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

DEFENDERS OF WILDLIFE, et al.,	)	
	)	
Plaintiffs,	)	Case No. 9:14-cv-246-DLC
	)	
v.	)	(Consolidated with Case Nos.
	)	9:14-cv-247-DLC and

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

Defendants,

and

IDAHO FARM BUREAU  
FEDERATION, et al.,

\_\_\_\_\_  
Defendant-Intervenors.

) 9:14-cv-250-DLC)  
)  
)  
) **PLAINTIFFS’ CONSOLIDATED**  
) **RESPONSE TO DEFENDANT-**  
) **INTERVENORS’ MOTIONS FOR**  
) **SUMMARY JUDGMENT [Dkt.#75,**  
) **78, 81] AND REPLY IN SUPPORT**  
) **OF PLAINTIFFS’ MOTION FOR**  
) **SUMMARY JUDGMENT [Dkt.#62]**  
)  
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## GLOSSARY OF ABBREVIATIONS

API	Defendant-Intervenors American Petroleum Institute, et al.
API Mem.	Defendant-Intervenors American Petroleum Institute, et al.'s Memorandum of Points and Authorities in Support of Cross-Motion for Summary Judgment and Response to Plaintiffs' Motions for Summary Judgment [Dkt.#82]
AR	Administrative Record; Plaintiffs cite the record by document category and page number
DPS	Distinct Population Segment
ESA	Endangered Species Act
Farm Bureau	Defendant-Intervenors Idaho Farm Bureau Federation, et al.
Farm Bureau Mem.	Non-Governmental Defendant-Intervenors' Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment [Dkt.#77]
Fed. Mem.	Brief in Support of Federal Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment [Dkt.#73]
FWS	U.S. Fish and Wildlife Service
Plaintiffs' Mem.	Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment [Dkt.#63]
Plaintiffs' Response-Reply	Plaintiffs' Response to Federal Defendants' Motion for Summary Judgment [Dkt.#72] and Reply in Support of Plaintiffs' Motion for Summary Judgment [Dkt.#62] [Dkt.#86]

State Mem.

Defendant-Intervenor States of Idaho, Montana, and Wyoming's Memorandum in Support of Combined Cross-Motion for Summary Judgment and Response to Conservation Organizations' Motions for Summary Judgment [Dkt.#79]

The summary-judgment briefs submitted by Defendant-Intervenors Idaho Gov. C.L. “Butch” Otter, et al. [Dkt.#79], American Petroleum Institute, et al. [Dkt.#82], and Idaho Farm Bureau Federation, et al. [Dkt.#77] fail to salvage the U.S. Fish and Wildlife Service’s unlawful withdrawal of a proposal to list the lower-48 distinct population segment of the wolverine as an endangered or threatened species under the Endangered Species Act, 16 U.S.C. § 1533.

**I. INTERVENORS’ ARGUMENTS CONCERNING THE GENETIC THREAT TO THE WOLVERINE DPS ARE MERITLESS**

In addressing the genetic threat to the lower-48 wolverine DPS arising from its extremely small and fragmented population, neither state intervenors nor API attempt to defend FWS’s speculative assertion that “genetic factors are not a threat to the DPS due to increasing populations.” AR:FR-8; see State Mem. at 24-26; API Mem. at 34-37. Instead, they offer a series of alternative justifications for FWS’s determination, all of which are meritless.

First, state intervenors argue that, given alleged “uncertainty” in the applicable science, FWS properly “opted to give more weight to ‘on the ground’ evidence”—i.e., FWS’s claim that “no adverse effects” of the DPS’s genetic impoverishment have been documented “[t]o date.” State Mem. at 25; AR:FR-22. However, there was nothing uncertain about the published, peer-reviewed science documenting an effective population size of 35 for wolverines in the northern Rocky Mountains—the largest population in the DPS—which is “below what is



thought necessary for short-term maintenance of genetic diversity.” AR:FR-22 (emphasis added). Demanding further proof of adverse effects in the form of “‘on the ground’ evidence,” State Mem. at 25—instead of relying on the scientifically established, “empirically based” threshold for minimum effective population size, AR:FR-22—defies the ESA’s best-available-science standard, 16 U.S.C. § 1533(b)(1)(A), and threatens to doom the rare and hard-to-study wolverine, which is “seldom observed even when radio collared,” AR:FR-5618.

In any event, in addition to observing the absence of documented “adverse effects” to date, FWS determined that wolverine “populations are low enough that they could be vulnerable to loss of genetic diversity in the future.” AR:FR-22 (emphasis added). FWS’s sole rationale for dismissing that foreseeable threat was to rely on an unsupported and speculative finding of “increasing populations,” AR:FR-8, that cannot sustain the challenged decision, see Plaintiffs’ Mem. at 11-15; Plaintiffs’ Response-Reply at 1-4; Tucson Herpetological Soc’y v. Salazar, 566 F.3d 870, 878-80 (9th Cir. 2009) (invalidating ESA listing withdrawal decision that similarly relied on “inconclusive” and “sparse data” for key species population-status determination) (quotations and citations omitted).

For its part, API offers only a series of erroneous assertions. API attempts to downplay the threat of genetic inbreeding, asserting that it has never “‘caused any wild populations to decline.’” API Mem. at 35 (quoting AR:LIT-385). However,

the cited source for this assertion, Allendorf & Luikart (2007), offers the quoted language only to describe an assertion advanced by “[s]ome authors” that was subsequently disproven by field research. See AR:LIT-385, 386-87 (describing study of prairie chickens that determined that “the decline of birds in Illinois was at least partially due to inbreeding depression”). Contrary to API’s suggestion, inbreeding depression exacerbated by small population size poses a recognized threat to species survival that may warrant listing under the ESA. See, e.g., Final Rule, Endangered and Threatened Wildlife and Plants; Endangered Status for the Mexican Wolf, 80 Fed. Reg. 2488, 2509 (Jan. 16, 2015) (FWS final rule listing Mexican wolf as endangered under ESA due to threats including “small population size, ... inbreeding, [and] loss of heterozygosity and adaptive potential”).

API next claims FWS recognized that the best available science requiring a minimum effective population of 50 to ensure even short-term maintenance of genetic diversity “is less applicable to wolverines, given the tendency of a few male wolverines ... to dominate reproduction.” API Mem. at 35. To the contrary, FWS recognized that “this monopolization is a natural feature of wolverine life-history strategy, [but] it can lead to lower effective population size and reduce population viability by reducing genetic diversity.” AR:FR-21 (emphasis added); see id. 22 (applying minimum 50 effective population threshold to wolverine

DPS). Thus, FWS recognized that an effective population below 50 reduces population viability for wolverines as with other species.<sup>1</sup>

API also wrongly claims that “FWS had reason to question the effective population estimate of 35” because it purportedly used the Copeland, et al. (2010) study “to determine where wolverine territories overlap to identify reproduction opportunities.” API Mem. at 36. FWS itself offered no such critique and that alone renders API’s argument irrelevant because “a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.” SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

Regardless, API’s argument is spurious: Putting aside for the moment API’s unfounded attack on Copeland, et al. (2010), which is rebutted infra, the fact is that the cited study, Schwartz, et al. (2009), derived its effective population calculation from genetic analysis of wolverine tissue samples collected by state trapping

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<sup>1</sup> API asserts that FWS recognized that the wolverine DPS’s maximum “effective population likely changed” since the Schwartz, et al. (2009) scientific study calculated an effective population of 35. API Mem. at 36. However, the Schwartz study examined data from 1989 to 2006 and stated that the wolverine effective population size “was found not to change over time.” AR:LIT-3166. FWS merely observed that, generally, “effective population is not static.” AR:FR-21.

regulators and scientific researchers from 1989 to 2007, not from Copeland, et al. (2010). See AR:LIT-3163-64, 3165.<sup>2</sup>

## **II. INTERVENORS FAIL TO BOLSTER FWS'S IRRATIONAL CLIMATE CHANGE DETERMINATIONS**

State intervenors and API attempt to shore up FWS's irrational dismissal of the foreseeable threat that wolverines face from climate change by invoking comments submitted by peer reviewers, FWS's April 2014 science panel, and FWS Regional Directors. None justifies the agency's decision.

### **A. Peer Reviewers**

State Intervenors and API rely heavily on disagreements with certain aspects of the proposed wolverine listing rule voiced by two of seven peer reviewers. See State Mem. at 13-14, 21-22; API Mem. at 11-15, 29-31.<sup>3</sup> At the outset, these peer reviewers' dissenting views are irrelevant because, as FWS acknowledges, "FWS

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<sup>2</sup> API also attacks Plaintiffs' argument that no evidence indicates that a sufficient minimum effective population could be achieved even if all wolverine habitat in the northern Rockies were occupied to full capacity, see Plaintiffs' Mem. at 14-15; Plaintiffs' Response-Reply at 4, arguing that "no basis exists for this comparison," API Mem. at 36. But that is the point: FWS failed to grapple with this issue, which is central to the agency's claim that "increasing populations" will salvage the DPS's genetic viability. AR:FR-8.

<sup>3</sup> API repeatedly highlights the views of "the majority of non-governmental peer reviewers." API Mem. at 1, 3, 24. API offers no reason, and none is apparent, why certain scientists' views should be accorded more respect because they do not work for government agencies. Further, contrary to its treatment of government biologists in the peer review, API repeatedly endorses the views of "state biologists" who advocated "that listing was not warranted." Id. at 15; see id. at 3, 30, 31.

did not ultimately base its determination on these concerns.” Fed. Mem. at 22 n.4; see AR:FR-16 (withdrawal decision). Again, because this Court must judge the legitimacy of FWS’s withdrawal decision “solely by the grounds invoked by the agency,” Chenery Corp., 332 U.S. at 196, the peer-review minority report referenced by intervenors cannot support FWS’s withdrawal decision.

Even were this not so, the dissenting peer reviewers’ comments offered no rational justification for the withdrawal decision. Intervenors claim that “the most relevant” concern identified by these two peer reviewers was Inman’s critique that, because “[d]ocumented dens in the contiguous U.S. occur exclusively on north facing slopes,” McKelvey, et al. (2011) may have overestimated climate-change impacts on the wolverine DPS “by as much as 75%.” State Mem. at 13-14 (quoting AR:PI-751) (emphases added); accord API Mem. at 13, 28. However, documented wolverine dens in the contiguous United States do not occur exclusively on north facing slopes. Although many published denning reports do not state the aspects of wolverine dens, the spring 2006 report on a Glacier National Park wolverine study documented that a female wolverine utilized a natal and two maternal dens on “a western aspect” in 2004, and that a second female

utilized a natal den and two maternal dens on “an east slope” in 2005.<sup>4</sup> AR:FR-959, 961-62 (Copeland & Yates (2006)) (emphases added). Accordingly, the factual predicate for Inman’s peer-review critique of McKelvey, et al. (2011) was erroneous.

API also attempts to exploit statements by Inman and Magoun to undermine the Copeland, et al. (2010) study as a basis for delineating the wolverine’s snowy “bioclimatic envelope.” API Mem. at 11-12. API suggests that wolverines do not need snow for reproductive denning and quotes Inman’s assertion that ““there is now evidence of wild wolverines successfully using non-snow dens.”” API Mem. at 11-12 (quoting AR:PI-749). API fails to acknowledge Inman’s full statement, which asserts merely that the den in question lacked snow “on 24 April and most likely for a period of days before the photo was made,” AR:PI-749—not that the den was unassociated with snow at all. In fact, “every den that has ever been verified has been associated with snow.” AR:PI-504 (Copeland comment, emphasis original); see Plaintiffs’ Mem. at 19-20.

When read in context, API’s quoted statements from Inman and Magoun do not question whether wolverines rely on snow-covered landscapes for denning but rather whether wolverines are always “‘obligated’ to den under snow through 15

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<sup>4</sup> “The sites where female wolverines keep cubs before weaning have been distinguished as natal dens (birth location) and maternal dens (site used subsequent to natal den but before weaning).” AR:LIT-1646 (Inman, et al. (2012)) (citations omitted).

May.” AR:PI-749 (Inman); AR:PI-977 (Magoun) (both quoted in API Mem. at 11-12). But Copeland, et al. (2010) never asserted that they were. To the contrary, as explained by Forest Service scientists (including Copeland and three co-authors of the 2010 “bioclimatic envelope” paper) in response to state comments that similarly invoked the minority peer reviewers’ critique, “it should not be forgotten that areas classified as being snow covered [through May 15] represent a proxy—correlated with and based on biological requirements but not a direct measurement of them.” AR:PI-1259; accord AR:LIT-992 (Copeland, et al. (2010)). In particular, Copeland, et al. (2010) identified the geographic area defined by spring snow coverage until at least May 15 in at least 1 of 7 years as a proxy “for cold snowy areas that would not melt out prematurely”—areas for which wolverines are physically adapted and that they depend upon for reproductive denning, predator avoidance and, potentially, caching of food. AR:PI-1258, 1264 (citing studies); see Plaintiffs’ Mem. at 20-21; Plaintiffs’ Response-Reply at 6-7. While the Copeland study’s authors explored other proxies for the wolverine’s essential habitat niche, including alpine vegetation and cool summer temperatures, “[o]nly spring snow cover provided a high quality fit to all of the wolverine’s life history patterns across the breadth of their range,” AR:PI-1265—and one that efficiently “encloses locations of den sites but does not enclose areas not utilized for denning,” id. 1260.

FWS’s dismissal of this body of evidence on the superficial basis that “snow persisting until May 15” may not always constitute “a necessary condition for wolverine reproduction,” AR:FR-14, failed to rationally address the import of the Copeland study. See Nw. Coal. for Alternatives to Pesticides v. EPA, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (agency decision is arbitrary where it is “not supported by the data it purports to interpret”) (quotations and citation omitted). Intervenors’ repetition of this same critique, see API Mem. at 12, does not bolster FWS’s decision.

API goes even further to selectively quote a March 2014 email exchange between Copeland and Magoun to support claims that Copeland both doubted the “obligate nature of spring snow” for wolverine habitat and even personally deemed listing of the wolverine DPS under the ESA unwarranted. API Mem. at 14-15. Neither claim is correct. Contrary to API’s assertion, Copeland consistently maintained—including in the very correspondence cited by API—that the Copeland, et al. (2010) “snow model depicts the wolverine’s fundamental niche.” AR:PI-1394; accord AR:PI-1262 (letter from Copeland and other Forest Service scientists to FWS describing “May 15 snow cover proxy” as “clearly both biologically based and incredibly accurate”). As for API’s suggestion that Copeland deemed listing unwarranted, Copeland clarified his position in a later portion of the March 2014 correspondence with Magoun that API omits:



What I should have said is that I have never openly expressed support for listing; nor have I expressed opposition. I made the earlier statement because I wondered if you believed, as does Bob Inman and Montana FWP, that we developed these papers solely to support the listing of the wolverine. I wanted you, Audrey, to understand that my contribution to this dialog, thus far, has been in defense of the bioclimatic envelope paper, rather tha[n] the proposed rule to list.

AR:PI-1388.

**B. Science Panel**

State intervenors and API similarly err in characterizing the results of FWS's April 2014 science panel. See State Mem. at 15-16, 17, 21; API Mem. at 16. Intervenors claim that the science panel “strongly indicated that the relationship between wolverine and deep spring snow throughout a wolverine’s year-round habitat was non-obligate.” State Mem. at 17. In fact, the figures in the science panel report demonstrate that five out of nine panelists indicated that they were “leaning” toward a conclusion that wolverines have an obligate relationship to deep snow at the home range scale, AR:FR-14044; this does not “strongly indicate[.]” a contrary conclusion, State Mem. at 17. Further—although not mentioned by intervenors—six of nine science panelists indicated that they were either “leaning” toward or confident of a finding that wolverines have an obligate relationship to contiguous snow at the home range and rangewide scales. AR:FR-14045; accord AR:FR-5613 (Asst. Reg’l Dir.’s Memo). These findings support, rather than undermine, reliance on Copeland, et al. (2010).

Indeed, although state intervenors and API both tout the significance of “new information” that FWS received from the peer review and science panel after publishing the proposed listing rule, API Br. at 10-16; State Mem. at 13-16, 21, the facts are that five out of seven peer reviewers concurred with the proposed listing, AR:FR-3, and all nine science panelists uniformly “expressed pessimism for the long-term (roughly end-of-century) future of wolverines in the contiguous US because of the effects of climate change on habitat,” AR:FR-14024. FWS could rationally reject this information and the substantial pre-existing scientific evidence supporting listing only if it “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). For the reasons stated in Plaintiffs’ briefing, FWS failed to do so. See Plaintiffs’ Mem. at 15-36; Plaintiffs’ Response-Reply at 6-15.

**C. Regional Directors**

State intervenors and API also attempt to make much of concurrence in the withdrawal decision by the Regional Directors of FWS’s Pacific and Pacific Southwest regions. State Mem. at 18; API Mem. at 16-17, 31, 32. However, mere concurrence by these Directors, without a rational justification, does not bolster FWS’s decision.

Here, far from providing any such rational justification, the Pacific Regional Director's comment accepted and relied upon the same arbitrary reasoning that appeared in FWS's ultimate withdrawal decision, including unfounded assertions that female wolverine den selection decisions are based primarily on "fine-scale local factors" and "there is no evidence to suggest that den sites are limiting," AR:FR-5551—both of which have already been rebutted by Plaintiffs' summary judgment briefing, see Plaintiffs' Mem. at 22-26, 28; Plaintiffs' Response-Reply at 7-9, 10-11. In addition, it appears that the Pacific Director's comment constituted the source for the spurious FWS "calculation" of future wolverine habitat carrying capacity reported and relied upon in the withdrawal decision. Compare AR:FR-5551 with AR:FR-15 (both calculating that habitat for 283 wolverines would remain in contiguous United States even after habitat loss modeled by McKelvey, et al. (2011)). As discussed in Plaintiffs' briefing, this back-of-the-envelope calculation ignored critical factors such as sizes of remaining habitat patches and distances between them, and in any event FWS's stated confidence interval for this calculation included a potential population decline to 110 wolverines that the agency arbitrarily disregarded. See Plaintiffs' Mem. at 33-34; Plaintiffs' Response-Reply at 9 & n.6. The director's concurrence cannot reinforce FWS's decision where it too "fail[s] to consider an important aspect of the problem." State Farm, 463 U.S. at 43.

As for the Pacific Southwest Director's concurrence, it acknowledged "a wide range of opinion on this issue" among regional staff and expressed the director's personal view that "the ability to predict landscape changes within a biome as a result of climate change is unproven." AR:FR-5602. However, the director's sweeping skepticism about the ability to predict climate change impacts does not reflect even the position of FWS itself. See Final Rule, Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28,212, 28,243 (May 15, 2008) (FWS listing rule for polar bear: "Models have proven to be extremely important tools for simulating and understanding climate and climate change, and we find that they provide credible quantitative estimates of future climate change, particularly at larger geographical scales.").

### **III. INTERVENORS FAIL TO ADDRESS THE FORESEEABLE RESUMPTION OF WOLVERINE TRAPPING IN MONTANA**

Intervenors fail to dispel the threat to the DPS posed by incidental and intentional trapping of wolverines given that "even small numbers of mortalities"—particularly of dispersing individuals—"are likely to be problematic when habitat and populations are contracting due to climate change." AR:FR-5611 (Asst. Reg'l Dir.'s Memo); see also AR:LIT-1984-85 (Krebs, et al. (2004)) (finding that "young, inexperienced males" who are the most likely dispersers are also disproportionately impacted by wolverine trapping).

State intervenors point out that Montana’s wolverine trapping season was halted by court order in 2012 and argue that FWS properly dismissed trapping as a threat “because Montana’s trapping season was closed indefinitely at the time the Service made its decision.”<sup>5</sup> State Mem. at 6-7, 27. However, regardless of the cited court order, FWS foresaw the resumption of Montana’s wolverine trapping season at the time it issued the withdrawal decision. An internal briefing memorandum submitted by FWS to the Secretary of the Interior on July 7, 2014—just over a month before publication of the withdrawal decision—states: “Montana is highly concerned about the potential for listing and its affect to their wolverine trapping season. They will support the withdrawal which will allow their trapping season to resume.” AR:FR-2722 (emphasis added). Montana fails to disavow any such intention. See State Mem. at 6-7. Accordingly, the ESA required FWS to rationally address the foreseeable threat that trapping poses to the wolverine DPS. See 16 U.S.C. § 1532(20) (“threatened” species definition requiring FWS to

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<sup>5</sup> State intervenors inaccurately report that “a federal court temporarily enjoined Montana’s wolverine trapping season” in 2012. State Mem. at 6. The relevant ruling was issued by a Montana state court. See id.

consider threats “within the foreseeable future”). The agency did not do so. See Plaintiffs’ Mem. at 36-37; Plaintiffs’ Response-Reply at 16.<sup>6</sup>

#### **IV. INTERVENORS OFFER NO LEGITIMATE DEFENSE OF FWS’S “SIGNIFICANT PORTION” ANALYSIS**

Intervenors equally err in arguing that FWS reasonably found the wolverine DPS not to be imperiled throughout “a significant portion of its range.” State intervenors repeat FWS’s finding that there are “no portions of the range where potential threats are significantly concentrated or substantially greater than in other portions of the range,” State Mem. at 41 (quoting AR:FR-25)—but offer no explanation how this can be so given that huge portions of the wolverine DPS’s acknowledged “current range” in the southern Rocky Mountains and Sierra Nevada are each occupied by only single male wolverines with “no evidence” of likely female colonization and therefore no potential for wolverine reproduction. Id.; AR:PR-767 (distribution analysis from proposed listing rule that was adopted in withdrawal decision); see Plaintiffs’ Mem. at 39-40; see also State Farm, 463 U.S. at 43 (holding that agency acts arbitrarily where its decision “is so implausible

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<sup>6</sup> State intervenors argue that Plaintiffs fail to state a legitimate cause of action alleging improper political influence in FWS’s withdrawal decision. State Mem. at 30-32. However, Plaintiffs advance no such claim. Instead, Plaintiffs contend that FWS accepted arguments that originated from Montana and/or other states that opposed the proposed wolverine listing and in doing so adopted speculative and irrational reasoning and violated the ESA. See AR:FR-2722 (FWS: “The State of Montana is opposed to listing and many of the arguments used in the withdrawal originated with them.”).

that it could not be ascribed to a difference in view or the product of agency expertise”).

As for API, it argues that the presence of dispersing lone male wolverines in the southern Rockies and Sierra Nevada is not a factor supporting ESA listing but rather “a positive sign—an indicator of increased abundance.” API Mem. at 40. But even FWS’s irrationally optimistic interpretation of the available data acknowledged that these male dispersals “could just as easily” reflect population expansion or a response to “habitat loss in the northern part of the DPS” due to climate change. AR:FR-16. Further, API offers no explanation how these lone male dispersals portend “increasing abundance and expansion,” API Mem. at 40, when there is no prospect of female colonization that could lead to population establishment in these areas, see AR:PR-767 (FWS distribution analysis); Plaintiffs’ Mem. at 13-14; see also AR:FR-3933 (comment from FWS regional endangered species chief: “Range expansion won’t occur without females.”).

## **V. INTERVENORS MISCONSTRUE THE ESA’S DPS PROVISION**

Intervenors Idaho Farm Bureau Federation, et al., do not address the merit of FWS’s reasoning in withdrawing the proposed wolverine DPS listing, but instead disagree with FWS’s determination that the wolverine population in the lower-48 United States “is a listable entity under the [ESA] as a DPS.” AR:PR-770 (proposed listing); see AR:FR-3 (withdrawal decision adopting DPS determination

from proposed listing). The Farm Bureau argues that “this case should begin and end with a single sentence” of statutory language because FWS lacks authority under the ESA to list a DPS of a subspecies. Farm Bureau Mem. at 5. The Farm Bureau’s argument is meritless and should be rejected.

At the outset, the Farm Bureau’s argument defies both the implementing agency’s formal statutory interpretation and relevant judicial precedent:

First, FWS and the National Marine Fisheries Service rejected the Farm Bureau’s position in a 1996 joint policy decision construing the ESA’s DPS-listing authority that was published in the Federal Register. See Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722, 4724 (Feb. 7, 1996) (“DPS Policy”).

Second, the Ninth Circuit “has already determined that ‘distinct population segment’ is an ambiguous term and that FWS’s DPS Policy defining it” is generally entitled to judicial deference under Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). Modesto Irrig. Dist. v. Gutierrez, 619 F.3d 1024, 1033 (9th Cir. 2010); Nw. Ecosystem Alliance v. FWS, 475 F.3d 1136, 1141-45 (9th Cir. 2007) (“[T]he DPS Policy is a reasonable construction of ‘distinct population segment.’”); see also Alaska Wilderness League v. Jewell, 788 F.3d 1212, 1217-18 (9th Cir. 2015) (explaining application of Chevron).



Third, a Ninth Circuit panel (in an unpublished disposition) and a federal district court have rejected the Farm Bureau's precise statutory argument. See Ctr. for Biological Diversity v. FWS, 274 F. App'x 542, 545 n.5 (9th Cir. 2008); Sierra Forest Prods., Inc. v. Kempthorne, 2:07-CV-00060 JAM GGH, 2008 WL 2384047, at \*6 (E.D. Cal. June 9, 2008), aff'd, 361 F. App'x 791 (9th Cir. 2010).

Ignoring all these authorities<sup>7</sup>, the Farm Bureau claims that FWS cannot list the wolverine DPS because 16 U.S.C. § 1532(16) authorizes listing only of “any distinct population segment of any species” and thus the plain language of the ESA “operates to exclude subspecies from the distinct population segment classification.” Farm Bureau Mem. at 5-8, 14. However, FWS's DPS Policy squarely addressed the issue raised by the Farm Bureau, stating: “The Services maintain that the authority to address DPS's extends to species in which subspecies are recognized, since anything included in the taxon of lower rank is also included in the higher ranking taxon.” 61 Fed. Reg. at 4724; accord AR:FR-12. In other words, a DPS of a subspecies also is necessarily a DPS of the species of which that subspecies is a part. In this case, the DPS recognized by FWS of the North American wolverine subspecies, *Gulo gulo luscus*, is equally a DPS of the single worldwide wolverine species, *Gulo gulo*, because this subspecies is a constituent part of the species. AR:PR-762. Accordingly, the wolverine DPS is a “distinct

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<sup>7</sup> The Farm Bureau briefly references the DPS Policy, see Farm Bureau Mem. at 2, but does not address the relevant portion, see id. at 5-14.

population segment of any species” under 16 U.S.C. § 1532(16) and, contrary to the Farm Bureau’s argument, the plain language of the ESA supports FWS’s interpretation. At a minimum, FWS’s interpretation of “the ambiguous language of 16 U.S.C. § 1532(16)” to “authorize listing of a DPS of a subspecies” is “a permissible construction of the statute” and therefore warrants Chevron deference. Ctr. for Biological Diversity, 274 Fed. App’x at 545 n.5; accord Sierra Forest Prods., 2008 WL 2384047, at \*6; see also Nw. Ecosystem Alliance, 475 F.3d at 1143 (according Chevron deference to DPS Policy because its interpretation of ESA “is not inconsistent with common usage”).

All of the Farm Bureau’s plain language and statutory construction arguments founder on this basic point—i.e., the wolverine DPS is as much a DPS of the wolverine species as of the North American wolverine subspecies. See Farm Bureau Mem. at 5-14. Indeed, the wolverine species consists entirely of two subspecies, *Gulo gulo gulo* in Europe and Asia and *Gulo gulo luscus* in North America. AR:PR-762. Every wolverine on Earth is a member of one of these two subspecies. Id. If, as the Farm Bureau suggests, FWS were not authorized to designate a DPS of the wolverine species because its members would also be members of one of these two subspecies, then FWS could never designate any DPS of the wolverine species—or of any other species that are taxonomically divided into various subspecies. Cf. Sw. Ctr. for Biological Diversity v. Babbitt, 980 F.

Supp. 1080, 1084-85 (D. Ariz. 1997) (holding that ESA authorizes designation of DPS containing multiple subspecies).

There is no indication that Congress intended to allow such accidents of taxonomy to limit the designation of DPSs under the ESA. Although the Farm Bureau cites a 1978 House Conference Report on the ESA's "species" definition for the proposition that Congress meant to "exclude taxonomic categories below subspecies from the definition," Farm Bureau Mem. at 16 (quoting H.R. Conf. Rep. No. 95-1804, at 17 (1978)), this is irrelevant because "the term 'distinct population segment' appears nowhere in taxonomic science or literature," Sw. Ctr. for Biological Diversity, 980 F. Supp. at 1085; accord 61 Fed. Reg. at 4722 (DPS not "recognized in formal taxonomic terms"). Rather, "[i]t appears to be some sort of hybrid language that Congress carved out which is not based upon taxonomy" and is instead calculated to grant FWS flexibility "to protect a portion of a species according to that portion's conservation status." Sw. Ctr. for Biological Diversity, 980 F. Supp. at 1085. The Farm Bureau's citation of Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D. Or. 2001) (discussed in Farm Bureau Mem. at 13-14, 16), is equally inapposite because that case held that the ESA does not authorize listing of only a portion of a DPS, see id. at 1161-63, and did not address whether FWS could list a DPS of a species in which subspecies are recognized.

By contrast, relevant indicators of statutory meaning support FWS's recognition of a wolverine DPS in the lower-48 states. Although the Farm Bureau suggests that Congress did not intend for the FWS to list wolverines in the lower 48 "without regard for the subspecies living in more sustainable populations elsewhere," Farm Bureau Mem. at 17, Congress intended that FWS may appropriately "provide for different levels of protection for populations of the same species. For instance, the U.S. population of an animal should not necessarily be permitted to become extinct simply because the animal is more abundant elsewhere in the world." S. Rep. No. 96-151, at 7 (1979) (emphasis added). As the Ninth Circuit has observed in a related context:

The text of the ESA and its subsequent application seems to have been guided by the following maxim:

There seems to be a tacit assumption that if grizzlies survive in Canada and Alaska, that is good enough. It is not good enough for me ... . Relegating grizzlies to Alaska is about like relegating happiness to heaven; one may never get there.

Aldo Leopold, A Sand County Almanac 277 (1966).

Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145 n.10 (9th Cir. 2001). In sum, Congress did not intend to allow the biological diversity of the lower-48 states to become impoverished simply because certain wildlife species persist in larger numbers "in Canada and Alaska." Farm Bureau Mem. at 2. This Court should reject the Farm Bureau's contrary interpretation of the ESA.

## CONCLUSION

For the foregoing reasons and the reasons stated in their prior summary judgment briefing, Plaintiffs Defenders of Wildlife in No. CV-14-246-M-DLC and Center for Biological Diversity, et al., in No. CV-14-247-M-DLC respectfully request that this Court grant their motion for summary judgment and deny the motions for summary judgment filed by the Federal Defendants and Defendant-Intervenors.

Respectfully submitted this 16th day of October, 2015.

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