance) "allowed" FWS to avoid the statutory deadlines for responding to petitions.

Keypoints:

In response to this litigation and the court's ruling, when we receive a petition for a candidate species, we have typically been including an entry in the CNOR, articulating the reasons it warrants listing and indicating that this entry in the CNOR constitutes a 90-day and 12-month finding. Thus, we are providing the information that meets 4(b)(3)(B)(iii).

Lost River and shortnose suckers (02-0305)
Walt Moden v. USFWS
281 F. Supp. 1193 (D. Ore., September 2, 2003)

Background and summary:

Plaintiffs challenged the Fish and Wildlife Service's (FWS) negative 90-day finding on a petition to de-list the Lost River and shortnose suckers. The court found that the Service's finding was arbitrary and capricious and that the petition had substantial information that a reasonable person could conclude that a delisting may be warranted.

Specifically the Court found "that the FWS acted arbitrarily and capriciously in concluding that the petition did not present substantial scientific or commercial information indicating that a status review may be necessary. I reach this conclusion for the following reasons: (1) the standard in reviewing a petition to delist does not require conclusive evidence that delisting is warranted; (2) under the statute and the regulations the petition contains substantial evidence that a reasonable person could conclude that delisting may be warranted; and (3) the FWS's conclusion that the population estimates are uninformative is unexplained and not supported by the administrative record." *Moden*, at 1203.

Regarding the standard of review for a petition the Court noted, "[w]hile certainly the FWS need not conduct a status review for every petition it receives, the standard for evaluating whether substantial information has been presented by an "interested person" is not overly-burdensome, does not require conclusive information, and uses the "reasonable person" to determine whether the substantial information has been presented to indicate that the action may be warranted." *Id.* at 1204. The Court granted deference to the FWS's conclusions regarding the petition; however, after a thorough review, the Court concluded that the FWS's conclusions were not adequately explained and did not appear to be supported by the administrative record. *Id.*

Key points:

While the Court felt that a reasonable person reviewing the petition could conclude that delisting may be warranted, the Court did not substitute its judgment for that of FWS'. Instead, the Court reviewed the record to consider whether FWS "adequately explained its decision, based its decision on the facts in the record, considered relevant factors, and articulated a rational basis for its conclusion." *Id.* In this instance, contradictions in the administrative record (between information in an earlier status review and the finding) led the Court to conclude that FWS did not adequately explain its conclusions.

Yellowstone cutthroat trout (04-0108)
Center for Biological Diversity, et al, v. Morgenweck, et al
351 F. Supp. 1137 (D. Colo., December 17, 2004)

Background and summary:

Plaintiffs challenged the 90-day finding regarding a petition to list the Yellowstone cutthroat trout (YCT) as at least threatened under the ESA. The Court sided with Plaintiffs and held that FWS "used an incorrect standard to determine the extent of danger" to the species; "improperly relied on voluntary promised State management action to deny protection" for the species; and the petition contained "substantial evidence indicating that listing the YCT as threatened may be warranted." *Morgenweck*, at 1140. The Court also held that FWS improperly solicited information from State and Federal agencies during the 90-day review of the petition.

In holding that the FWS applied an incorrect standard when evaluating the petition, the Court stated that "FWS applied an incorrect standard – whether there was conclusive evidence that the YCT faced a high probability of extinction – to its determination of whether listing is appropriate. FWS concluded that the YCT did not face a high probability of extinction. However, the ESA does not require such conclusive evidence that listing is warranted to go to the next step." *Id.* at 1141. The court found the reasoning in *Moden* (2 suckers) persuasive, and concluded: "Thus, it is clear that the ESA does not contemplate that a petition contain conclusive evidence of a high probability of species extinction to warrant further consideration of listing that species. Instead, it sets forth a lesser standard by which a petitioner must simply show that the substantial information in the petition demonstrates that listing of the species may be warranted." *Id.*

In addition, the court found that in the 90-day finding, FWS failed to give proper consideration to the petition. The Court found that FWS failed to consider specific issues raised in the petition regarding habitat loss and fragmentation, while the agency addressed point-by-point other issues raised. Though FWS argued that information presented in the petition was outdated, the Court concluded that "FWS's failure to consider all of the relevant information in the petition, including information it considered to be no longer current but not necessarily obsolete or misleading was inappropriate." *Id.* at 1142. The Court further noted that "[t]his is not to say that FWS must blindly accept statements in petitions that constitute unscientific data or conclusions, information FWS knows to be obsolete or unsupported conclusions of petitions. Of course FWS can rely on what is within its own expertise and records to reject petitions consistent with ESA standards." *Id.*

Lastly, the Court found that FWS improperly solicited information from State and Federal agencies regarding the validity of the petition. "FWS's consideration of outside information and opinions provided by state and federal agencies during the 90-day review was overinclusive of the type of information the ESA contemplates to be reviewed at this stage. Such targeted information gathering campaign, begun only after the petition had been filed, was improper." *Id.* at 1143. The Court further reasoned that "FWS certainly need not make a positive finding after its 90-day review of every petition. The ESA simply does not endorse such rubber stamping of petitions. However, those petitions that are meritorious on their face should not be subject to refutation by information and views provided by selected third parties solicited by FWS." *Id.*

Key points:

ESA and regulations do not require conclusive evidence that the petitioned action is warranted, but some lesser amount of information equal substantial information.

Invitations by FWS to others to respond to the petition should await the 12 month status review.

Colorado River cutthroat trout (00-2497)
Center for Biological Diversity, et al, v. Kempthorne, et al
448 F. Supp. 2d 170 (D. D.C., September 7, 2006)

Background and summary:

The plaintiffs claimed that the negative 90-day finding for the Colorado River cutthroat trout (CRCT) was invalid because the FWS selectively obtained information and opinions from three states and several Federal agencies and stated its reasoning was because the petition was over three years old. The Court reasoned that "[the regulations] do not authorize the FWS to weigh the information provided in the petition against information selectively solicited from third parties. The FWS simply cannot bypass the initial 90-day review and proceed to what is effectively a 12-month status review, but without the required notice and opportunity for public comment." *Kempthorne* at 5. Quoting *Morgenweck* (YCT), the Court reminded, "petitions that are meritorious on their face should not be subject to refutation by information and views provided by selected third-parties solicited by FWS." *Id.* at 5 (citing *Morgenweck* at 1143*).*

FWS argued that 50 CFR 424.13 of the regulations permit the FWS to consult with states and Federal agencies during the petition process. The Court stated that "even a cursory reading" of the regulation shows that it refers to the FWS's right to consult with affected states in the course of a status review [12-month finding] or subsequent listing determinations, not at the 90-day stage. *Id.* at 5. The Court cited other 90-day petition findings to demonstrate that FWS knows the correct standard. The court opined that interpreting the regulations to allow the FWS to solicit information from outside agencies at the 90-day finding stage would render meaningless the detailed notice and comment provisions of the ESA implementing regulations. *Id.* The Court further concluded both the statute-setting for the 90-day review requirements and its implementing regulation make plain that the 90-day review is to be based on the petition alone or in combination with the FWS's own records. *Id.* at 6.

Citing the cases enjoining the Petition Management Guidance (PMG), the court did not find the PMG binding or persuasive on the point of gathering information from outside sources. The court found that the FWS's reliance on the PMG is misplaced; it allowed the FWS to avoid the mandatory, nondiscretionary obligations. *Id.*

The Court also held that staleness of the information presented in the petition is not a valid reason for soliciting information at the 90-day stage. The court reasoned that while some of the data cited may have been stale, it does not necessarily follow that it was inadequate or incorrect. The court reminded FWS that its own failure to fulfill its statutory duty to issue a timely 90-day finding was not a basis to ignore other statutory requirements. *Id.*

FWS was ordered to complete a status review and 12-month finding. Since four years had passed from receipt of the petition and FWS had in effect already begun a status review at the 90-day stage without allowing the public to comment, the court believed a full status review (12-month finding) was the appropriate remedy.

Key point(s):

More strongly than several other decisions, this court held that soliciting information from outside entities after receipt of the petition and before a 90-day finding is not consistent with the ESA or its regulations. Staleness of the petition does not change the scope of the review required at the 90-day finding stage.

Wolverine 90-day finding Case Significance (05-0099)
Defenders of Wildlife, et al v. Kempthorne, et al
(D. Mont., September 29, 2006)

Background and summary:

Plaintiffs challenged the 90-day finding regarding a petition to list the Wolverine as threatened or endangered under the ESA. The Court sided with Plaintiffs and held that the 90-day finding was in error and stated that the plaintiffs provided substantial information to support further study [warrant a 12-month review].

After noting that FWS acknowledged that the species no longer inhabits a number of states, the Court disagreed with FWS' disparagement of the evidence presented in the petition. "Even absent conclusive information that depicts the wolverine's exact historic range there is still substantial information to show that the wolverine's range is a fraction of what it once was." *Id.* at 11-12. In particular, the Court disagreed with FWS's discounting of a published article because the author relied on anecdotal information. FWS had cited an "internal memo" (likely a draft of the 90-day finding policy) that required that anecdotal information be corroborated. "While the Court gives deference to Agency methods, findings, and expertise, the controlling law is set forth in Federal regulations and statutes, not in internal FWS memos." *Id* at 12. The Court also thought FWS had cited the memo selectively, ignoring the memo's recognition that information from experts can generally be considered reliable. *Id.* at 12-13. Following similar reasoning in *Moden* (2 suckers), the Court found that the "FWS selectively cite[d] from an internal memo to conclude that the historic range information is inadequate and not substantial.... . The petitioner does not have to present conclusive evidence; the petition need only present substantial scientific information that would lead a reasonable person to believe listing may be warranted." *Id.* at 13.

The Court also determined that the FWS applied the incorrect standard when considering a study related to human intrusion in wolverine habitat. "The Heinemeyer study would lead a reasonable person to believe that listing of the wolverine may be warranted. Contrary to the FWS's assertion, the Heinemeyer study does not have to draw explicit conclusions between human activity and wolverine habitat and denning patterns in order for the study to provide substantial information. The FWS does not have to blindly accept the results of scientific studies and that [sic] the Court should defer to the FWS's expertise, but the nature of the FWS criticism here revolves around application of an incorrect standard. A standard that requires conclusive evidence is inappropriate." *Id.* at 14-15 (footnote and citations omitted).

The Court also noted that the petition provided other information on threats to the species and concluded, "[t]hese facts raise questions that further substantiate Plaintiff's point: listing the wolverine may be warranted." *Id.* at 16.

Further, the Court found that "[p]laintiffs cited two scientific studies that present substantial information about habitat fragmentation and genetic isolation. The FWS counters by again selectively citing its internal memo in an effort to discredit these studies." *Id.* at 17. The Court again found that the FWS selectively applied the internal memo (which states that there should be countervailing information to cast doubt on a peer-reviewed study, *Id.* at 13). "[T]he FWS dismisses the studies as speculative, yet the FWS does not offer countervailing information that would allow it, in accordance with its policy memo, to find the information 'not substantial.' " *Id.* at 17.

The court ordered a 12-month finding to be completed. Defendants then argued that the proper remedy was to re-do the 90-day finding; however the court held on December 22, 2006, relying on *Biodiversity Legal Foundation v. Badgley*, 309 F. 3d 1166 (9th Cir. 2002), that "the mandated 12-month finding is necessary to effectuate the congressional intent behind the ESA." *Defenders v. Kempthorne*, 05-99, D. Mont., December 22, 2006.

Key points:

ESA and regulations do not require *conclusive* evidence that the petitioned action is warranted, but some lesser amount of information. The Court in this case did not point to any specific statements in the finding or the record to reach this conclusion, but inferred it from how FWS addressed the information presented in the petition. Though not explicit in the opinion, this decision seems to show that merely contradicting information in the petition is not enough to show that the petition does not present substantial information.

Siskiyou Mountains and Scott Bar salamanders ("2 salamanders")
90-day finding court case and its significance
Center for Biological Diversity v. Kempthorne
No. 06-04186 WHA, (N.D. Cal. Filed Jan. 19, 2007)

Background and summary
Plaintiffs challenged a negative 90-day finding on a petition to list the Siskiyou Mountains and Scott Bar salamanders. Specifically, the plaintiffs claimed that FWS used the wrong standard for evaluating the petition [that FWS set the bar too high], that the negative 90-day finding was arbitrary and capricious, that FWS failed to properly account for the future uncertainty of existing regulatory mechanisms, and that FWS failed to make specific "significant portion of the range" and Distinct Population Segments ("DPS") findings.

The Court granted Plaintiffs' motion, holding that the wrong standard was used in evaluating the petition [that a reasonable person would be led to believe that based on the information provided in a petition the proposed measure may be warranted], and held that the 90-day finding was arbitrary and capricious under the Administrative Procedures Act. An internal memo mentioned the "need [for] a strong likelihood that it may be warranted to meet standard." *Slip op.* at 6. The FWS indicated that this clarified the "may be warranted" standard but the court did not agree, reasoning that the author of the quoted memorandum applied the 'strong likelihood' standard to conclude that equivocal evidence, meaning a submission admitting more than one interpretation, was insufficient as a matter of law inasmuch as it would not rise to the level of a strong likelihood. *Id.* at 6. A reasonable person could find that an action 'may be warranted' even in the face of evidence cutting multiple ways. *Id.* at 6. The "may be warranted" standard seems to require that in cases of such contradictory evidence, the Service must defer to information that supports petition's position. *Id.* at 6. It would be wrong to discount the information submitted in a petition solely because other data might contradict it. At this stage, unless the Service has demonstrated the unreliability of information that supports the petition, that information cannot be dismissed out of hand. Here, FWS reached its ultimate conclusion because much of the evidence was not conclusive. This was arbitrary and capricious. *Id.* at 7.

FWS indicated in its finding that other information refuted the information that was in the petition. In the petition, the plaintiff raised the issue of logging which impacts the salamanders' habitat and provided documentation to support their petition. The Service found that the evidence was not conclusive. This was determined by the court to be arbitrary and capricious. *Id.* at 7. The Court stated "the FWS did not adequately explain how the petition's evidence fell short…. The fact that other studies [suggest] that salamanders could exist in clear-cut & young forests did not render [the petition] not substantial. *Id.* at 10. Where there is disagreement among reasonable scientists, the Service should make the 'may be warranted' finding… ." *Id.* at 10-11.

The court also briefly addressed the "significant portion of its range" issue. FWS had not conducted an analysis of the issue, arguing that it was not required, given the petition's lack of substantial information on the existence of any threat. The court, citing the flat-tailed horned lizard case, found that "there is at least some evidence that there are 'major geographical areas' where the salamander used to be, but no longer remains, viable," and that FWS needed to determine whether this information was substantial. *Id.* at 15.

The Court remanded for a new 90-day finding (allowing 63 days for the new finding), leaving open the possibility that a new negative 90-day finding may be properly issued. The primary issue was that the FWS's bar was too high in determining what was substantial information in the petition; however, the court ordered also that the new finding had to address the issue of regulatory mechanisms and make specific "significant portion of the range" and DPS findings.

Key points:

This decision seems to indicate that when evaluating the validity of the information presented in the petition, that mere contradictory evidence is not enough to render the information presented "not substantial." If it only contradicts, but does not refute or overturn, then a more detailed analysis is needed.

Mountain Quail (06-0073)
Western Watersheds Project v. Hall
(D. Idaho, September 24, 2007)

Background and summary

The Service concluded at the 90-day finding stage that the petition to list Mountain Quail did not provide substantial information in accordance with 50 CFR 424.14. Plaintiffs challenged the Service's finding. The three arguments made by the plaintiffs were: (1) FWS applied the higher standard of scientific proof; (2) FWS improperly required complete separation to find the populations discrete; and (3) FWS considered only whether the population was threatened throughout its range, and not over a significant portion of its range (SPR).

The court did not specifically address plaintiff's first claim that FWS applied the higher standard of review. After reviewing the DPS policy and the record, the Court, on plaintiffs' second argument, held that FWS did not improperly require absolute separation, and that FWS provided a rational basis for its conclusion that the population was not discrete under the DPS policy.

The court noted that FWS contacted an expert (a personal communication with a researcher who was cited in the petition) and although the court claimed this review to be improper, it held that it was a harmless error. The Court discussed the Yellowstone and Colorado River cutthroat trout cases and agreed with those decisions, but distinguished them. The Court found that it was improper for the FWS to make an outside solicitation or inquiry about the petition and consider the responses when making its 90-day finding. The statutory purpose at the 90-day finding stage is to render a threshold determination of whether the petition has offered substantial scientific or commercial information indicating that the requested action may be warranted. As such, the FWS [sic] personal communication with [the expert] was improper, particularly since the public was not given a chance to respond." *Slip. op.* at 10.

The Court distinguished this case from *Morgenweck* (YCT) and *Kempthorne et al* (CRCT) finding that the facts were distinct. In both of those cases FWS made *several* inquiries from multiple agencies in making its 90-day determination. In *Morgenweck* (YCT), the court described the FWS's efforts as "a targeted information campaign, begun only after the Petition had been filed," and concluded such action "was improper." However, in this case, the FWS made a *single* inquiry of a source that was cited in the petition and the response received was brief. The Service also cited to other authorities supporting its decision. *Slip op.* at 10. The court held that FWS's conclusion about discreteness was otherwise supported in the record. *Id.* at 10-11.

Finally, the court appeared to handle the SPR issue by noting that FWS didn't need to address it because the population was not discrete. Stating that having found the petition failed to show sufficient information or evidence of discreteness, the FWS was not required to determine the Mountain quail's significance within the species to which it belongs because without finding discreteness, the petition is denied. *Id.* at 12-13.

Key point(s):

The court found that although it felt the reasoning of both the *Morgenweck* (YCT) and *Kempthorne et al* (CRCT) cases were persuasive in that contacting a cited expert to ask questions pertaining to the petition was improper; however in this case, it was a harmless error because the conclusion drawn in the finding was otherwise supported by the record.

If contacting a researcher cited in a petition is improper, as this court indicates, it is unlikely that any information gathering other than contacting petitioners for clarification would be permissible.

Pygmy rabbit (06-00127-S-EJL)
Western Watersheds Project, et al, v. Norton, et al
(D. Idaho, September 26, 2007)

Background and summary:

Plaintiffs challenged the negative 90-day finding regarding their petition to list the pygmy rabbit. The Court found that the FWS imposed a higher standard than is required for a 90-day petition review. Specifically, the Court found that the FWS questioned the reliability of the petitioner's information regarding declining range and population without providing information to the contrary. The Court stated that, although the FWS argued that it determined that the information in the petition was not adequate to support the petitioner's contention (that the species range has declined from historical levels resulting in population declines), the language of the finding contradicted that assertion. *Slip op. at 8.* The Court found the strength of the language discussing the inadequacies of the information relating to declining range in the petition demonstrated that the denial was based on the failure to provide more accurate information rather than on the lack of substantial information. *Id. at 9.*

Further the Court pointed to the FWS's regulations (*see*, 50 CFR 424.12) and the positive 90-day finding to delist the Ute Ladies-Tresses orchid as cited in *Kempthorne* (CRCT) to show that the FWS recognized the appropriate standard. That finding stated that at the 90-day finding stage no additional research is conducted, that the petition is not subjected to rigorous critical review, and that the FWS accepts the petitioner's sources and characterizations of the information unless it has specific information to the contrary. *Id.* at 10, citing, *Kempthorne* (CRCT).

The Court also addressed Plaintiff's claim that the finding did not analyze "significant portion of the range." The FWS determined that the petition did not present substantial information regarding habitat loss and population decline, and, therefore, never reached the "significant portion of the range" issue. The Court noted that the finding was not in error for its failure to address significant portion of the range, however, because the Court found the FWS's finding arbitrary on other grounds. The Court directed that, if necessary based on the FWS's finding on remand, the FWS consider it as directed in *Defenders of Wildlife v. Norton*, 258 F. 3d 1136, 1145 (9th Cir. 2001) ("the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a 'significant portion of its range'"). *Slip op*. at 12.

Regarding the question of third-party solicitation the Court found that FWS improperly conducted outreach to the States and Tribes, stating that the finding is to be based on the information in the petition and whatever is in the FWS' files. *Id.* at 13-16. The Court found this case similar to *Kempthorne* (CRCT) and *Morgenweck* (YCT) in that the FWS made several inquiries soliciting information relating to the species. *Id.* at 14-16. However, the Court found that because the FWS did not cite to nor seemingly obtain any viable information, it did not rely on any of those sources, and therefore, there was no prejudice to the Plaintiffs. *Id.* at 16.

The Court remanded the finding to the FWS to issue a new 90-day finding within 90 days of the order.

Key points:

This decision seems to indicate that when evaluating the validity of the information presented in the petition that the absence of information in the petition is not enough to render the information presented "not substantial." When a petition presents credible information to support the petitioned action, the failure to provide more accurate evidence is not grounds for declining to conduct a more detailed analysis.