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

DEFENDERS OF WILDLIFE,

Plaintiff,

vs.

SALLY JEWELL, Secretary, U.S.  
Department of the Interior, in her official  
capacity; DANIEL M. ASHE, Director,  
U.S. Fish and Wildlife Service, in his official  
capacity,

Defendants.

CV 14-246-M-DLC

(Consolidated with Case Nos.  
14-247-M-DLC and 14-250-M-DLC)

**DEFENDANT-INTERVENORS  
AMERICAN PETROLEUM  
INSTITUTE, MONTANA  
PETROLEUM ASSOCIATION, AND  
WESTERN ENERGY ALLIANCE'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
CROSS-MOTION FOR SUMMARY  
JUDGMENT AND RESPONSE TO  
PLAINTIFFS' MOTIONS FOR  
SUMMARY JUDGMENT**

and

IDAHO FARM BUREAU FEDERATION;  
WYOMING FARM BUREAU; MONTANA  
FARM BUREAU FEDERATION;  
WASHINGTON FARM BUREAU; IDAHO  
STATE SNOWMOBILE ASSOCIATION;  
COLORADO SNOWMOBILE  
ASSOCIATION; COLORADO OFF-  
HIGHWAY VEHICLE COALITION;  
AMERICAN PETROLEUM INSTITUTE;  
MONTANA PETROLEUM  
ASSOCIATION; WESTERN ENERGY  
ALLIANCE; GOVERNOR C.L. "BUTCH"  
OTTER; STATE OF MONTANA;  
MONTANA FISH, WILDLIFE AND  
PARKS; and STATE OF WYOMING,

Defendant-Intervenors.

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## INTRODUCTION

These consolidated actions challenge the decision (the “Final Rule”) of the U.S. Fish & Wildlife Service (“FWS” or “the Service”) to withdraw a proposed rule (the “Proposed Rule”) to list as “threatened” under the Endangered Species Act (“ESA”) the contiguous United States Distinct Population Segment of the North American subpopulation of the wolverine (“wolverine”).<sup>1</sup> Plaintiffs disagree with the Service’s conclusion that the best available science does not support listing, and seek to have this Court substitute its judgment for that of FWS. Plaintiffs offer a lengthy, but ultimately perfunctory, argument that the data underlying the Proposed Rule were the best available and that all subsequent data and analyses were inferior.

These actions, however, are not solely about the deference afforded to agencies making scientific determinations; they assail the scientific and deliberative processes mandated in the ESA and Administrative Procedure Act (“APA”). Plaintiffs suggest that FWS erred by considering public comments questioning the scientific basis for the Proposed Rule, by accepting input from state biologists and conservation experts, and by considering the view of the majority of non-governmental peer reviewers when they explained – with detail and evidence – that the Proposed Rule’s conclusions were unsupportable. To be clear, Plaintiffs argue that FWS should not have considered any scientific data or analyses conflicting with the Proposed Rule

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<sup>1</sup> This Memorandum of Points and Authorities Responds to Plaintiffs in 13-246, 14-247, and 14-250.

because they were not the “best available science.” Had FWS done as Plaintiffs request, however, it would have rendered meaningless the APA’s “Notice and comment” mandate and the ESA’s requirement that decisions be based on the best available science.

Plaintiffs’ contention that the ESA’s “best available science” standard prohibited FWS from considering information conflicting with the Proposed Rule’s conclusions rests on Plaintiffs’ misapprehension that the “best available science” standard eliminated the ESA’s definition of “threatened species.” A “threatened species” is “any species which is likely to become [in danger of extinction] within the foreseeable future throughout all or a significant portion of range.” While Plaintiffs are correct that the ESA does not mandate that future risks be projected with certainty, they ignore that the ESA still requires FWS to consider the likelihood and foreseeability of extinction. The ESA’s allowance for listing in the face of uncertainty does not permit species to be listed based on speculative adverse impacts in the future. Rather, to list a species as threatened, FWS must determine that those impacts are likely to place the species on the brink of extinction within a foreseeable timeframe. The best available science shows that wolverines rebounded from extirpation, that wolverine abundance and range continues to expand, that there are no present threats to the wolverines, and that available habitat has capacity to foster the wolverine’s growth well into the future. While the Service may not insist on



“certainty,” FWS cannot list the wolverine as threatened without identifying some emerging threat so dire that it is “likely” to, not only reverse the wolverine’s increasing abundance, but drive wolverines to the brink of extinction within the foreseeable future.

FWS reasonably concluded it could not project such an outcome. In the absence of legal arguments and scientific critiques, Plaintiffs manufactured intrigue as a basis to set aside the Final Rule. Plaintiffs argue that the Final Rule is invalid because a handful of the Proposed Rule’s drafters continued to support its conclusions after the majority of non-governmental peer reviewers, an independent science panel, state biologists, numerous commenters, and other biologists within the FWS questioned its validity. It is understandable that those who drafted the Proposed Rule would defend it, but that does not make their position the correct one. Their recommendation to persist with the Proposed Rule’s conclusions in the face of the new data and analysis was considered, but ultimately rejected, by biologists and wildlife experts in multiple offices, who understood that the ESA does not permit FWS to become vested in an outcome and that proposals must change course when the facts dictate.

What Plaintiffs frame as a fractious process is simply scientific deliberation. Conflicting views are both common and necessary. That FWS fostered an

atmosphere for debate and welcomed dissent, in fact, suggests that the Service sought and utilized the best available science.

The ESA requires FWS to finalize listing decisions on strict deadlines. It is a “pencils down” moment. The FWS Director may not respond with a shrug when FWS staff express different views. Ultimately, the Director made the decision – as did three Regional Directors and several others– that wolverines are not likely to be at risk of extinction throughout all or a significant portion of their range within the foreseeable future. It was a science-based decision developed through a robust scientific process and it is entitled to deference. Plaintiffs’ assertions to the contrary are meritless.

## **BACKGROUND**

### **Wolverine Population at Issue**

Wolverines range throughout “northern portions of Europe, Asia, and North America. The currently accepted taxonomy classifies wolverines worldwide as a single species, *Gulo gulo*, with two subspecies. Old World wolverines are found in the Nordic countries. . . New World wolverines occur in North America.” PR-00762.

“The bulk of the range of North American wolverines is found in Canada and Alaska . . . .” PR-00764. There are between 15,089 and 18,967 wolverines in western Canada. PR-00765. The number of wolverines in Alaska is unknown, but

there is no evidence “to indicate that wolverine populations have been reduced in numbers or geographic range in Alaska.” PR-00765.

“The southern portion of the species’ range extends into the contiguous United States. . . .” PR-00762-63. FWS considers wolverines in the contiguous United States to be a distinct population segment (“DPS”) of the larger North American subpopulation of the even larger worldwide population of wolverines. 75 Fed. Reg. 78,030 (Dec. 14, 2010). FWS determined that wolverines in the contiguous United States were discrete because they differed from wolverines in Canada in population size, available habitat, and regulatory protections (75 Fed. Reg. at 78,040)—not based on biological distinction. Thus, the contiguous U.S. DPS is delineated only by an international boundary. 75 Fed. Reg. at 78,040.<sup>2</sup>

### **Wolverines Are Increasing in Abundance and Range**

Wolverines were likely extirpated from the contiguous United States in the first half of the twentieth century. PR-00767-68. Beginning in the second half of the twentieth century, however, wolverines began recolonizing the United States from Canada. *Id.*; FR-00022. Wolverine abundance and range have continued to increase the present estimate of 250-300. FR-00016.

These increases in abundance correspond with increases in range. LIT-1411.

Wolverines now occupy the northern Rocky Mountains in Idaho, Montana,

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<sup>2</sup> Energy Industry Interveners disputed this DPS analysis in comments [PI-2713], do not herein challenge this determination, and reserve the right to bring such claims later.

Wyoming, and Oregon and the North Cascades in Washington. PR-00767. Recently, wolverines have dispersed into Colorado, California, and Utah. *Id.*; FR-00019. It is predicted that the wolverine range in the contiguous United States will continue to expand. FR-00016.

Wolverines naturally occur in low densities (one animal per 25-130 mi<sup>2</sup>). PR-00764. Because of this low density, and in spite of increasing abundance and range, FWS has clung to an “effective” population size of 35. FR-00022. The “effective” population size is an estimate of the number of wolverines capable of reproduction. Reproduction capability is a function of both the abundance and proximity of sexually mature wolverines. *Id.* For wolverines, it is also a function of territoriality and dominant males’ tendency to monopolize multiple females. FR-00021.

### **Petitioning/Listing History**

In 2000, several Plaintiffs here filed a petition arguing that wolverines were endangered due to forestry practices and loss of roadless areas– the groups’ policy issues at the time. LIT-4486. Neither proved true. After a series of court actions over whether “substantial evidence” was presented and whether wolverines in the United States constituted a DPS [*See Defenders of Wildlife v. Kempthorne*, 9:05-cv-00099-DWM (D. Mont. Sept. 29, 2006); *See also Defenders of Wildlife v. Kempthorne*, No. CV-08-139-M-DWM (Sept. 30, 2008)], FWS determined that wolverines in the contiguous United States constituted a DPS, that the DPS warranted listing, but that

listing was precluded by higher-priority listings. 75 Fed. Reg. 78,030. FWS based its threat analysis not on the threats Plaintiffs had alleged, but on the surmised impacts of climate change and the species' surmised response to potential climatological impacts decades into the future. 75 Fed. Reg. at 78,042.

In 2011, pursuant to a settlement with two Plaintiffs, *Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377 (EGS), MDL Docket No. 2165 (D.D.C.), FWS agreed to publish a proposed listing or withdraw the 12-month finding by the end of the 2013 fiscal year ("Settlement Agreements"). *Id.* at Dkt. 42-1 p. 6 (July 12, 2011), Dkt. 55 (September 9, 2011), and Dkt. 56 (September 9, 2011); PR-00762.

Even though the Settlement Agreements preserved the Service's authority to propose a wolverine listing *or* determine that listing was no longer warranted, Dr. Sartorius, the Service's wolverine team leader, instructed dozens of staff, scientists, and state personnel that the Settlement Agreements required that FWS "publish a proposed listing rule . . . for wolverines during FY2013." PR-16,342. When questioned, Dr. Sartorius underscored his view of the Settlement Agreements' mandate: "Rest assured that in the current settlement proposal, wolverines are slated for a proposed rule in 2013." PR-16,341. According to Dr. Sartorius, the Service's ability to determine that wolverines did not meet the definition of threatened or

endangered species would not arise until the final rule stage: “A final rule (or withdrawal) [sic] would follow 12 months later.” PR-16,342.

The misconception that the Settlement Agreements compelled FWS to propose to list wolverines – and did not allow it to make a not-warranted finding – was seemingly never questioned. The Service’s talking points on the Settlement Agreements stated that “[t]he CBD agreement commits us to publishing a proposed listing rule in 2013.” PR-16,532. The Service’s “kick-off” call was to plan for “[t]he wolverine proposed listing,” and asked for volunteers to draft a proposed listing: “Listing rule: who is in?” PR-16,328-29. And, shortly after the Settlement Agreements, Dr. Sartorius sought Department of Interior approval to publish a proposed listing based on “habitat and range loss due to climate warming.” PR-16,333. While it is not clear whether the misconceptions about the Settlement Agreements lead to the proposed rule’s erroneous conclusions, it is significant that the Proposed Rule’s drafters thought they were compelled to propose listing even if facts and analysis suggested otherwise.

### **Basis for Proposed Rule**

Consistent with the Service’s perceived mandate, FWS published the proposed “threatened” listing for the wolverine and preliminarily concluded that “[t]he primary threat . . . is from habitat and range loss due to climate warming . . .” PR-00782. “Other threats are minor in comparison to the driving primary threat of climate

change; however, cumulatively, they could become significant when working in concert with climate change if they further suppress an already stressed population.”

*Id.* Stated differently, all other threats, like trapping and genetic diversity, were only considered significant *if viewed cumulatively and* in conjunction with alleged climate change threats.

The Proposed Rule’s alleged climate change threat was based on two related conclusions reached by FWS: (1) that “[d]eep snow that persists into the month of May is essential for wolverine reproduction”; and (2) that areas with “deep snow that persists into May” (May 15<sup>th</sup> to be exact) were projected to shrink by 31 percent by 2045 and 63 percent by 2070. PR-00776.

The Service’s conclusion that deep snow persisting into May is essential to wolverine survival was based on Copeland(2010), a study examining the “bioclimatic envelope” outside of which wolverines were unlikely to survive. LIT-00981. Copeland(2010) posited that the wolverine’s bioclimatic envelope was limited to areas proximate to where successful reproductive dens could be established. LIT-00981. Copeland(2010) isolated a single factor – deep persistent spring snow – as an obligate feature of successful denning and used it to define “suitable habitat.” LIT-00983. “Suitable habitat” (areas with deep persistent spring snow) were identified as areas where snow cover on May 15<sup>th</sup> was visible from satellite images at least once every seven years. LIT-00983. FWS used the maps generated in Copeland(2010) to

establish its bioclimatic envelope of suitable habitat, outside of which wolverine populations could not survive. PR-00768.

FWS then looked to McKelvey(2011), which used the snow model in Copeland(2010) to identify the spatial extent of wolverine habitat (*i.e.*, areas that contained snow at least once every seven years on May 15<sup>th</sup>) and then modeled how climate change might reduce the size and number of areas containing snow at least once every seven years on May 15<sup>th</sup>. LIT-02568. McKelvey(2011) projected that the suitable habitat defined by Copeland(2010) would be reduced by 32 percent by 2045 and 63 percent by 2085. LIT-02568.

Based almost entirely on these two studies, the Proposed Rule concluded that climate change would so significantly reduce and fragment suitable habitat that observed increases in range and abundance would be reversed, and that the wolverine would likely be driven to the brink of extinction in the foreseeable future. PR-00782.

### **New Data and Analysis**

After publishing the Proposed Rule, FWS sought out and obtained new information. FWS submitted the Proposed Rule to seven peer reviewers. PI-101753. Four of the seven peer reviewers were employed by the U.S. Forest Service [PI-2619; PI-1248; PI-1292; PI-489], which manages the vast majority of wolverine habitat. PI-101750. Six of the seven peer reviewers coauthored Copeland(2010) [LIT-981], and four of the seven coauthored McKelvey(2011). LIT-2568.



Even though FWS selected peer reviewers seemingly inclined to approve a proposal reliant on their scholarship, two of the peer reviewers vociferously disagreed with the Proposed Rule's conclusion that projected future climate change impacts were likely to threaten wolverines with extinction. PI-101753. Importantly, neither dissenting peer reviewer disagreed with wolverines' association with cold snowy weather or the potential for climate change to impact those conditions. Instead, they contended that Copeland(2010), which they both coauthored, did not establish or delimit suitable wolverine habitat in the manner suggested in the Proposed Rule. PI-749; PI-964. Copeland(2010) provided an approximation of an underlying bioclimatic factor. PI-964; PI-749. It reflected a correlation between dens and spring snow, but both peer reviewers concluded that this correlation failed to establish an obligate relationship, and further questioned the arbitrary selection of "snow on May 15<sup>th</sup> in at least one of seven years" as a measure of persistent spring snow or biological necessity. PI-749; PI-977. As explained by Dr. Inman:

While I am coauthor on that paper, I have, on further thought and new information, come to the conclusion that this hypothesis [obligate relationship with persistent spring snow] is not based on sound theory, is not actually supported by the observed correlation, and is not proving to be true upon subsequent real-world assessment. . . . Dens under snow may simply be a good place for wolverines to give birth in the location where their distribution is limited by the morphological, demographic, and behavioral adaptations that allow them to adequately compete for food. But this does not mean that dens under snow are the only place that wolverines can successfully reproduce . . . There

is no reason to believe that wolverines are incapable of using non-snow structures as dens. In fact, there is now evidence of wild wolverines successfully using non-snow dens. PI-749.

As Dr. Magoun (also a coauthor of Copeland(2010)) explained:

Although wolverines use snow dens in May in many areas of their distribution, one cannot conclude that they *must* have snow for dens in May, and certainly there need not be “persistent spring snow” as measured by [Copeland(2010)] because . . . wolverines live and den outside this spring snow coverage . . . Use of snow dens in May, and especially to 15 May, is clearly not obligatory, especially where boulders, blowdown, and avalanche debris provide alternate sites for protecting kids.” PI-977

In addition to failing to establish an obligate relationship to snow, Copeland(2010) failed to establish a relationship with reproduction – the sole purpose of denning. As

Dr. Inman explained:

The 15 May snow layer in Copeland et al. 2010 is not actually correlated with wolverine dens in a way that suggests an obligate relationship . . .The date used, 15 May, does not correspond to the period when wolverines would benefit significantly from thermal insulation for young provided by snow at dens. Young are born during February-mid March. PI-750.

Copeland(2010), the two peer reviewers argued, identified a metric that effectively defined where wolverines den - the vast majority of den sites were within the Copeland(2010) snow model - but this metric did not suggest that these areas are the only place wolverines can live. PI-749; PI-977. The Proposed Rule misapprehended this distinction between correlation and dependence, and therefore erroneously

concluded that suitable wolverine habitat was limited to that identified in Copeland(2010). PR-00770. That error was significantly compounded, the peer reviewers explained, because McKelvey(2011) – the study on which FWS concluded that suitable habitat was likely to decline significantly – also relied on Copeland(2010) to define suitable habitat. PI-991; PI-751.

Even though McKelvey(2011) was arguably then the most sophisticated analysis of potential climatological impacts on wolverines, it was calibrated to measure a reduction in the number of areas that contain snow on May 15<sup>th</sup> at least once every seven years– a metric that does not reflect habitat on which wolverines are dependent. PI-991; PI-751. Even accepting McKelvey’s estimated declines of 32 and 63 percent, those are projections of a habitat feature described by Copeland(2010) (snow on May 15<sup>th</sup> at least once every seven years) – not projections of a decline of suitable habitat. PI-991; PI-751.

McKelvey(2011) had other flaws and limitations as well, including many disclaimed within the study [LIT-2581-82], and to Dr. Sartorius. PR-13,432-33. Dr. Inman further noted that, even though McKelvey(2011) attempted to downscale large-scale climate models, it did not scale the analysis to high-elevation north-facing slopes, the only areas in the contiguous U.S. with documented wolverine dens, and the last places likely affected by climate change. PI-751.

The dissenting peer reviewers raised these deficiencies with FWS and with the studies' authors to determine whether the authors understood Copeland(2010) to establish an obligate relationship between wolverines and deep persistent spring snow or whether FWS misinterpreted it to say so. In the following exchange between Dr. Copeland, the lead author of Copeland(2010), and Dr. Magoun, Dr. Copeland struggled to define persistent deep snow from the perspective of depth or duration, but also suggested that the overstated obligate nature of spring snow was the Service's interpretation alone. PI-1387 – PI-1414.

Dr. Magoun: Jeff . . . I don't see the usefulness if [sic] the term "late spring snow" unless it is defined. What to you does "late spring" mean (when does late spring start and end?) and what "snow" in particular are you including in this term (snow cover regardless of depth, a certain snow depth, snow on north slopes, lingering snow patches, snow in 5-6 years out of 7, etc.) Until we have a term defined how can we discuss it [the obligation relationship]? PI-1390.

Dr. Copeland: I see your point. Where I think you have went astray is that you are mixing the 2 papers with the proposed listing rule. All of your questions may be valid and might be considered as a next step for refining our understanding of the wolverine/snow relationship. The bioclimatic envelope and climate papers didn't propose listing. They just investigated hypothesis and offered interpretations. What you should be addressing is the FWS's interpretation of those papers in regards to their decision to warrant listing. You are criticizing two papers of many that were used in their process when what you should be debating is their conclusion that these findings, along with others, warrant listing. You have stirred up this big controversy about the validity of the science when the

issue is the validity of the FWS finding – two very different things.

I personally don't believe listing is warranted, and neither does Kevin McKelvey. I do believe though that the FWS has a compelling argument. THAT is what needs to be debated. Saying we can't discuss this until we know the answers to all the questions you pose suggests we probably can never discuss it. All the paper says is that late spring snow is important for denning, which you seem to agree with. Neither of these papers suggest that means the wolverine needs listed. PI-1389-90.

Along with these insights gained during peer review, FWS obtained new data and analysis from state biologists demonstrating that listing was not warranted. *See e.g.*, PI-2632; PI-2683; PI-2686; PI-2697; PI-2697; PI-2704; PI-2718; PI-2924; PI-2978; PI-3175. Energy Industry Intervener American Petroleum Institute (API) provided detailed comments that McKelvey(2011) used climate models to predict changes on spatial scales and temporal horizons beyond what the model builders claimed could credibly be predicted. PI-2753-54. API further noted that that the Service's reliance on projections of temperature and precipitation interactions on small geographically complex areas so far into the future exceeded what listing agencies claimed could be predicted in other listing decisions. PI-2753-54. FWS also gained a more refined understanding of climate modeling limits through its Regional Director for Science Applications, Dr. Torbit, who conferred with the National Oceanic and Atmospheric Administration (NOAA) about modeling limits and learned that a recent NOAA study modeled the persistence of snowpack at comparable levels in "the higher

elevations of Colorado and the northern Rockies” [FR-5361] – the precise areas McKelvey(2011) deemed to be most at risk from climate change.

FWS also convened a panel of nine scientists with diverse expertise (“Science Panel”). FR-14012. Over two days, FWS conducted a structured review on the relationship between wolverines and snow, and the prospect of habitat loss driving wolverines to the brink of extinction. FR-14014. The panelists generally agreed that wolverines need deep springtime snow for successful denning but expressed a mixture of uncertainty and skepticism about the depth and duration of spring snow and its importance outside of denning. See FR-14012-58.

In spite of the new evidence, a handful of the Proposed Rule’s drafters recommended to Region 6 that the Proposed Rule be finalized. FR-5626. Other field offices within Region 6, however, expressed skepticism about the conclusions reached in the Montana Field Office. PI-1556-59. The directors of the two other Regional Offices that manage wolverine habitat recommended that the Proposed Rule be withdrawn. FR-5602; FR-5550. Regional Director Walsh, “a trained wildlife biologist [with] extensive experience in ESA” who was also active and involved in the wolverine listing process [PI-101503], provided a detailed written explanation of why she did not share the conclusions of the Proposed Rule’s drafters, and that she was recommending withdrawal of the Proposed Rule because FWS could not credibly conclude that wolverines would be at risk of extinction throughout all or a

significant portion of range in the foreseeable future. FR-5357. After Regional Director Walsh sent her recommendation and those of two other regional directors to the FWS Director, both the head of the Montana Field Office and the Assistant Regional Director who recommended listing informed the FWS Director that Regional Director Walsh's conclusions were reasonable and objective, even if they differed from their own. PI-101503.

The detailed recommendation provided by Regional Director Walsh was accepted by the FWS Director and became the basis for the Service's decision to withdraw its Proposed Rule. The Final Rule responded to each comment, incorporated and explained all new data and analysis, and provided detailed justifications for the final determination. FR-00002 *et. seq.* Yet, Plaintiffs argue that the determination, and the scientific process on which it was made, are entitled to no deference. *See* Center for Biological Diversity and Defenders of Wildlife's Motion for Summary Judgment ("CBD/DOW's MSJ") at 30.

### **STANDARD OF REVIEW**

Agency action pursuant to the ESA is governed by the APA, 5 U.S.C. §706(2)(A). *See Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. Cal. 2012). Under § 706, a court may set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Alliance for the Wild Rockies v. Kruger*,

CV-12-150-M-DLC (D. Mont. April 23, 2014). An agency's decision is arbitrary and capricious if it:

has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision 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.

*O'Keeffe's Inc. v. United States Consumer Prod. Safety Comm'n*, 92 F.3d 940, 942 (9th Cir 1996), quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). “This standard of review is highly deferential.” *Friends of Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986).

The deference afforded agencies like FWS is not diminished because the agency changed course after a proposed rule or because that course change was internally debated. As the Supreme Court recently affirmed:

With regard to the various statements made by the involved agencies' regional offices during the early stages of consideration, the only “inconsistency” respondents can point to is the fact that the agencies changed their minds—something that, as long as the proper procedures were followed, they were fully entitled to do. The federal courts ordinarily are empowered to review only an agency's final action, see 5 U.S.C. § 704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.



*Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 127 S. Ct. 2518, 2530 (2007). This Circuit similarly found, in a case where petitioners alleged the Service's final finding differed from a "draft finding" without citing any new data, that "the Service may change its mind after internal deliberation. . . . The only question before us is whether the Service, in reaching its ultimate finding, '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, 1145 (9th Cir. 2007) (citations omitted). It is up to FWS to weigh the evidence. *See 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.").

Because courts judge the rationality of an agency's ultimate finding, and do not weigh the relative merits of an agencies' final decision against an interim finding or proposed rule, "an agency does not have a burden to explain a change in position from a proposed rule to the final rule, and that lack of an explanation for the change is not in itself evidence of arbitrariness." *Fed'n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1163 (N.D. Cal. 2000). Indeed, a "paramount purpose of the APA is to

make an agency publish its preliminary rule and then to rethink that position, in light of the comments and additional information received.” *Id.* at 1162 (citation omitted).

## **ARGUMENT**

### **A. The ESA**

The ESA’s high standard for listing is embedded within the ESA’s definitions of endangered and threatened species. The ESA defines an “endangered” species as one presently in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). A “threatened” species is one that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(20).

FWS interprets the phrase “in danger of extinction” as “currently on the brink of extinction,” and courts have upheld this interpretation. *In re Polar Bear Endangered Species Act Listing & 4(d) Litig*, 794 F. Supp. 2d 65, 89 (D.D.C. 2011), *aff’d sub. nom. In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig. – MDL No. 1993*, 709 F.3d 1 (D.C. Cir. 2013). Accordingly, a “threatened species” is one which is likely to be placed on the brink of extinction within the foreseeable future throughout all or a significant portion of its range. In short, by definition, FWS is statutorily prohibited from listing a species as threatened absent some demonstration that future extinction throughout all or a significant portion of its range is both *likely and foreseeable*.

When evaluating the likelihood and foreseeability of extinction, the Service must utilize “the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). While this standard allows consideration of uncertain information, it does not supplant the ESA’s definitional prohibition on listing as threatened any species for which extinction is not likely or foreseeable. Courts have universally held that the decision to list a species may not be based on speculation or an intent to err on the side of conservation:

Under Section 4, the default position for all species is that they are not protected under the ESA. A species receives the protections of the ESA only when it is added to the list of threatened species after an affirmative determination that it is “likely to become endangered within the foreseeable future.” Although an agency must still use the best available science to make that determination, *Conner* [*v. Burford*, 848 F.2d 1441 (9th Cir. 1988)] cannot be read to require an agency to “give the benefit of the doubt to the species” under Section 4 if the data is uncertain or inconclusive. Such a reading would require listing a species as threatened if there is any possibility of it becoming endangered in the foreseeable future. This would result in all or nearly all species being listed as threatened.

*Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see also Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (finding the “benefit of the doubt” concept does not apply in the listing context); *Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (ESA requires a determination as to the likelihood—rather than the mere prospect—that a species will or will not become endangered in the foreseeable future);

*Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000) (“The ESA cannot be administered on the basis of speculation or surmise.”).

1. Foreseeable Future

The foreseeable future extends only so far as the Service “can explain reliance on the data to formulate a reliable prediction.” FR-05836 (Office of the Solicitor, U.S. Department of the Interior, *The Meaning of “Foreseeable Future” in Section 3(20) of the Endangered Species Act* at 8) (“M-Opinion”).

What must be avoided is reliance on assumption, speculation, or preconception. Thus, for a particular species, the Secretary may conclude, based on the extent or nature of data currently available, that a trend has only a degree or period of reliability, and to extrapolate that trend beyond that point would constitute speculation.

FR-05836. Evaluating the foreseeable future requires analysis of not only “the foreseeability of threats, but also ... the foreseeability of the impact of the threats on the species.” FR-05838. The M-Opinion explained that “in each case the Secretary must be able to make reliable predictions about the future. The further into the future that is being considered, the greater the burden to explain how the future remains foreseeable for the period being assessed.” FR-05838.

2. Significant Portion of Range<sup>3</sup>

The ESA defines a threatened species as one “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20). FWS defines a species’ “range” as the geographical area where that species is found at the time of the listing. 79 Fed. Reg. 37578, 37609 (July 1, 2014). FWS further defines the term “significant portion” as the part of that range whose contribution to the viability of the species is so important that, without the individuals in it, the species as a whole would be in danger of extinction or likely to become so in the foreseeable future. *Id.* Stated differently, in order for adverse impacts in a portion of a species’ range to warrant listing, the viability of the entire species must be at risk.

**B. The Service Reasonably Concluded that Climate Change is Not Likely to Place Wolverines on the Brink of Extinction in the Foreseeable Future**

Plaintiffs urge this Court to afford no deference to the Service’s determination that future climate impacts are not likely to place wolverines on the brink of extinction. *See* CBD/DOW MSJ at 6; WildEarth Guardians’ Motion for Summary Judgment (“WEG’s MSJ”) at 9. Plaintiffs argue that FWS erred in failing to agree with Plaintiffs on three essential prerequisites to determining that climate change will

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<sup>3</sup> Both Plaintiff DOW and Plaintiff WEG challenge the application of the Significant Portion of Range Rule in the Final Rule. Plaintiff WEG also challenges the Significant Portion of Range Rule itself. Energy Industry Interveners take no position on the Significant Portion of Range Rule and discuss the phrase “significant portion of range” only as applied to the challenged decision.

threaten wolverines with extinction: (1) that a specific, yet undefined, level of persistent spring snow is essential to wolverine survival; (2) that climate change will reduce this springtime snow to such an extent that habitat will become unsuitable for wolverines; and, (3) that so little suitable habitat will remain in the foreseeable future that wolverines will be driven to the brink of extinction.

Plaintiffs argue that the Service's analysis of these elements is entitled to no deference because: (1) the Service's ability to consider "uncertain" information required it to ignore the ESA's requirement that threatened species only be listed when risk of extinction is *likely* and *foreseeable*; (2) the Service's failure to adopt Plaintiffs' conclusions with respect to certain studies constituted a failure, under the "best available science" standard, to consider those studies at all; (3) the Service's consideration of information with which Plaintiffs did not agree violated the "best available science" standard; and, (4) a minority of FWS staff, a minority of the non-governmental peer reviewers, and some commenters share Plaintiffs' conclusions. Neither the ESA nor the APA allow the Service's determination to be set aside on such grounds.

1. The Service Applied the Correct Standard

Plaintiffs allege that the Final Rule violated the ESA by requiring potential threats to be established conclusively and with certainty. WEG MSJ at Sec. B.1.; CBD/DOW MSJ at III.A.4. FWS required no such certainty. FWS merely observed the ESA's requirement limiting listing status to species likely to become at risk of

extinction within the foreseeable future. FR-00023. While FWS may not mandate conclusive evidence as a prerequisite to listing, the ESA requires FWS to consider likelihood and foreseeability and, in fact, prohibits the Service from listing species where extinction risks are not likely or where those risks are too remote to be foreseeable. 16 U.S.C. § 1532(20); *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007).

Plaintiffs attempt to read these analytical requirements and listing limitations out of the ESA by conflating the statute's requirement that FWS list species where threats of extinction are likely and foreseeable (but not necessarily certain) with the ESA's requirement that FWS utilize "the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). The "best available science" standard may prohibit FWS from dismissing data in some instances that are inconclusive, incomplete, or uncertain, but it does not mandate that FWS list species where the threats of extinction are unlikely or unforeseeable. *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see also Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (the "benefit of the doubt" concept does not apply in the Section 4 listing context); *Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (ESA requires a determination as to the likelihood—rather than the mere prospect—that a species will or will not become endangered in the foreseeable future); *Federation of Fly Fishers v.*

*Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000) (“The ESA cannot be administered on the basis of speculation or surmise.”).

FWS did not withdraw its Proposed Rule based on an evidentiary threshold that required certainty or conclusiveness. Instead, the Service considered all available information identified by Plaintiffs regardless of certainty and utilized the “likelihood” and “foreseeability” thresholds mandated by the ESA in making its determination:

Based on our review of the best available scientific and commercial information, we find that the current and future factors affecting the wolverine are not of sufficient imminence, intensity, or magnitude to indicate that the wolverine is in danger of extinction (endangered), or likely to become so within the foreseeable future (threatened), throughout all or a significant portion of its range. Therefore, the wolverine does not meet the definition of an endangered or threatened species . . .

FR-00023. That determination is entitled to deference.

2. The Final Rule Was Based on the Best Science Available

After reading into the ESA’s definition of threatened species the “best available science” standard’s requirement that FWS consider data even if it is not conclusive or definitive, Plaintiff WEG then urges abandonment of the “best available science” standard.. *See* WEG’s MSJ at Sec. B.2, B.5. Specifically, Plaintiff WEG argues that FWS violated the “best available science” standard because “*Every* published, peer-reviewed analysis of climate change impacts on wolverine supports the rationale for listing” and “because there is no new, peer reviewed paper, study, or



data that contradicts McKelvey *et al.* (2011).” WEG’s MSJ at 16; 24. Not only are these statements factually inaccurate, a close reading reveals that Plaintiff WEG does not understand the “best available science” standard.

Implicit within this argument is Plaintiff WEG’s belief that the Service’s analysis in its Final Rule could not deviate from its analysis in the Proposed Rule unless it identified a study of the potential impact of climate change on wolverines that: (1) was published or newly identified after publication of the Proposed Rule; (2) was peer reviewed; and (3) contradicted McKelvey *et al.* (2011). This lofty standard, however, exists only in Plaintiffs’ mind.

As Plaintiffs are quick to cite elsewhere, the ESA does not allow FWS to ignore best available information based on whether it was published, when it was published, or if it was peer-reviewed. *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 680 (D. D.C. 1997) (the “best available data” standard requires far less than “conclusive evidence”); *Sw. Ctr. For Biological Diversity v. Norton*, No. CIV.A.98-934, 2002 WL 1733618, at \*9 (D.D.C. July 29, 2002) (“[E]vidence might strongly suggest that a species is not endangered or threatened, yet still be considered inconclusive or uncertain from a scientist's perspective.”). According to Plaintiff WEG, however, the best available science standard requires FWS to ignore the NOAA Study on projected snow conditions on the Rocky Mountains – which contradicted McKelvey *et al.* (2011) – because it was not a study of climate impacts

*on wolverines*. WEG's MSJ at 26. Plaintiff WEG urges this Court similarly ignore the analysis of FWS's Regional Director for Science Applications because his analysis was neither published nor peer-reviewed.

Plaintiff WEG further argues that FWS violated the best available science standard by considering the views of two coauthors of Copeland(2010) suggesting that Copeland(2010) was improperly used in McKelvey(2011) as the measure of suitable habitat potentially lost. Nor, according to Plaintiff WEG, could FWS consider recent evidence of expanding range and abundance or information from state biologists showing that wolverines den at higher altitudes and only on north-facing slopes, that McKelvey(2011) did not consider these features, and that these areas were likely to be the last impacted by climate change. WEG's MSJ at 26. Oddly, Plaintiff WEG further argues that FWS should not have considered data about wolverines' north-facing habitat preferences as part of its analysis because:

***it is not possible to evaluate climate impacts at this small scale*** 'due to limitations in existing global climate models and to our limited understanding of the species' tolerance to shallow and/or more patchy snow.'

WEG's MSJ at 27 (citing Squires (PI-1254)(emphasis added). If existing model limitations make small-scale habitat projections impossible, than McKelvey(2011) cannot credibly predict habitat loss. If small-scale projections are possible, than McKelvey(2011) overlooked a key habitat feature. Plaintiff WEG cannot dismiss

model limitations when applied to McKelvey(2011) and then summon them to deflect critiques of the same.

Plaintiff WEG's argument that the best available science standard precluded FWS from considering relevant information is baseless. The ESA does not just allow for consideration – it mandates it.

3. The Service's Conclusions on Prospective Climate Impacts Were Rational, Supported, and Explained

Plaintiffs' arguments that FWS violated the ESA and APA by determining that potential climate impacts would not likely place wolverines at risk of extinction within the foreseeable future all stem from the fact that FWS proposed to conclude otherwise 18 months earlier and that five drafters of the Proposed Rule supported listing. DOW MSJ at; WEG MSJ at 1. FWS, however, was compelled to update its analysis in response to new facts and analysis, and it did so in a transparent manner, with detailed explanation.

Snow – Contrary to Plaintiffs' arguments, the Final Rule did not dispute that wolverines are associated with snow. FWS agreed that “[t]here is strong support for the existence of an obligate relationship between wolverines and deep spring snow at the den site.” FR-00019. FWS did not agree, however, that deep snow was necessary at the home range or species' range scales. FR-00013. Drs. Inman and Magoun shared this view [PI-811; PI-1002], an analysis of the biologists' responses

at the Science Panel suggested concurrence FR-14021, and three different FWS regional offices agreed. FR-5362.

Regarding the obligate relationship at the denning scale, FWS concluded that Copeland(2010) effectively described wolverine habitat and predicted current wolverine distribution, but that it could not conclude that the habitat defined by Copeland(2010) (containing snow on May 15<sup>th</sup> in at least once every seven years) reflected the only habitat suitable for denning, and therefore wolverine survival. FR-00014. FWS did not find any relationship between denning success and the metric for snow persistence in Copeland(2010) for several reasons: Copeland(2010) was defined based on snow persistence that was infrequent (as little as 14% of years); Copeland(2010) did not capture known denning sites with even less frequency (including those recognized in Copeland(2010) and those identified by state biologists); and because May 15<sup>th</sup> was an arbitrary measure altogether as wolverines' reproduction typically occurs in February and denning needs conclude in April. FR-00014. For this reason, FWS concluded that Copeland(2010) did not delineate all habitat suitable to wolverines or provide a means by which denning success (and therefore wolverine survival) could be measured. *Id.* Again, these conclusions were shared by Drs. Inman and Magoun [PI-749; PI-977], several state biologists [PI-000348-75; PI-002683-85; PI-002686-88], and each of the three FWS regional offices. FR-05362.

Because Copeland(2010) did not provide a measure of denning success, FWS could not identify why wolverines select denning sites based on snow conditions. FR-00014. Without understanding why wolverines den in areas with the deepest snow, FWS could not conclude that any potential future shortage of areas with the deepest snow would adversely impact wolverines or that denning would be less successful in snow that was, to some degree, less deep or persistent. FR-00014. This inquiry – deemed “less important” by the Proposed Rule’s drafters – was viewed as essential by all three regional offices [FR-5362], and was based on analysis in Copeland(2010), and analyses provided by Drs. Inman, Magoun, and several state biologists that denning is influenced by numerous factors other than snow. FR-5362; FR-813; FR-965. While Plaintiffs make much of the Service’s interest the “precise mechanism” [WEG MSJ at 1], or the “causal relationship” between wolverines and spring snow, [CBD/DOW MSJ at 27], FWS was merely noting that we do not know the wolverine’s biological response to climate change. In other words, unless FWS can explain how spring snow helps wolverines, it cannot credibly conclude that wolverines would be hurt by a potential reduction in spring snow.

Projected Declines in Persistent Spring Snow – While FWS concurred with Plaintiffs and the Proposed Rule’s authors that McKelvey(2011) provided a sophisticated projection of climate change impacts on wolverines, it measured potential impacts to habitat as defined in Copeland(2010). Because there is no

evidence that loss of areas containing snow on May 15<sup>th</sup> at least once every seven years adversely impacts wolverines, projected declines could not credibly be interpreted as projected threats.

Even assuming that fewer areas containing snow on May 15<sup>th</sup> at least once every seven years would adversely impact wolverines, FWS concluded that McKelvey(2011) did not accurately project the decline of that habitat feature. FR-5362. FWS reached this conclusion through its climate change expert, Dr. Torbit, his discussions with an expert at NOAA, the NOAA Study, and an analysis conducted by experts at the Idaho Department of Fish and Game. FR-5360-61. All three regional offices concurred with the conclusion. FR-00149-152; FR-05573-74; FR-05362.

Even assuming that areas containing snow on May 15<sup>th</sup> at least one of seven years were essential to wolverines, and that McKelvey(2011) was able to project the decline of that habitat feature at the relevant scale, FWS could not credibly conclude that wolverines would be adversely impacted unless it could show loss of the essential habitat feature on a scale that would constrain denning opportunities or otherwise result in an adverse biological response. To that end, FWS evaluated the carrying capacity of wolverine habitat against the projected declines in McKelvey(2011). FR-00015. FWS concluded that current habitat had the capacity to hold at least twice as many wolverines, that McKelvey(2011) therefore does not identify potential habitat constraint occurring until the end of the 21<sup>st</sup> century, and

that wolverines' response to that constraint (to the extent it existed) would not occur until well after the turn of the century – well beyond what FWS deemed foreseeable. FR-00015-16.

FWS similarly found that projected climate change impacts would not make suitable wolverine habitat too distant or isolated from other areas inhabited by wolverines. FWS based its conclusion on evidence that wolverines were capable of long dispersals across habitat unsuitable for denning and on McKelvey's projections of the persistence of large habitat patches less prone to genetic depression. FR-00015.

Again, these conclusions were widely held, well supported, and fully explained. They are not arbitrary and capricious, contrary to the evidence before FWS, or implausible. Nor do these conclusions become so because FWS earlier proposed a different finding or because a minority within FWS continued to support their prior conclusion. This is precisely the type of scientific determination for which FWS is owed deference.

**C. FWS Reasonably Concluded that Non-Climate Threats Do Not Place Wolverines On The Brink of Extinction Now or in the Foreseeable Future**

In the Proposed Rule, the primary threat was alleged as “habitat and range loss due to climate warming . . .” PR-00782. “Other threats are minor in comparison to the driving primary threat of climate change; however, cumulatively, they could become significant when working in concert with climate change if they further

suppress an already stressed population.” *Id.* In other words, all other threats, like trapping and genetic diversity, were considered significant *only if* cumulative and only in conjunction with alleged climate threats. Therefore, when FWS subsequently concluded that wolverines were not threatened by potential climate impacts, it removed a key prerequisite to its analysis of cumulative secondary threats. Nonetheless, the Final Rule provided detailed analysis of the threats (or absence thereof) posed by trapping, population size, and other alleged factors individually *and* cumulatively. FR-00019-23.

Plaintiff WEG’s argument that FWS violated the ESA by not “analyzing the total combined impact and without addressing or correctly interpreting the best available science on the collective threat,” is therefore factually inaccurate. Plaintiff WEG’s MSJ at 32. FWS analyzed *each threat* identified by Plaintiffs *individually and cumulatively*. Plaintiffs simply disagree with the outcome of the Service’s analysis. Neither the ESA nor the APA allow a determination to be set aside simply because Plaintiffs would have reached different conclusions

1. Wolverines Are Not Threatened by Their Population Size

Plaintiffs argue that FWS erroneously concluded that wolverines were not threatened by their population size based because their “effective” population size (35) was lower than the target effective population size (50). DOW MSJ at II; WEG MSJ at C. Importantly, Plaintiffs do not argue that FWS failed to consider these estimates. It did. FR-00021-22.



The risk posed from small effective populations is inbreeding depression. LIT-385. “Three conditions must hold for inbreeding depression to reduce the viability of populations: [1] Inbreeding must occur. [2] Inbreeding depression must occur. [3] the traits affected by inbreeding depression must reduce population viability.” *Id.* FWS examined each of these factors. FR-00021-22.

Inbreeding occurs in all small populations . . . “and some deleterious recessive alleles will be present in all populations . . .” LIT-385. For inbreeding to negatively affect populations, however, it must “affect traits that influence population viability.” *Id.* FWS concluded that wolverine inbreeding was occurring, but that there were no signs of inbreeding depression or that inbreeding depression was affecting viability. *Id.*

Plaintiffs identify no effects either. Instead, Plaintiffs identify “a general rule-of-thumb” that populations smaller than 50 will experience inbreeding depression in the short-term and that populations of less than 500 will experience inbreeding depression in the long-term. DOW MSJ at II; WEG MSJ at C. While FWS also examined this “rule-of-thumb,” it recognized that a uniform genetic “warning light” is less applicable to wolverines, given the tendency of a few male wolverines’ tendency to dominate reproduction regardless of population size. FR-00021. Moreover, FWS understood that “it has yet to be shown that inbreeding depression caused any wild populations to decline” [LIT-385], and that, absent evidence that

inbreeding depression was occurring *and* affecting traits that influence viability, it could not conclude that inbreeding depression would drive wolverines to the brink of extinction within the foreseeable future. FR-00021.

Further, FWS had reason to question the effective population estimate of 35. That estimate comes from Schwartz(2009), which used the disputed Copeland(2010) “bioclimatic envelope” to determine where wolverine territories overlap to identify reproduction opportunities. LIT-3163. Further, the study area in Schwartz(2009) is a subset of the habitat identified in Copeland(2010). *Id.* Even if Schwartz(2009) reasonably estimated effective population size in 2009, FWS recognized that effective populations are not static, and that in the ensuing five years – a period of presumed population increases - the effective population likely changed. FR-00021.

Finally, Plaintiff DOW argued that, even if wolverines are not threatened by inbreeding depression now, they remain at risk from long-term genetic depression because limited habitat availability restricts wolverines’ ability to meet long-term effective population targets. DOW MSJ at 14-15. Plaintiff DOW supports this argument with their own calculation seemingly applying a ratio from Schwartz(2009) to the population capacity for the Northern Rockies identified by Inman(2013). *Id.* But no basis exists for this comparison. Schwartz(2009) did not extrapolate effective population *from* total population. It used genetic data to estimate effective population *in lieu of* population estimates. LIT-3163. There is no relationship between these

numbers. They are different estimates of different population aspects, derived from different data.

FWS analyzed the potential risks from small population size, reasonably concluded that there was no evidence of genetic depression, that any evidence of inbreeding was the consequence of wolverines being recently “founded” by a few individuals, and that increasing wolverine abundance would reduce the risk of inbreeding depression. Plaintiffs assertion to the contrary is meritless.

2. Wolverines Are Not Threatened by Trapping

FWS reasonably concluded that trapping does not threaten wolverines. Much of the wolverine’s recolonization and increased abundance occurred under less restrictive harvest regulations than are currently in place. FR-00020. Montana is the only state that permits wolverine trapping, and it is strictly controlled to prevent concentrated trapping in any single area or in areas with small populations. *Id.* From 2008-2012, the average wolverine harvest was 3 wolverines per year. *Id.* Well-regulated, science-based trapping regulations can actually aid genetic diversification by removing alpha males dominating regional reproduction. PI-836.

Plaintiffs DOW and Plaintiff WEG both insist that trapping is a threat, but offer scant analytical support. Plaintiffs DOW claim “FWS arbitrarily discounted the impact of recreational wolverine trapping in Montana” for two reasons: (1) “because FWS’s dismissal of the climate threat was arbitrary, this finding too was irrational”,

and (2) “because there already are too few wolverines to sustain a genetically viable population, none can afford to be lost to recreational trapping. FWS offered no rational response to this issue.” Plaintiffs DOW MSJ at 36-37 As discussed above, however, FWS reasonably concluded that climate change is not likely to place wolverines on the brink of extinction in the foreseeable future, and Contrary to Plaintiffs’ DOW second contention, FWS did address this issue. FR-00011 (“Targeted trapping of wolverines only occurs in Montana, and occurs at a low level that is compatible with the current population level. Montana is only a part of the DPS. Therefore, trapping is not a threat to the entire DPS.”) *Id.* at 37.

**D. Wolverines Are Not Threatened by the Inadequacy of Regulatory Mechanisms**

Plaintiff WEG argues that FWS violated the ESA by not evaluating the adequacy of the Clean Air Act (CAA) to address climate change. WEG MSJ at 33. As noted in the Final Rule, however, the ESA does not mandate evaluation of the adequacy of regulatory mechanisms to address conditions that are not threats. FR-00008-00009, FR-00021.

Indeed, it is impossible to evaluate the adequacy of a regulation without a projected harm against which to measure the protectiveness of the regulation. To suggest that FWS must address the adequacy of regulations regardless of whether those regulations govern activity that threatens the species is illogical, inconsistent

with the ESA, and would result in a boundless inquiry offering little to no insight into the status of the species.

Plaintiff WEG's argument otherwise is that FWS must evaluate the CAA, various trapping regulations, and Forest Service protections that cover 94 percent of all occupied habitat simply because those regulations presently exist. WEG MSJ at 33. This interpretation reads out of the ESA's listing criteria the full purpose of the listing criteria – to evaluate threats. It is meritless.

**E. Wolverines Are Not Threatened Throughout a Significant Portion of Their Range**

Both Plaintiff WEG and Plaintiffs DOW argue that, even if FWS properly concluded that wolverines are not threatened throughout all their range, it should have found them threatened throughout a significant portion.

While Energy Industry Intervenors do not defend the Service's Significant Portion of Range Rule, we readily point out the fallacy of Plaintiffs' argument. Plaintiffs identify the Sierra Nevada and Southern Rockies as significant portions of the wolverine's range, and allege that the species is threatened in these "significant portions" because surveys have verified only a single male in each. WEG MSJ at 41; CBD MSJ at 39.

While the last of a species in an area could be at risk of extinction, these seemingly solitary males are not the last of their species – they are the first. The

wolverine in the Sierra Nevada range is the first verified since 1922. PR-767. The wolverine in Colorado is the first verified since 1919. PR-767.

These expansions into new and long-extirpated areas, while not yet sufficient to signify establishment of new populations, are examples of a species increasing in both abundance and range. LIT-1411; LIT 401; LIT-1537. Wolverines require large home ranges and are very territorial. PR-00764; FR-00010, FR-00021. Increased abundance in an area occupied (and defended) by wolverines necessitates migration to new areas. LIT-1411; LIT-1526.

In a remarkably short time (given wolverines' naturally low densities and low rate of reproduction [PR-00762, PR-00764]), wolverines have grown in abundance from zero to between 200-350. This rapid repopulation of the continental United States is likely the product of the same excursion and establishment pattern now being observed (in its earliest stages) in California and Colorado. Expansion of wolverines into long-extirpated regions is a positive sign - an indicator of increased abundance.

Plaintiffs, therefore argue wolverines should be listed – not in spite of, but because of – its increasing abundance and expansion into new areas. Such an interpretation cannot be rectified with the ESA. Congress enacted the ESA to conserve endangered and threatened species and the ecosystems on which they rely. 16 U.S. C. § 1531(b). There is no credible reading of the ESA that requires FWS to

list species based on increasing abundance and expanding range. Plaintiffs' arguments to the contrary are meritless.

**CONCLUSION**

For the forgoing reasons, Energy Industry Intervenors respectfully request that this Court grant their Cross-Motion for Summary Judgment, and deny Plaintiffs' Motions for Summary Judgment.

DATED this 17th day of August, 2015.

s/ Randy J. Cox \_\_\_\_\_  
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