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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

DEFENDERS OF WILDLIFE, et al.,

Plaintiffs,

v.

SALLY JEWELL, in her official capacity as Secretary of the Department of the Interior, et al.,

Defendants.

)
) No. 9:14-cv-00246-DLC
)
)

) (Consolidated for briefing with
) case No. 9:14-cv-247-DLC)
)

) **BRIEF IN SUPPORT OF
) FEDERAL DEFENDANTS'
) MOTION FOR SUMMARY
) JUDGMENT AND
) OPPOSITION TO PLAINTIFFS'
) MOTION FOR SUMMARY
) JUDGMENT**
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INTRODUCTION

On August 13, 2014, after a comprehensive review of the status of the distinct population segment of the North American Wolverine (*Gulo gulo luscus*) (“wolverine” or “the species”) and the potential threats facing the species, the U.S. Fish and Wildlife Service (“FWS”) withdrew the February 4, 2013 proposed rule to list wolverines as threatened, determining that wolverines are neither “endangered” nor “threatened” as those terms are defined in the Endangered Species Act (“Act”). *See* FR-00001 (“Withdrawal”).¹

As required by the Act, FWS analyzed the best available scientific and commercial information on potential threats to the wolverine and reasonably concluded that none of those threats, either individually or in combination, placed the wolverine in danger of extinction, or made it likely to become in danger of extinction in the foreseeable future. FWS based its Withdrawal on the totality of the information it determined to

¹ The Administrative Record at issue in this case is contained on five separate discs, each with a separate Bates stamp prefix: FR (final rule); PR (proposed rule); PI (public involvement); LIT (literature); and SUP (supplement). Citations herein will be to the identifying Bates stamp prefixes.

be the “best available science,” rather than merely considering isolated studies.

Plaintiffs brought this suit on October 13, 2014, challenging the Withdrawal. Doc. 1 (“Compl.”). They fail to carry their high burden of showing that the Withdrawal is arbitrary or capricious. For the reasons set forth below, the Court should enter summary judgment in favor of Federal Defendants.

BACKGROUND

I. Statutory and Regulatory Background

The purpose of the Act is to prevent the extinction of “endangered” or “threatened” species. *See* 16 U.S.C. § 1531. “The term ‘species’ includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). An endangered species is one that “is in danger of extinction throughout all or a significant portion of its range.” *Id.* at § 1532(6). A threatened species is one “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* at U.S.C. § 1532(20). FWS must examine five factors to determine if a species meets either of these

definitions: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.” 16 U.S.C. § 1533(a)(1).

The determination whether to list a species must be made “solely on the basis of the best scientific and commercial data available.” *Id.* § 1533(b)(1)(A). An agency’s determination of what constitutes the “best available science” is accorded significant deference by the court. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (“The determination of what constitutes the ‘best scientific data available’ belongs to the agency’s ‘special expertise When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.” (citing *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983))). This requirement “merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.” *Kern Cnty. Farm Bureau v.*

Allen, 450 F.3d 1072, 1080 (9th Cir. 2006) (quoting *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000)).

II. Factual and Procedural Background²

a. Wolverines.

The wolverine is the largest terrestrial member of the family Mustelidae, resembling a small bear with a bushy tail. *See* PR-00762. Adult males weigh 26 to 40 pounds, and adult females weigh 17 to 26 pounds. *See id.* Wolverines worldwide are considered a single species (*Gulo gulo*) with two subspecies: Old World wolverines found in the Nordic countries of Europe, Russia, and Siberia are part of the subspecies *Gulo gulo gulo*; and wolverines in North America, including those in the conterminous 48 states, are of the New World subspecies, *Gulo gulo luscus*. *See id.*

Historically, wolverines were found across the northern tier of the conterminous 48 states, with convincing evidence of wolverine populations in the northern and southern Rocky Mountains, Sierra Nevada Mountains, and North Cascades. *See* PR-00767. Currently,

² See concurrently filed Federal Defendants' Statement of Facts ("Facts") for additional background.

wolverines appear to be distributed as functioning populations in two regions in the conterminous 48 states: the North Cascades in Washington, and the northern Rocky Mountains in Idaho, Montana, and Wyoming (including the Wallowa Range in Oregon). *See id.*

In the first half of the 20th century, wolverines were possibly extirpated from the conterminous 48 states, likely due to unregulated trapping and widespread, indiscriminant predator control. *See PR-00767 to -00768.* Evidence suggests that in the second half of the 20th century and continuing into the present time, wolverine populations have expanded in the North Cascades and the northern Rocky Mountains from sources in Canada. *See PR-00768.* The current range of the species in the conterminous 48 states includes the North Cascades, the northern Rocky Mountains, the southern Rocky Mountains, and the Sierra Nevada Mountains. *See id.*

Wolverines naturally occur in low densities with a reported range from one animal per 25 square-miles, to one animal per 130 square-miles. *See PR-00764.* Current population and trends are not known with certainty, but based on the current knowledge of occupied wolverine habitat and wolverine densities in this habitat, to FWS

estimated that the wolverine population in the conterminous 48 states is approximately 250 to 300 animals. *See id.* The bulk of the current population occurs in the northern Rocky Mountains, with a few individuals in the North Cascades and one known individual each in the Sierra Nevada and southern Rocky Mountains. *See id.*

Within the areas known to currently have wolverine populations, relatively few wolverines can coexist due to their naturally low population densities, even if all areas were occupied at or near carrying capacity. *See id.* Given the natural limitations on wolverine population density, it is likely that historical wolverine population numbers were also low. *See id.*

b. Procedural History.

On December 14, 2010, FWS determined that the wolverine in the 48 conterminous states constituted a Distinct Population Segment (“DPS”) and that the DPS warranted listing under the Act, but that listing was precluded by higher priority listing actions. *See* PR-00762.

On February 4, 2013, FWS issued a proposed rule to list the

wolverine DPS as threatened under the Act. *See* PR-00760.³

On August 13, 2014, after analysis of extensive public comment and two stages of additional review, Facts ¶¶ 16–48, FWS withdrew the proposed rule. FWS found that wolverine did not meet the definition of “endangered species” or “threatened species” and thus listing under the Act was not warranted. *See* FR-00001. In finding that wolverine did not warrant listing because it is not in danger of extinction (or likely to become so) throughout “a significant portion of its range,” FWS applied the July 1, 2014 Final Policy on Interpretation of the Phrase “Significant Portion of its Range” in the Endangered Species Act (“Policy”), 79 Fed. Reg. 37578.

On August 13, 2014, Plaintiffs notified the Federal Defendants of their intention to sue, alleging that the August 13, 2014 withdrawal violated the Act. Plaintiffs filed their Complaint on October 13, 2014.

STANDARD OF REVIEW

Review of Plaintiffs’ claims is governed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. *See, e.g., Home Builders Ass’n v.*

³ A complete list of the previous federal actions related to the wolverine’s status under the Act can be found at PR-00761 to -00762.

U.S. Fish & Wildlife Serv., 616 F.3d 983, 988 (9th Cir. 2010). Under this standard, “resolution of this matter does not require fact finding on behalf of this court. Rather, the court’s review is limited to the administrative record Because this case does not present any genuine issues of material fact,” the matter is properly decided on summary judgment. *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994).

Plaintiff must satisfy a “high threshold” to establish that the withdrawal should be set aside. *See River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1067 (9th Cir. 2010). A court may set aside a final agency action only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

The scope of the Court’s review is “narrow,” and the Court “is not to substitute its judgment for that of the agency.” *Judulang v. Holder*, 132 S. Ct. 476, 483 (2011) (quotation omitted). The Court may reverse

only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (citations and internal quotation marks omitted). The standard of review is “highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.” *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (quotation omitted).

A court “must be ‘at its most deferential’ when reviewing scientific judgments and technical analyses within the agency’s expertise.” *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011); *see also Judulang*, 132 S. Ct. at 483 (Agencies “have expertise and experience in administering their statutes that no court can properly ignore.”). “The court is not to ‘act as a panel of scientists that instructs the [agency] . . . , chooses among scientific studies . . . , and orders the agency to explain every possible scientific uncertainty.’” *N. Plains Res. Council*, 668 F.3d at 1075 (quoting *Lands Council*, 537 F.3d at 988). This is especially true in cases under the Act because “[a]ssessing a species’ likelihood of extinction involves a great deal of predictive judgment. Such judgments are entitled to particularly deferential review.” *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th

Cir. 2009) (citation omitted). Thus, the Court’s “task is simply to ensure that the agency ‘considered the relevant factors and articulated a rational connection between the facts found and the choices made.’” *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (quoting *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003)).

ARGUMENT

I. FWS Reasonably Determined the Species is Not Endangered or Threatened.

“Endangered species” are those currently in danger of extinction throughout all or a significant portion of their range, while “threatened species” are those likely to become in danger of extinction within the foreseeable future throughout all or a significant portion of their range. 16 U.S.C. § 1532(6), (20). Here, FWS found that the wolverine is not in danger of extinction (is not an “endangered species”), and is not likely to become in danger of extinction in the foreseeable future (it is not a “threatened species”). *See* FR-00023 to -00025. In reaching this conclusion, FWS thoroughly and objectively examined all available scientific and commercial information and the potential threats to the

species in light of the five statutory factors. *See* FR-00002 to -00025. Plaintiffs concede wolverine is not threatened by Factors C (disease/predation) or D (regulatory mechanisms). They dispute FWS's conclusions mainly for Factors A (habitat destruction), B (regulatory mechanisms), and E (other factors). FWS's expert judgment is entitled to deference and should be upheld. *See, e.g., San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014); *N. Plains Res. Council*, 668 F.3d at 1075; *Trout Unlimited*, 559 F.3d at 959.

a. Factor A: the present or threatened destruction, modification, or curtailment of wolverine's habitat or range.

In examining the issues presented under Factor A, FWS considered and discussed “(1) [e]ffects of climate change, (2) human use and disturbance, (3) dispersed recreational activities, (4) infrastructure development, (5) transportation corridors, and (6) land management.” FR-00012 to -00019. This consideration is thorough, thoughtful, and well supported.

Plaintiffs challenge the Factor A analysis on two grounds: (1) that it ignores the best available science on climate change's effects on wolverine habitat, Doc. 63 (“Pls.’ Br.”) at 11–28, and (2) that

infrastructure development “impedes essential wolverine dispersal,” *id.* at 38. A review of the record, especially the Withdrawal, FR-00002 to -00025, and the May 30, 2014 memorandum of Noreen Walsh (“Walsh Memorandum”), FR-05357 to -05380, shows that FWS’s determination was reasonable and supported by the evidence in the record, and that Plaintiffs’ arguments challenging the Factor A analysis are without merit.

There is no dispute that FWS must base its listing determinations on “the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2); *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 601–02. And this is precisely what FWS did. Plaintiffs identify no study or other data that FWS ignored. *See Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1081 (9th Cir. 2006) (“Without any evidence in the record that FWS ignored relevant information, we hold that FWS satisfied its duty to base its listing determinations on the best available data.”). Instead, they dispute the conclusions drawn by the expert agency based on its review of the science, and the weight accorded by the agency to particular pieces of evidence. Ninth Circuit case law is clear that such differences of opinion are no basis for overturning the agency’s well-

reasoned decision-making. *See, e.g., Lands Council*, 537 F.3d at 987 (Because Plaintiff cannot show that FWS’s analysis “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,” its challenge fails.); *Trout Unlimited*, 559 F.3d at 958 (“An agency’s decision may be based on the best scientific evidence available even if the administrative record contains evidence for and against its decision. When not dictated by statute or regulation, the manner in which an agency resolves conflicting evidence is entitled to deference so long as it is not arbitrary and capricious.”); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (“[S]o long as an agency considers all relevant data, it may rely on that available evidence even when it is imperfect, weak, and not necessarily dispositive.”); *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658–59 (9th Cir. 2009) (“We grant considerable discretion to agencies on matters requiring a high level of technical expertise. Though a party may cite studies that support a conclusion different from the one the [agency] reached, it is not our role to weigh competing scientific analyses.”); *Ground Zero Center for Non Violent Action v. U.S. Dep’t of Navy*, 383 F.3d 1082, 1090 (9th Cir.

2004) (“Agencies are normally entitled to rely upon the reasonable views of their experts over the views of other experts.”); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333, 1336–37 (9th Cir. 1992) (“To set aside FWS's determination in this case would require us to decide that the views of Greenpeace's experts have more merit than those of FWS's experts, a position we are unqualified to take.”)

Both the Withdrawal and the Walsh Memorandum offer detailed, cogent explanations for what FWS found to be the best available science—a determination “entitled to particularly deferential review,” *Trout Unlimited*, 559 F.3d at 959—and why some information was simply too speculative to justify listing the wolverine as threatened. FR-00012 to -00016; FR-05359 to -05373.

i. Climate Change.

In its analysis of the possible effects of climate change on wolverines, the Withdrawal first explains why certain studies do not, in the agency’s judgment, constitute the best available scientific data. FR-00013; *see San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 602 (“The determination of what constitutes the ‘best scientific data available’ belongs to the agency’s ‘special expertise.’”). It also explains

why McKelvey et al. (2011) (“McKelvey (2011)”), despite being “the most sophisticated analysis of impacts of climate change at the scale of wolverine,” is not sufficient to justify listing wolverines as threatened, including the study’s own admission that “although wolverine distribution is closely tied to persistent spring snow cover (Copeland et al. 2010), we do not know how fine scale changes in snow patterns within wolverine home range may affect population persistence.” FR-00013; *see also* FR-05360. Indeed, “[n]ewer modeling techniques suggest that higher elevations could maintain more snow than previously thought and possibly even receive more snow than historical records show due to climate change,” and “[m]odern assessment techniques that include slope, aspect, and other topographic information are now available and can be used to predict precipitation, including snowfall at finer scales that could be more aligned with existing or potential wolverine habitat.” *Id.*

Contrary to Plaintiffs’ claims, the Withdrawal describes in detail why the best available data do not justify listing wolverines as threatened based on possible effects of climate change. FR-00013 to -00016. For example, there is reason to doubt that “snow persisting until May 15 is

a necessary condition for wolverine reproduction”; and there is no evidence that den sites are scarce or lacking, or that they currently limit wolverine reproduction.” FR-00014. Further, estimated available habitat capacity is approximately 644 wolverines, and the current population size is only approximately half of capacity, thus “den sites are likely not currently limiting wolverine reproduction and population abundance.” *Id.* (citing Inman et al. 2013). At least two studies indicate that “food availability [is] the limiting factor” with wolverine densities. *Id.* Available information “does not yet allow us to predict if and when” “a decrease in deep, persistent snow will limit the availability of den sites”; recent “publications have suggested that factors beyond those included by Copeland et al. (2010) such as land cover . . . , topography, human footprint, and snow depth should be incorporated into predictive models to accurately describe wolverine habitat because these factors appear to also influence primary wolverine habitat use.” *Id.* (citing Inman et al. 2013 and Fisher et al. 2013). Significantly, “while contiguous areas of spring snow cover are predicted to become smaller and more isolated over time, large (>2000km) contiguous areas of wolverine habitat are predicted to persist within the study area

throughout the 21st century for all model projections,” and “[w]olverines are able to successfully disperse between habitats, despite the level of development that is currently taking place in the current range of the DPS.” FR-00015.

FWS drew two main conclusions based on its comprehensive review of the evidence: (1) the best available scientific data on the expected loss of wolverine habitat do not justify listing the wolverine under Factor A; and (2) how wolverine will respond to climate change is currently unknown, and FWS cannot assume a response that would justify listing. FR-00015. While pervading the entire analysis, these points are encapsulated in the following excerpts from the Withdrawal.

First,

while it may be more likely that habitat will decrease over time due to earlier snow melt, if wolverines also use areas outside of the area covered with snow until May 15, this reduction in snow cover may not equate linearly to an equivalent loss of wolverine habitat thus, [McKelvey (2011)] may overestimate the loss of wolverine habitat.

FR-00015. The reasoning and support behind this conclusion is provided in the Withdrawal, FR-00014 to -00015, and also in the Walsh Memorandum, FR-05359 to -05369. For example, Walsh explains that given issues raised in the peer review and Science

Panel, she asked Dr. Stephen Torbit, Assistant Regional Director for Science Applications, to review the state of the science on downscale climate models. Dr. Torbit, in turn, consulted with Dr. Andrea Ray, of the National Oceanic and Atmospheric Administration's Earth Systems Research Laboratory, who "concurred that great difficulty still exists in predicting changes in precipitation with climate models" FR-05361. Dr. Ray noted that a model used for a National Oceanic and Atmospheric Administration report on snowfall in the upper Colorado River Basin indicated that "above 8,000 feet, 70-80% of the 1950-1999 mean snowpack is maintained through the end of the century and above 10,000 feet, 80-90% of snowpack is maintained." *Id.* Dr. Torbit concluded that "[n]ewer techniques reveal that colder air temperatures at higher elevations will tend to maintain all precipitation as snow, even in the early and late season" and that "higher elevations of Colorado and the northern Rockies could receive even more snow than historical records show" *Id.*

Second, "with such uncertainty in wolverine response to changes predicted" by "climate modeling, we do not know if and to what

extent genetic exchange will be limited and in what timeframe.”

FR-00015. This point highlights a key issue requiring the

Withdrawal.

A threatened species is a species “likely to become an endangered species within the foreseeable future.” 16 U.S.C. § 1532(20). As explained in the Walsh Memorandum, “[a]n important part of any such decision is whether the best available science and commercial information indicates that endangerment will occur within the foreseeable future.” FR-05369. The Interior Solicitor issued M-Opinion 37021, determining that “foreseeable future” is “the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the future conservation status of the species,” and that it “extends only so far as the Secretary can explain reliance on the data to formulate a reliable prediction.” *Id.* (quoting Solicitor’s Memorandum on the Meaning of “Foreseeable Future” in Section 3(20) of the ESA, M-37021 (Jan. 16, 2009)); *see also W. Watersheds Project v. Ashe*, 948 F. Supp. 2d 1166, 1178 (D. Idaho 2013) (“In the absence of available evidence, the ESA does not require an agency to conduct its own studies to determine whether to list a species The best

available science requirement is designed to ‘ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.’” (citations omitted)). Applied to this legal standard, the available data simply do not compel listing the wolverine as threatened. FWS made a reasonable choice based on equivocal data, and that choice is entitled to deference. *See Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983) (agency must “consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made”).

A. Wolverine Denning Habitat

First, Plaintiffs assert that the Factor A analysis is flawed because FWS “disregarded the threat posed by a predicted massive loss of wolverine denning habitat.” Pls.’ Br. 17. Plaintiffs’ argument that climate change threatens the wolverine by adversely affecting denning relies mainly on statements in the proposed rule and two of the studies central to the proposed rule that FWS later determined were inadequate to justify a determination to list wolverine as threatened. Pls.’ Br. 17–19. Their argument is broken into four sub-arguments, all of which fail.

Plaintiffs' first argument about wolverine's den requirements is a straw man. They accuse FWS of misinterpreting the Copeland et al. (2010) study, and argue that it "erred in concluding that [the study's] data call into question wolverine reliance on persistent spring snow for successful reproductive denning." *Id.* at 20. But FWS did no such thing. The Withdrawal concluded that "it is reasonable to believe that wolverines select for den sites likely to have deep snow that will persist until some point into the spring," FR-00013, and "[t]here is strong support for the existence of an obligate relationship between wolverines and deep spring snow at the den site," FR-00016. The entire analysis accepts this as a requirement for wolverines. FR-00012 to -00016. Further, Plaintiffs argue that FWS misunderstood Copeland to mean that "denning wolverines require snow persisting until May 15 in all cases," when the May 15 date was rather simply "an approximation of underlying bioclimatic requirements." Pls.' Br. 20. But given that Copeland et al. (2010) does not conclude that snow persisting to May 15 is a requirement—that it is merely a "surrogate for habitat features,"

id. at 21—FWS’s conclusion that it is unclear that snow must persist until May 15 is not in conflict with Copeland.⁴

Second, Plaintiffs dispute FWS’s conclusion that there is no evidence that den sites currently limit wolverine reproduction. *Id.* at 23–24. FWS based this conclusion at least partly on the results in Inman et al. (2013), which estimated the habitat capacity in the conterminous 48 states as 644 wolverines and the then current population as 322. FR-00014. Plaintiffs argue that this was error because the habitat capacity estimate of 644 included areas currently not occupied by wolverines. Pls.’ Br. 23. But Plaintiffs’ argument disregards that Inman et al. (2013) includes an estimated population capacity for each designated region, and combining those estimates for the regions with active wolverine populations totals 427. LIT-01659.

⁴ It cannot be disputed that Copeland et al. (2010) acknowledged that there are reported areas with adequate snow and den sites that exist outside the May 15 snow cover model. And while FWS did not ultimately base its determination on these concerns, Magoun and Inman—both co-authors of the Copeland et al. (2010) paper—offered in the peer review vigorous objection to the conclusion that wolverine actually *require* deep, persistent spring snow. *See, e.g.*, PI-001367; PI-000749 to -000750; PI-000977, -000983.

Thus even assuming that wolverines will not expand out of their current range, there is still additional carrying capacity in the habitat.

Plaintiffs then argue that FWS “ignores the pertinent question of likely impacts on wolverines in ‘the foreseeable future.’” Pls.’ Br. 24. But of course FWS did not ignore that issue. *See, e.g.*, FR-00015 (“while contiguous areas of spring snow cover are predicted to become smaller and more isolated over time, large (>2000km) contiguous areas of wolverine habitat are predicted to persist within the study area throughout the 21st century for all model projections”; FR-00014 (available information “does not yet allow us to predict if and when” “a decrease in deep, persistent snow will limit the availability of den sites”); FR-00015 (“the predicted habitat remaining after 2085 (McKelvey et al. 2010) could support 344 (95 percent CI: 250-421) wolverines (versus the current estimate of 250-300) in the contiguous United States, with the bulk (283; 95 percent CI: 110-347) of individuals estimated in the Northern Rocky Mountains in 2070-2099.”) Plaintiffs’ citation to the May 2014 memorandum from the Assistant Regional Director for Ecological Services is unavailing because it was written without the benefit of the Walsh Memorandum and the information on

which it was based, and thus overly relies on the projections from Copeland et al. (2010) and McKelvey (2011). *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (An agency is “fully entitled” to change its mind “as long as the proper procedures were followed.”)

Third, Plaintiffs challenge FWS’s conclusion that McKelvey (2011) “may overestimate the loss of wolverine habitat,” FR-00015. Pls.’ Br. 25–27. FWS properly considered the findings in McKelvey, and came to the conclusion that the best available science was still too uncertain to provide a reasonable basis for making a reliable determination. *See supra* Argument I(a)(i). As McKelvey itself noted, “[a]lthough wolverine distribution is closely tied to persistent spring snow cover, we do not know how fine-scale changes in snow patterns within wolverine home ranges may affect population persistence.” FR-00013; *see also* FR-05360. This limitation is built into McKelvey (2011), and was reiterated in communications between McKelvey and FWS. McKelvey told a biologist in FWS’s Montana Field Office that while it makes sense to use the data from McKelvey (2011) for determining continent-scale habitat loss, it is a less reliable tool for assessing habitat loss at a

smaller scale. PR-13432. McKelvey further explained that the maps are a highly modeled product with known deficiencies that make errors likely when using them at a small scale. *Id.* The resolution on the climate data is 6x6 square kilometers, which is sufficiently fine-grained for assessing continent-scale habitat loss, but lacks adequate detail at the scale of wolverine landscapes. *Id.* As a result, differences that are likely important for assessing potential wolverine habitat loss are not reflected in the McKelvey (2011) data.

In addition to McKelvey's own warnings, *id.*, Walsh performed a detailed analysis of whether McKelvey (2011) could be relied on to make a reliable determination of the possible effects of climate change on wolverine habitat, FR-05357 to -05380, based at least in part on a new analysis by Torbit in consultation with Ray, FR-05451 to -05456. Walsh concluded that McKelvey (2011) may overestimate the potential loss of habitat. Further, both the peer review and the Science Panel raised concerns about the reliability of McKelvey. *See* PI-000747 to -000762; PI-000967 to -001050; FR-14023 to -14024 (indicating some disagreement as to the accuracy of the indicated snow cover projections

in McKelvey (2011), and how well those projections represent wolverine habitat).

FWS found that the findings of McKelvey (2011) were inadequate due to “limitations inherent in downscaled climate models and the importance of understanding the effect of climate-data spatial resolution on wolverine viability in complex terrain.” FR-00013. This was not improper—when FWS is operating within its congressionally mandated area of expertise, it is permitted to decide among competing scientific opinions.⁵ *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (“When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.”); *Pub. Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986) (“[A]s long as Congress

⁵ Plaintiffs’ references to the Science Panel results do not change this conclusion. The panelists were offering their view on the accuracy of the McKelvey findings as they were. The ultimate issue with the use of McKelvey (2011) was not those findings as they were, but rather that those findings were inadequate due to “limitations inherent in downscaled climate models and the importance of understanding the effect of climate-data spatial resolution on wolverine viability in complex terrain.” FR-00013.

delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence.”).

Fourth, Plaintiffs argue that FWS improperly demanded “conclusive science.” Pls.’ Br. 27–30. As the above demonstrates, *see supra* Argument I(a)(i), FWS applied the standard appropriately. Plaintiffs’ citation to *Southwest Center for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (“*Southwest Center*”), is taken out of its context. Pls.’ Br. 27. In *Southwest Center*, the D.C. Circuit reversed a district court that demanded FWS conduct an additional study, a demand plainly contrary to the law. *See* 215 F.3d at 60–61. In the finding at issue in *Southwest Center*, FWS found that the Queen Charlotte goshawks did not warrant listing despite the fact that the birds “are difficult to census, and no reliable population estimates or population trend data are available,” leading to “insufficient information to predict the effect of removing 64 percent of the old growth forest on goshawk abundance on Vancouver Island.” 62 Fed. Reg. 46710, 46711. The crux of the *Southwest Center* holding is the now well understood point of law that FWS must rely on the best available

scientific data, rather than the best possible data. It does not, however, mean that FWS must, or even may, list a species as threatened when the evidence is insufficient to formulate a reliable prediction that the species is “likely to become an endangered species within the foreseeable future.” *See Bennett v. Spear*, 520 U.S. 154, 176 (1997) (“The obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.”); *W. Watersheds Project*, 948 F. Supp. 2d at 1178–79.

Moreover, the Act merely requires FWS to take into account the “best scientific and commercial data available” when it makes its decision. The terms “scientific and commercial data” convey Congress’s intent that, although there will always be competing conclusions as to a specific scientific question, the agency cannot ignore the underlying data that was compiled in this particular field. The term “data” specifically denotes that the agency must look past whatever conclusion was made by an individual scientist, report, or paper and instead critically eye the hard evidence compiled to reach its conclusion. *See Webster’s Ninth New Collegiate Dictionary* at 325 (data: “factual

information (as measurement or statistics) used as a basis for reasoning, discussion, or calculation.”). Here, FWS brought its own significant expertise to interpreting the available data and concluded that it did not support listing. The agency did not demand “conclusive science,” rather it took a hard look at the evidence and found it inadequate to support a finding of “threatened.” That judgment call is supported by the record and entitled to deference.

Plaintiffs’ reliance on certain statements by FWS’s field office biologists is unavailing. Pls.’ Br. 28–29 (citing FR-05609 and -05614). Those statements were made before Walsh’s fuller analysis of the data, including the analysis by Dr. Torbit in consultation with Dr. Ray. FR-05451 to -05456; FR-05361. The Walsh Memorandum notes that the lack of better understanding of that precise mechanism makes it “difficult to determine beyond speculation how and how soon climate change and earlier snowmelt will likely influence or limit availability of den sites, habitat, and ultimately wolverine abundance” FR-05365.

Plaintiffs also rely on certain conclusions from a 1998 study that have been discredited by the lead author herself. PI-001363 (Magoun noting that after 15 years of further experience and study “hopefully

[we] have progressed further in our knowledge of wolverines and their habit,” and that she has since “made a few revisions in [her] thinking”).

Plaintiffs next suggest that FWS is demanding a “smoking gun” that would be impossible to uncover, Pls.’ Br. 29, but this is not the case. FR-00016, -00024. As Walsh explained in her memorandum, “the pertinent question that remains is if and when a decrease in deep, persistent spring snow will limit the availability of den sites, therefore causing a population decline in the foreseeable future.” FR-05365. Thus, advancement in climate change modeling could provide greater evidence of any potential threat to wolverine even without the “smoking gun” Plaintiffs erroneously suggest FWS demands. FR-00024.

FWS applied the proper standard for a listing determination. It is Plaintiffs who have flipped the standard. Their arguments suggest that FWS needed conclusive evidence to withdraw the proposed rule, and that reliance on speculation is permissible, or even required, when it supports listing. But the standard permits listing a species as threatened only when it is supported by the best scientific and commercial data available sufficient to form a reliable prediction. *See supra* Argument I(a).

B. Wolverine Year-Round Habitat

Second, Plaintiffs assert that the Factor A determination is flawed because FWS “dismissed the climate-change threat to year-round wolverine habitat.” Pls.’ Br. 30–36. This argument also fails.

After a thorough discussion, FWS concluded that while the current information suggests that climate changes may affect wolverine habitat, “the specific response or sensitivity of the wolverines to these current and forecasted changes is sufficiently uncertain at this time, such that we cannot reasonably project the future conservation status of the DPS based on any such changes that may occur.” FR-00016. This conclusion met the standard and is entitled to deference.

Plaintiffs begin by referencing the withdrawn proposed rule, the Copeland et al. (2010) study that was subject to extensive analysis during the comment period and discussed at length in the Withdrawal, and the findings of the Science Panel. Pls.’ Br. 30. Plaintiffs claim that FWS unfairly “criticized Copeland, et al. (2010)” for failing to take other datasets into account in determining wolverine denning locations. *Id.* at 31. But FWS’s “criticism” was just a true observation that the considered data were limited, and was but the first sentence in a

paragraph detailing why there is still too much uncertainty to draw reliable conclusions from the results of the study. FR-00014. Further, the Walsh Memorandum extensively discusses the lack of reliable information. FR-05358 to -05367. The Science Panel results also indicated uncertainty regarding the wolverine's need for deep or contiguous spring snow throughout its year-round habitat. FR-05362 to -05363; FR-14020 (“[T]here is a wide spread of points within each category, suggesting that panelists disagreed about the importance of the relationship between wolverines and contiguous snow.”)

Plaintiffs next argue that FWS's calculations about the capacity of wolverine habitat in the future were flawed. Pls.' Br. 32–34. But as the Plaintiffs construe these calculations, as relying on the habitat loss predicted by McKelvey, even if they are flawed it does not matter because they were not a necessary part of the determination. FR-00019, -00023 to -00024. FWS found that the calculations in McKelvey (2011) were not sufficiently reliable, thus any determination FWS made assuming those calculations to be reliable was superfluous. FR-00014 to -00015, -00019.

Plaintiffs also argue that even if FWS's calculations are correct that "the wide confidence interval . . . demonstrates that FWS can state with some degree of certainty only that the northern Rockies population will be at or above 110 by 2085—not at 283." Pls.' Br. 33. But this conflates the calculation with the statistics. The model produced a calculation estimate of 283 wolverines for the area. The confidence interval, captured as a "95 percent confidence interval: 110–347," is merely a statistical method for demonstrating confidence in the model's calculation. It is not properly construed as an indication of FWS's estimate of a range of equal probability. While it indicates that FWS is "95 percent confident" that the future population will fall within that range, it does not indicate the estimated likelihood that the result will be at any specific point in that range.

Plaintiffs further claim FWS offered overly optimistic interpretations of the calculations and conclusions from McKelvey (2011). But, as described above, FWS has supplied a reasoned explanation for its interpretation of the data.

Plaintiffs' long quotation from the Withdrawal about how wolverine's "probability of [moving large distances to establish new home ranges]

decreases with increased distance between suitable habitat patches,” Pls.’ Br. 35, does not contradict the determination that there is an unacceptable level of uncertainty that suitable habitat patches would become too distant from one another. FR-00015 (“[W]ith such uncertainty in wolverine response to changes predicted association [sic] with climate modeling, we do not know if and to what extent genetic exchange will be limited and in what timeframe.”)

Lastly, Plaintiffs argue that “[g]iven that habitat fragmentation and isolation have already reduced the wolverine DPS’s effective population size below ‘what is thought necessary for short-term maintenance of genetic diversity,’” it was unreasonable of FWS to conclude wolverine could move to expand its habitat range. Pls.’ Br. 35–36. This is a bridge too far. Plaintiffs cite no evidence that the current estimated effective population size for wolverine has been “reduced” because of habitat fragmentation or is otherwise the result of anything other than the fact that wolverine was likely extirpated from the conterminous 48 states and the current population is from a relatively recent recolonization resulting in founder effects. FR-00022.

ii. Infrastructure development.

In addition to its analysis of the possible effects of climate change, FWS also analyzed five other potential risks under Factor A, including the presence of infrastructure development and transportation corridors. FR-00012 to -00019. Plaintiffs challenge FWS's analysis of the effects of infrastructure development on wolverine, arguing that roads have a "significant impact on wolverine" that will lead to further genetic isolation. Pls.' Br. 38. Plaintiffs' extremely cursory challenge fails.

Plaintiffs cite three studies to support their argument. First, Austin (1998), which found that the Trans Canada Highway, not roads in general, was a significant barrier to wolverine movement. LIT-00453. Second, Inman et al. (2013), which Plaintiffs cast as "finding wolverines 'negatively associated' with higher road densities," also concluded that "there is no indication that dispersal is currently being limited by human development in a manner that has negative consequences for the wolverine metapopulation." LIT-01660. Third, Dawson et al. (2010), which found that "road densities may affect selection of home ranges by Wolverines," but also concluded that "[f]urther study of movements and

den-site selection by Wolverines in this region is needed to determine if Wolverines adjust their movements and home ranges to accommodate changes in land use patterns,” LIT-05299 to -05300. Nothing in those studies indicates that FWS erred in its conclusion, based on an analysis of multiple studies and reports, that “the available evidence indicates that dispersing wolverines can successfully cross transportation corridors.” FR-00018.

b. Factor B: Overutilization for Commercial, Recreational, Scientific, or Educational Purposes.

Under Factor B, FWS determines if overutilization for commercial, recreational, scientific, or educational purposes is a threat to the species. 16 U.S.C. § 1533(a)(1). In examining the issues presented under Factor B, FWS considered and discussed the possible effects of trapping on Wolverine. FR-00019 to -00021.

Plaintiffs’ principle challenge to the Factor B analysis is that FWS allegedly “discounted the impact of recreational wolverine trapping in Montana.” Pls.’ Br. 36–37. The record, especially the Withdrawal, FR-00005, -00011, -00019 to -00021, fully refutes this claim.

Seeking to maximize their Factor A argument, Plaintiffs first allege that because FWS improperly “dismissed the climate-change threat,” its finding under Factor B was also “irrational.” Pls.’ Br. 36–37. Because FWS’s finding under Factor A was reasonable and proper, this challenge to its Factor B analysis fails. *See supra* Argument I(a).

Plaintiffs next argue that “given that the wolverine DPS’s effective population size is already smaller than necessary” additional mortalities due to trapping are a threat worthy of listing. Pls.’ Br. 37. FWS’s analysis of trapping in Montana was thorough and ultimately concluded that it was not a threat. FWS explained that before 2004 average wolverine harvest in Montana was 10.5 per year. FR-00020. Montana then adjusted its trapping regulations in 2004 to divide the state into three trapping areas to spread the trapping out across the state. *Id.* Montana again adjusted its trapping regulations in 2008 to “further increase geographic control on harvest to prevent concentrated trapping in any single area, and to completely stop trapping in isolated mountain ranges where small populations are most vulnerable.” *Id.*; *see also* PI-001252 (peer reviewer John Squires “applauded [Montana’s] restructured harvest both publically and privately, and [believes] their

actions improved the species' conservation and management in the Northern Rockies"). These regulations also established a statewide limit of five wolverines. *Id.* From 2008 to 2012, take averaged three wolverines annually. *Id.* Since 2012, Montana has not permitted wolverine trapping. *Id.* FWS noted that Montana wolverine populations "have rebounded from historic lows in the early 1900s while at the same time being subjected to regulated trapping. In fact, much of the wolverine expansion [described in the Withdrawal] took place under less restrictive (i.e., higher harvest levels) harvest regulations than are in place today." *Id.* (citations omitted). FWS then concluded that "[b]ased on the best scientific and commercial information available, we conclude that trapping, including known rates of incidental trapping in Montana and Idaho, result in a small number of wolverine mortalities each year and that this level of mortality by itself is not a threat to the wolverine DPS." FR-00021. As for how these very few mortalities affect wolverine's effective population, there is no evidence of a negative effect because loss of a particular individual, depending on the circumstances, may have no effect, or might possibly actually benefit the effective population and genetic diversity, *see infra* Argument I(c). Any

conclusion otherwise would be based on speculation. FWS's analysis under Factor B was adequate and reasonable.

*c. Factor E: other natural or manmade factors affecting wolverine's continued existence.*⁶

In its Factor E analysis, FWS thoroughly considered the wolverine's small population size and concluded that it did not warrant listing. FR-00021 to -00023; *see also* FR-00004, -00005, -00008, -00009, -00012; Defs.' Facts ¶¶ 54–65. Plaintiffs contend that the Factor E analysis ignored the best available science. *See* Pls.' Br. 7–15. Plaintiffs' challenge is disproven by the record and thus fails.

The potential risk of wolverine's small population size, including as it relates to genetic diversity, was recognized and considered by FWS. FR-00021 to -00023; *see also* Defs.' Facts ¶¶ 54–65. But the best available scientific data indicate that these are “as-yet” only undocumented, potential threats, the significance of which is still unknown. FR-00023. Although wolverine's effective population sizes are very low, there is no evidence of adverse effects from lower genetic diversity. FR-00022. FWS

⁶ Plaintiffs do not challenge FWS's determination under Factors C and D, or the synergistic interactions between factors.

“acknowledge[d] that the effect of small population size and low genetic diversity may become more significant if populations become smaller and more isolated, [but they] lack reliable information to conclude if and when this would occur.” FR-00005. FWS cannot base a listing determination on speculation and surmise. *See W. Watersheds Project*, 948 F. Supp. 2d at 1178; Solicitor’s Memorandum on the Meaning of “Foreseeable Future” in Section 3(20) of the ESA, M-37021 (Jan. 16, 2009).

FWS explained wolverines “in the DPS area are thought to be the result of colonization events that have occurred since the 1930s,” and “[s]uch recent colonizations by relatively few individuals and subsequent population growth are likely to have resulted in founder effects, which could contribute to low genetic diversity.” FR-00023. But because wolverine is capable of dispersing between habitats and its population is growing, FWS reasonably concluded that “[b]ased on the best scientific and commercial information available we conclude that demographic stochasticity and loss of genetic diversity due to small effective population sizes is not a threat to the wolverine DPS.” *Id.*; FR-00012.

FWS also reasoned that a “contributing factor that reduces effective population size is the tendency in wolverines for a few males to monopolize the reproduction of several females, reducing reproductive opportunities for other males.” FR-00021. This natural behavior is “a feature of wolverine life-history” that “can lead to lower effective population size and reduce population viability by reducing genetic diversity.” *Id.* But because “effective population is not static; members of the effective population in one year may lose this status in the following year and possibly regain it again later depending on their reproductive success,” as members of the effective population are lost their territories are likely quickly filled by younger individuals. *Id.*

Plaintiffs present no evidence that was not fully considered in the Withdrawal, FR-00004 to -00023; they simply disagree with the agency’s scientific conclusions.

Plaintiffs first refer to the Withdrawal’s findings that the effective population is “below *what is thought* necessary for short-term maintenance of genetic diversity” and that “[l]oss of genetic diversity *can* lead to inbreeding depression and is associated with increased risk of extinction,” Pls.’ Br. 9 (emphasis added). They admit that FWS

concluded there is no evidence of adverse effects of the lower genetic diversity, *id.*, but still claim that FWS “offered no reason to conclude that the wolverine is immune to these effects.” *Id.* at 10. In fact, the source of this assumption is only a “general rule-of-thumb” not specific to wolverine, and “there are many problems with the use of simple rules such as this in a complicated world. There are no real thresholds (such as 50 or 500) in this process” LIT-00388. The Withdrawal acknowledged there are limitations to this “rule.” FR-00022. FWS clearly explained that there is no evidence that wolverine has suffered or is suffering from adverse effects due to lower genetic diversity, and that there is no reliable information to conclude if and when any such adverse effects might occur. FR-00005.

Plaintiffs next argue that FWS erred by only considering an “absence of documented impacts ‘to date,’” and not considering “future scenarios.” Pls.’ Br. 10. This is flatly contradictory to FWS’s entire analysis, which was a determination about whether wolverine should be listed as threatened, a determination that requires a finding that the species will become in danger of extinction in the foreseeable future. FR-00002 to -00025. FWS’s finding as to wolverine’s small population size is in accord

with this frame of reference. FR-00021 to -00023; *see also* Defs.’ Facts ¶¶ 54–65. It is precisely because the current small population size cannot be found to be a threat at this time, at the time when under FWS’s conclusion the risk to wolverine is at its greatest because it is expected to improve over time, that FWS concluded it is not a threat in the future. Plaintiffs’ argument is meritless.

Plaintiffs then argue that FWS’s conclusion that the wolverine population is growing was arbitrary and capricious. Pls.’ Br. 11–15. First, they claim that FWS “irrationally abandoned the best available science in favor of speculation.” *Id.* at 11. They note that the “FWS’s Montana biologists” characterized the “hypothesis” as “speculation.” *Id.* at 12. But this statement is taken out of context from a paragraph discussing the rebound in the population from near zero in 1930 to approximately 300 now. *Id.* In response to this statement, Walsh responded that “in the second half of the [last] century, and continuing to the present, wolverine populations have grown and expanded in the North Cascades and Northern Rocky Mountains” and that she is not “aware . . . of information that indicates this population growth and expansion has ceased.” FR-05358. She noted that any suggestion to the

contrary would be speculation, and that to make a listing recommendation she must “evaluate the degree to which [FWS] can reliably estimate future impacts.” *Id.* This was proper—FWS cannot list a species as threatened based on speculation. *See supra* Argument I(a).

Next, Plaintiffs argue that the recent dispersers to Colorado, California, and Utah do not support FWS’s position. Pls.’ Br. 14. But they do. First, the fact that there are recent expansions into territory that has not be occupied for many decades, does indeed indicate an increase in population. FR-05359. It is this increased population that FWS determined will alleviate the risk of low genetic diversity. This is true regardless of whether that habitat is eventually recolonized.

Lastly, contrary to Plaintiffs’ claim, FWS did not “admit” that “at least 400 breeding pairs would be necessary to sustain the long-term genetic viability of the northern Rocky Mountains wolverine population.” Pls.’ Br. 15. Rather, FWS acknowledged that a recent analysis (Cegelski et al. 2006) came to that conclusion. But here, FWS concluded that although Wolverine’s effective population sizes are very low, there is no evidence of adverse effects of the lower genetic diversity,

FR-00022, and it lacks “reliable information to conclude if and when [negative effects] would occur.” FR-00005.

II. FWS Reasonably Determined that the Wolverine is Not Threatened Throughout A “Significant Portion of its Range.”

In addition to determining that wolverine does not warrant listing throughout all of its range, FWS determined that wolverine does not warrant listing throughout a significant portion of its range. FR-00024 to -00025. This determination is reasonable and entitled to deference.

In making its determination for the wolverine, FWS relied on its Final Policy on the interpretation of the phrase “significant portion of its range,” 79 Fed. Reg. 37578 (“Policy”). The Policy consists of four parts. First, “if a species is found to be endangered or threatened throughout a significant portion of its range, the entire species is listed” as such. FR-00024. Second, a portion of the range of a species is “significant” if its contribution to the viability of the species is such that without the members in that portion, the species “would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range.” *Id.* Third, “the range of a species is considered to be the general geographical area within which that species can be found at the

time [the agency] makes any particular status determination”—i.e., the species’ current range. *Id.* Fourth, if the species is endangered or threatened throughout a significant portion of its range and that portion of its range is also a DPS, the agency “will list the DPS rather than the entire taxonomic species or subspecies.” *Id.* Plaintiffs do not challenge the legality of the Policy.

Plaintiffs claim that FWS erred by not finding wolverine threatened in the southern Rocky Mountains and the Sierra Nevada Mountains, which Plaintiffs argue should be considered “a significant portion” of wolverine’s range. Pls.’ Br. 39. This argument is meritless.

As an initial matter, Plaintiffs’ reliance on a D.C. district court decision from 2012 to supply the proper interpretation of “significant portion of its range” is completely misplaced. FWS’s interpretation of the ambiguous statutory phrase through the 2014 Policy, which Plaintiffs do not challenge, controls. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

Second, Plaintiffs argue that because FWS included the southern Rockies and Sierra Nevadas in the wolverine’s current range, it should have found the species threatened because of the lack of any female

wolverines in those mountain ranges. Pls.' Br. 39. This is plainly not true under the Policy. Those portions of wolverine's range do not classify as "significant" portions, because they do not "contribut[e] to the viability of the species" "such that *without the members in that portion*, the species 'would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range.'" FR-00024 (emphasis added). This is unquestionably the case because those portions of wolverine's range do not contain viable breeding populations, therefore their contribution to the viability of the species is nil.

Lastly, Plaintiffs' argument that those portions are "significant" because FWS relied on the existence of that habitat in justifying the Withdrawal, Pls.' Br. at 40, is specious. Even if this claim were supported by the record, which it is not,⁷ the Policy's definition of

⁷ FWS noted that dispersals into these ranges was evidence of population growth, but it did not state that the habitat in those ranges was necessary for wolverine's persistence. In fact, when it performed its future habitat calculations, it noted that its estimates did "not include possible additional occupancy of potentially important wolverine habitat in the Sierra Nevada Mountains and portions of Oregon, which were beyond the geographic scope of the McKelvey et al.'s (2011) analysis." FR-00015.

“significant” does not cover this circumstance. FR-00024. A portion of range is not significant under the Policy merely because habitat is vital. It is only significant if the *population of the species within that habitat* is so vital that without it the species would be in danger of extinction. FR-00024. Plaintiffs’ argument to the contrary falls flat.

FWS properly applied the Policy and complied with the Act.

CONCLUSION

Because the best available commercial and scientific data does not indicate that wolverines are likely to become in danger of extinction in the foreseeable future, FWS’s determination that wolverines in the conterminous United States are not “threatened” was reasonable and proper. That determination is supported by the record and entitled to deference. Therefore, summary judgment should be granted in favor of the Federal Defendants.

Respectfully submitted this 12th day of August, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that according to the word count function of Microsoft Word 2013 the foregoing brief is 9262 words, excluding the caption, table of authorities, table of contents, signature blocks, certificate of compliance, and certificate of service.

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