

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 01/28/2019

TIME: 02:12:00 PM

DEPT: C-67

JUDICIAL OFFICER PRESIDING: Eddie C Sturgeon

CLERK: Patricia Ashworth

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2017-00003866-CU-MC-CTL** CASE INIT.DATE: 01/31/2017

CASE TITLE: **California Cattlemens Association vs California Fish and Game Commission**

[IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

APPEARANCES

The Court, having taken the above-entitled matter under submission on 01/18/2019 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

FINAL RULING

Petitioners/plaintiffs California Cattlemen's Association and California Farm Bureau Federation's motion for judgment on the preemptory writs and request for declaratory relief is denied. The determination by defendant/respondent Fish & Game Commission ("Commission") finding the gray wolf a native species of California was not an abuse of discretion. Additionally, even if the case specific use of the "range" as "California" might be considered an underground regulation under the Administrative Procedure Act ("APA"), the interpretation has been supported by the case law since 2007. The listing decision based upon the presence of a wolf, which later became part of a breeding pair, by the Commission was not arbitrary or capricious. Petitioners' evidence does not support the Commission acted in excess of its jurisdiction by listing the gray wolf based upon an intermittent presence of one wolf.

The court has reviewed the administrative record ("AR") as well and the pleadings by the parties. The court has considered intervenor Biological Diversity, Environmental Protection Information Center, Klamath-Siskiyou Wildlands Center, and Cascadia Wildlands' opposition, as well as amicus curiae briefs by California Rifle and Pistol Association, Incorporated and California Wool Growers Association, and the Rocky Mountain Elk Foundation Inc. Although on occasion these referenced items outside the administrative record, their viewpoints were read to improve the court's understanding of the impact of these issues.

Petitioners' writ is denied to the first cause of action. The California Endangered Species Act ("CESA") defines an "endangered species" as "a native species or subspecies of a bird, mammal, fish, amphibian, reptile or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes." (Fish & G. Code § 2062, emphasis added.) Section 2062 authorizes the Commission to list at the level of a taxonomic species, and respondents have not cited

any law which requires it to list at the taxonomic subspecies level.

The Commission reasonably decided to list the gray wolf at the taxonomic species level in light of ongoing scientific debate regarding the appropriate classifications of the various gray wolf subspecies and their historic presence in California. The administrative record identified the gray wolf (*Canis lupus*) as a keystone species that once inhabited most of the United States, including much of California. (AR0011801.) "There are numerous historical records of wolves in California, dating back to the 1700s," leading the Department of Fish and Wildlife to conclude that "wolves were distributed widely in California, particularly in the Klamath-Cascade Mountains, North Coast Range, Modoc Plateau, Sierra Nevada, Sacramento Valley, and San Francisco Bay Area." (AR0012655-56; 0012695.) Almost a hundred years ago, all gray wolves had been extirpated from California (AR 10076.) There is no dispute that the individual wolf initially sighted in California (referred to as "OR-7") is a member of the taxonomic gray wolf species. Petitioners argue OR-7, was a subspecies of a gray wolf not native to California, which allegedly were either Great Plains or Mexican gray wolves, and not great northwestern wolf. Therefore, petitioners contend because a northwestern wolf is not native to California, no protection should be given. However, the commission is not limited to protecting only a subspecies, but may protect a native species.

The Commission's determination was based on scientific evidence and is entitled to deference. There was evidence in the record that the subspecies to which OR-7 belongs (*canis lupis occidentalis*) also has some genetic markers of a subspecies (*canis lupis nubilus*) that historically occupied California. The evidence supports the rather fluid classification of various subspecies of the gray wolf. (AR10337, 10104-10105; 10178, 10835-10836, 11888-11889, 12717-12718, 12848-12851.) The Commission considered OR-7 shared some genetic markers of a subspecies that formerly inhabited California, the Great Plains wolf. (AR 10105, 10835, 11888-11889.) Thus, there was substantial evidence for the Commission to reasonably conclude that OR-7 is a member of a subspecies that historically was native to California. The court must err on the side of protecting the species in interpreting CESA because the Legislature has expressly set forth its policy of conserving, protecting, and restoring any endangered species and its habitat. (§ 2052.) (*Central Coast Forest Assn. v. Fish & Game Com.* (2018) 18 Cal.App.5th 1191, 1227, *review denied* (Mar. 28, 2018).)

The Commission also could reasonably conclude based upon the evidence before it the gray wolf is in danger of becoming extinct in California. The Commission found the factors cited in CESA threaten the continued existence of gray wolf in the State of California, based upon a combination of the following factors: 1. overexploitation; 2. predation; 3. disease; or 4. other natural occurrences or human-related activities. (AR 10076, 12908.) Although petitioners object to the hearsay evidence of threats to kill wolves, the administrative record also shows the Commission considered other factors which threaten the gray wolves' existence, including accidental deaths by shooters believing they were shooting a coyote, traffic accidents, restricted habitat, susceptibility to several diseases, resulting in an extremely high rates of wolf pup mortality. (AR 10078-79; 12912-13.)

Petitioners compare the findings of the Department which did not recommend listing the gray wolf, with those of the Commission. The Department determined that the petitioned action was not warranted. (AR 5765.) "Department believes, based on best available scientific information, that a distribution and range occurs at a breeding population or species level . . . and should be based on successful reproduction and recruitment of the species, rather than the home range or dispersal travels of individual animals." (AR12091- 92.) However, the status of the Commission and Department, though related, does not defeat that the Commission has the sole ability to list an endangered species.

Furthermore, at the time the Department reached its recommendation in November 2014, the evidence was incomplete. At the time of the recommendation, OR-7 was the sole wolf in California: "The gray wolf is once again present in California, on at least an intermittent basis, and foreseeably *will continue to be present* in California, as discussed below. OR-7's range now includes California and Oregon. OR7 has established a range that includes portions of Northern California, as this wolf is known to have crossed back and forth across the Oregon-California border since 2011 and to have been present in California in each of those years. Status Review at 4." (AR 10076, emphasis added.)

The Commission received evidence after November 4, 2014, that OR-7 was traveling with a female mate and at least two gray wolf pups on the California-Oregon border, and that it was highly likely they had been traveling together within California. (AR01014; 10077; 10258; 10270; 10519; 10949; 10952; 11987; 12009; 12015; 12019; 12039; 12197; 12464.) Even the Department noted in its status review overview, "With the recent gray wolf expansion in the western United States, a lone radio-collared gray wolf known as OR7 dispersed from northeastern Oregon's wolf population to California in December 2011 and has been near the Oregon/California border since that time, crossing back-and-forth. The Department *believes it is likely that other dispersing wolves (marked or unmarked) from Oregon will travel to California*, and possible that gray wolves will eventually attempt to establish a breeding population in California in the foreseeable future. (AR 5739, emphasis added.) Wolf OR7, entered California from a northeastern Oregon wolf pack. The Oregon wolf population was established from wolves emigrating from Idaho. The Idaho wolves originated from translocated wolves (*Canis lupus occidentalis*) captured in the Rocky Mountains of British Columbia and Alberta (Montana Fish, Wildlife, and Parks 2013). Wolves in Central Washington packs have been found to carry an admixture of both *C. l. occidentalis* and *C. l. nubilis* genes (Martorello 2013). (AR 5741.)"

Thus, the Commission's decision could reasonably rely on Department's projections in order to determine protection was needed to be established to prevent extinction in California.

The court declines to take judicial notice as requested by petitioners. Notwithstanding petitioners list various findings with regard to other animals, there is no comparison evidence as to whether every listing by the Commission restricted "range" to California. At oral argument, petitioner's counsel asserted these were every case. Petitioners have not shown any evidence to support any written document or internal memorandum evidencing a policy adopted by the head of the Commission as to "range." Nonetheless, the court cannot ignore *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 575, where the court noted that "Government Code section 11340.5 makes clear that the rulemaking procedures of the APA apply to any "regulation," and the definition of regulation includes "every rule ... adopted ... to ... *interpret* ... the law ..." (i.e., interpretive regulations." The court in *Tidewater* did not stop its analysis even after finding the regulation void because there was a violation of the APA. It merely gave no weight to the agency's interpretation. (*Id* at 576.)

Unlike *Tidewater*, there was no written regulation, but petitioners' arguments have merit that the Commission limited its application of "range" to California. More importantly, the cases for which petitioners seek to take judicial notice occurred after *California Forestry Assn. v. California Fish & Game Commission* (2007) 156 Cal.App.4th 1535, 1540, where the Third District Court of Appeal made a judicial determination that the term "range" in the CESA refers to a species' California range only, thereby entitling a species to protection if it is threatened with extinction throughout all, or a significant portion, of its California range (as opposed to its worldwide range). The court recognized "California has been at the forefront of enacting legislation to protect endangered and rare animals-first doing so in 1970. In enacting the CESA, the Legislature made clear this state's policy to protect any endangered or

threatened "species or subspecies" if at risk of extinction "throughout all, or a significant portion, of its range" (§§ 2052, 2062, 2067). (*Id.* at 1540.) Petitioners argue that case is distinguishable because the court gave deference to the Commission and the Department's interpretation of "range".

Even without deference to the agency, the reasoning in *California Forestry* is persuasive given the remedial nature of CESA, and the importance to construe its provisions liberally. (*Id.* at 1545.) While the *California Forestry* court gives deference to the agency's interpretation, the court also "agreed with the Commission's and the Department's interpretation of the range provision as it was congruent with the CESA's purpose" for its interpretation based upon the goal of protecting species within the state. (*Id.* at 1549, emphasis added.) This court shall follow the holding in *California Forestry* to refer to a species' California range. (*Id.* at 1551.)

Based upon the administrative record, the court finds substantial evidence to support the Commission's findings. The Commission did not abuse its discretion nor did it act capriciously. Petitioners' motion is denied as to all causes of action.

Eddie C. Sturgeon

Judge Eddie C Sturgeon