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

WILDEARTH GUARDIANS <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	Case No. 9:14-cv-0250-DLC
	)	
vs.	)	(Consolidated with Case Nos.
	)	14-246-M-DLC and 14-247-
SALLY JEWELL, in her official capacity as	)	M-DLC)
Secretary of the Interior; the UNITED STATES	)	
DEPARTMENT OF THE INTERIOR;	)	RESPONSE TO
DANIEL ASHE, in his official capacity as	)	DEFENDANT-
Director of the U.S. Fish and Wildlife Service;	)	INTERVENORS' MOTIONS
THE U.S. FISH AND WILDLIFE SERVICE,	)	FOR SUMMARY
	)	JUDGMENT AND REPLY
Federal-Defendants.	)	IN SUPPORT OF
	)	PLAINTIFFS' MOTION
	)	FOR SUMMARY
	)	JUDGMENT

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## INTRODUCTION

Plaintiffs hereby submit this consolidated reply in support of their motion for summary judgment and response in opposition to the summary judgment filings submitted by the Defendant-Intervenors (Intervenors), including the Idaho Farm Bureau (Doc. 80), the States (Doc. 82), and the American Petroleum Institute (API) (Doc. 85).<sup>1</sup>

Pursuant to this Court's March 10, 2015 order, the Intervenors were allowed to adopt, but not repeat, arguments already set forth in the U.S. Fish and Wildlife Service's (Service's) summary judgment filings. Doc. 34 at 3. Only one Intervenor, the Idaho Farm Bureau, complied with this directive. The States' brief (Doc. 82) and API's brief (Doc. 85) largely repeat arguments already made by the Service and already addressed in Plaintiffs' September 25, 2015 reply brief (Doc. 87). For this reason, Plaintiffs limit their arguments in this brief – to the extent possible – to the non-duplicative issues and arguments raised by the Intervenors. In so doing, Plaintiffs expressly adopt and incorporate all other arguments already made in their opening (Doc. 69) and reply (Doc. 87) briefs.

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<sup>1</sup> Document (Doc.) citations are to ECF document numbers in this case (14-250) and, where appropriate, ECF page numbers.

## ARGUMENT

**A. The Idaho Farm Bureau's DPS argument is premature and without merit.**

The Idaho Farm Bureau does not dispute wolverines in the contiguous United States may be threatened by climate change, small population size, or synergistic threats. *See* Doc. 80. Nor does it take a position on whether the Service applied the best available science. Instead, the Idaho Farm Bureau asserts this Court “need not grapple” with these issues because the Service lacks the authority under the Endangered Species Act (ESA) to list a distinct population segment (DPS) of a subspecies. Doc. 80 at 6. This legal theory deserves little attention from this Court.

As an initial matter, this is not the time or place for the Idaho Farm Bureau's DPS theory because the Service is not listing anything. At issue is the Service's decision to withdraw its proposed rule to list wolverine. In other words, this is a challenge to a decision *not to* provide ESA protective status wolverine. If Plaintiffs prevail and obtain the relief requested, the result will not be automatic ESA listing. This Court, rather, would likely declare the Service's August 13, 2014 withdrawal of the proposed wolverine rule (FR-001) invalid, set aside the withdrawal, and remand this matter back to the Service for further proceedings and a new decision consistent with this Court's order. If, following remand, the Service changes course, applies the best available science, and decides to list wolverine, the Idaho

Farm Bureau could pursue its legal theory at that time. Litigating this issue now, however, is premature and only operates to unnecessarily complicate an already complex case.

Even if one assumes, *arguendo*, that the Idaho Farm Bureau's DPS theory is properly before this Court, the theory is without merit. The ESA's definition of a species includes "any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). Reference to the term "species" in the ESA, therefore, including the reference to the Service's authority to list a DPS of "any species," logically includes and encompasses "any sub-species." *Id.* As explained by the National Research Council in *Science and the ESA*, the reference to the term species in the ESA "is used in the legal sense to refer to" species, subspecies, or a DPS. SUP-139. Because the North American wolverine, *gulo gulo luscus*, is a designated subspecies of the worldwide species of wolverine, *gulo gulo*, the Service is authorized by the ESA to list a DPS of that subspecies. 75 Fed. Reg. 78030, 78030-31 (Dec. 14, 2010).

Consistent with the plain language of the ESA and the National Research Council's *Science and the ESA* report, *see* SUP-118, the Service's 1996 DPS Policy explicitly recognizes the Agency's ability to list a DPS of a subspecies: "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. 4722, 4724 (Feb. 7, 1996). The Service’s 1996 DPS Policy was upheld by the Ninth Circuit in as a valid interpretation of the ESA. *See Northwest Ecosystem Alliance v. USFWS*, 475 F.3d 1136, 1144 (9th Cir. 2007).

For support, the Idaho Farm Bureau relies heavily of the district court’s decision in *Alsea Valley Alliance v. Evans*, 161 F. Supp.2d 1154 (D. Or. 2001) but in that case the district court merely held that the Service could not make distinctions among species *below* the DPS level. *See id.* at 1163. This is not at issue in this case. Notably, the Idaho Farm Bureau’s legal theory that the Service lacks the authority to list a DPS of a subspecies was already made by their counsel, the Pacific Legal Foundation, and rejected by the Ninth Circuit in *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 274 Fed. Appx. 542, 545 n.5 (9th Cir. 2008) and *Sierra Forest Products v. Kempthorne*, 2008 WL 2384047, \*6 (E.D. Cal. 2008) *aff’d* 361 Fed. Appx. 791 (9th Cir. 2010). This Court should do the same.

**B. The States and API mischaracterize the nature of this dispute.**

The States and API characterize this case as nothing more than a simple dispute involving conflicting scientific evidence about the threats to wolverine. But when the Service’s finding conflicts with: (a) *every* published paper on the likely impacts of climate change on wolverine, PI-070 and FR-5632; (b) McKelvey



(2011) which – as the Service concedes – is the most sophisticated analysis of climate change impacts to wolverine habitat, LIT-2568; (c) two stages of independent peer-review both of which validated the findings of McKelvey (2011) and the underlying rationale for listing, Doc. 70 at ¶¶ 90 to 106 and FR-14023; and (d) the unanimous recommendation of the Service’s lead biologists and experts tasked with reviewing the available science, FR-5631 to FR-5636, there is no legitimate scientific dispute or controversy. Nor is there any reason, under these circumstances, for the Court to defer to the Service’s finding. *See Trout Unlimited v. Lohn*, 645 F.Supp.2d 929, 964 (D. Or. 2007) (no deference when agency disregards the best available science). Deference to the Service’s expertise is only warranted to the extent it utilizes, rather than disregards, the best available science. *See Doc. 87 at 3-4.*

**C. API misstates the ESA’s best available science standard.**

API maintains Plaintiffs do “not understand the ‘best available science’ standard” because nothing in the standard precludes the Service from “considering relevant information” including comments from state agencies, which it did in this case. Doc. 85 at 33, 35. While API correctly notes that nothing in the ESA prohibits the Service from considering this type of information when making a listing decision (indeed, it is part of the decision process), that does not mean that the information that needs to be considered is the best available.

Under the ESA, information supporting listing decisions must be both relevant *and* the best available. It must be “better than” or “superior to” other available information. *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006). The Service cannot disregard “available scientific evidence that is in some ways better than the evidence [it] relies on.” *San Louis & Delta-Mendota Water Auth. V. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (citing *Kern Cnty.*, 450 F.3d at 1080). This is precisely what occurred in this case.

The Service disregarded the findings of the published papers on climate change impacts to wolverine, PI-070 and FR-5632, including McKelvey (2011) which is recognized as the most sophisticated analysis. *See* LIT-2568. In addition, the Service disregarded the two stages of independent peer-review, both of which validated the findings of McKelvey (2011) and the underlying rationale for listing. *See* Doc. 70 at ¶¶ 90 to 106 and FR-14023. The Service also disregarded the findings of the Service’s lead biologists and experts tasked with reviewing the available science and making a wolverine listing recommendation. FR-5631 to FR-5636.

Instead of utilizing this best available science and deferring to its own experts, the Service’s chose to rely on inferior information. The Service chose to rely on unsubstantiated claims and theories about north-facing slopes from state agencies, *see* FR-5360, FR-5537 and FR-3568; an administrator’s (Noreen

Walsh's) personal opinion about the climate models, level of certainty needed, and predictions made in McKelvey (2011), *see* FR-5364 to FR-5366; and a personal communication with Torbit about a NOAA study, *see* FR-5361, that was neither peer reviewed nor examined by the Service's qualified experts, *see* FR-5031, and is of limited value because it pertains to future water availability in Colorado where no wolverine population currently exists and where the impacts of climate change will not be as severe. *See* FR-3928 (comment); FR-5031 (discussing report). None of this "relevant" information contradicts or undermines the McKelvey (2011), the peer-review findings, or the recommendation of the Service's lead biologists on the wolverine listing. Nor is this "relevant information" on equal footing with the best available science.

Unsubstantiated claims from state agencies, personal opinions, and private personal communications might qualify as "relevant information" but they are inferior sources to the published, peer-reviewed literature, including Copeland (2010) and McKelvey (2011), the peer-review findings, and the recommendations of the Service's qualified experts. *Cf. Brower v. Evans*, 257 F.3d 1058, 1071 (9th Cir. 2001) (Service's finding conflicted with the best available information, including an abundance study and literature review); *Earth Island Institute v. Hogarth*, 494 F.3d 757, 767-768 (9th Cir. 2007) (Service's findings not based on best available information, including relevant data and report); *Western*

*Watersheds Project v. Kempthorne*, 2008 WL 2338501, \*14 (D. Idaho. 2008) (Service's reliance on internal report that was not peer-reviewed or examined by experts did not qualify as the best available science).

This is precisely why the Society for Conservation Biology and the American Society of Mammalogists, along with fifty-six ecologists and wildlife biologist were so outraged by the Service's decision. *See* PI-100717 to PI-100719; PI-100722 to PI-100727. "In overriding the conclusions of staff scientists and two independent peer review panels, [the Service's decision] . . . demonstrates a serious flaw in the [Service's] listing determination process and continues a troubling pattern of disregard for the best available science . . ." PI-100719.

In response, API relies heavily on *Trout Unlimited*, *see* Doc. 85 at 27, 31, but there the district court refused to defer to agency findings that conflict with the best available science and declared the agency's decision arbitrary, capricious, and a violation of the ESA. *Trout Unlimited*, 645 F. Supp. 2d at 964-965. In *Trout Unlimited*, the court also made the important distinction between cases involving legitimate scientific disputes and the situation presented in cases such as this, where the Service erred in "disregarding the best available science and the opinions of their own scientists or scientific advisors." *Id.* at 964 (citing five similar cases).

**D. The States' and API's reliance on comments from state agencies and the views of two dissenting peer reviewers to attack Copeland (2010)'s May 15 snow model is misguided.**

Based on unsubstantiated comments from state agencies and their interpretation of the dissenting views of two of the seven peer reviewers, the States and API attack Copeland (2010)'s May 15 snow model as unreliable because it did not capture *all* the habitat suitable for wolverines, including *all* denning sites. Doc. 85 at 36; *see also* Doc. 85 at 18 (one cannot conclude wolverines *must* have snow for dens in May; young are born “during February-mid March” not May). This criticism reveals a fundamental misunderstanding about what Copeland (2010)'s May 15 snow model is and what it represents.

There is no scientific dispute that wolverines are snow-dependent organisms. PI-00943. The “relationship between wolverines and snow in general and spring snow during the denning period, in particular, is strongly founded in wolverine biology.” PI-100944. The real question thus is “not whether wolverines are snow-dependent, but how to map this relationship.” *Id.*

Aubry (2007) investigated the distribution and broad-scale habitat relationships of wolverines “based on general climate conditions, vegetation, topography, and spring snow.” PI-001253; LIT-393. Aubry (2007) found that “a model based on persistent spring snow (May 15) was the best fit to historical records of wolverines in the contiguous United States.” *Id.* The May 15 date was

therefore identified as an important component of the snow model that allowed the biologists to capture areas with persistent spring snow. If the area has snow in May, then it had snow when needed most by wolverines in February, March, and April. *See* LIT-981; PI-100944. The May 15 date, therefore, is a component of the model that best documents wolverine occurrence; it does not mean wolverines require snow until May 15 or den in May. *See* PI-0503 (discussing May 15 date); PI-1253 (same); PI-100944 (same).

Copeland (2010) expanded the work of Aubry (2007) by determining whether persistent spring snow (May 15) and temperature defined the “bioclimatic envelope” for wolverines. PI-001253; LIT-981. Copeland (2010) found that it did: the May 15 snow model was extremely effective in spatially defining wolverine denning habitat and in delineating areas of year-round habitat use by wolverines. PI-100944; PI-1253; LIT-981. Copeland (2010)’s May 15 snow model, which was used in McKelvey (2011) as a layer to evaluate climate effects on wolverine habitat, *see* LIT- 2568, was thus determined to be a good proxy or surrogate for habitat use by wolverines. PI-100944. Proxies are never a 100 percent accurate, so the fact that a given wolverine den or observation is found outside the May 15 snow model – a point emphasized by API and the States – does not disprove the model. PI-100944; PI-001253. Such deviations are expected. *Id.* Proxies may not be 100 percent accurate, but proxies “that both fit the data well, and have strong

underpinnings in organism biology” form the basis for much of the biologists’ knowledge “concerning wildlife biology, particularly their spatial patterns and habitat use.” PI-100944.

Here, the match between Copeland (2010)’s May 15 snow model and wolverine denning sites “was nearly perfect.” *Id.* The model captured 97 percent of the known wolverine den sites on two continents (550 of 562), including *all* known wolverine den sites in the contiguous United States. PI-100944; FR-13430. “It is rare in wildlife science that a model with a single covariate, like spring snow, fits so well with empirical data across the species’ life history.” PI-001253. The May 15 snow model’s fit was also extremely efficient: “in areas where dens were exhaustively sampled, very little extra land areas was included.” PI-100944.

As such, API’s and the States’ assertion that Copeland (2010)’s May 15 snow model is unreliable and invalid because exceptions exists (some dens and wolverine observations are outside the model) is misguided. Indeed, the States’ and API’s entire argument is built on unsubstantiated comments from state agencies (which were rebutted, point by point, by the leading federal wolverine biologists, *see* PI-100942) and comments from two dissenting peer-reviewers, Magoun and Inman. Five of the seven biologists on the peer-review panel, however, disagreed with Magoun and Inman and found that the link between projected climate change impacts and the wolverine’s listing are well-documented and supported in the

scientific literature, including Copeland (2010) and McKelvey (2011). The five biologists who supported the rationale for listing include Squires (PI-1278 and PI-1251), Schwartz (PI-1245), Zielinski (PI-1294), Copeland (PI-544), and Aubry who was impressed with the scientifically defensible way in which the listing proposal was applied, *see* PI-484.

The remaining two biologists, Inman and Magoun, did raise concerns about the accuracy of Copeland (2010)'s May 15 snow model but disputes of this nature are to be expected; they are part of the listing process. *See* PI-277 (“all I can say is that scientists always disagree with each other!”). After reviewing Magoun's and Inman's comments, Squires noted that the “scientific disagreement among peer-reviewers does not in [his] opinion negate the science . . . The basic conclusion that wolverine may be detrimentally impacted by climate change is consistent with best available science.” PI-1255. McKelvey and Copeland agreed, noting that none of the concerns raised by Inman and Magoun negate or undermine the climate science and the Service's rationale for listing. *See* PI-503; FR-14834.<sup>2</sup>

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<sup>2</sup> The timing and content of the “concerns” raised by Inman and Magoun during the peer review process, however, did create some consternation within the scientific community. *See* FR-5911; PI-001898; FR-13428 ; FR-13442; FR-14834. Inman, for example, questioned the reliability of Copeland (2010)'s May 15 snow model even though his 2013 paper relies on the paper and expressly states that the May 15 snow model “matched well” with his estimate of primary wolverine habitat. LIT-1660. Inman was also a coauthor of Copeland (2010) and a coauthor of Schwartz (2009), concluding that spring snow cover, and the bioclimatic niche that it indicates for wolverine, “is likely to continue to be strongly impacted by global



**E. API and the States cannot refute the best available science revealing wolverines are threatened by small population size.**

The Intervenors argue the science on the impacts to wolverine from small population size is too “uncertain” and there is no “on the ground” evidence to show that low genetic diversity from small population size is negatively affecting wolverine in the contiguous United States. Doc. 82 at 33. But the best available science, including Schwartz (2009), LIT-3162, Cegelski (2003), LIT-677, Cegelski (2006), LIT-662, and Kyle and Strobeck (2001), LIT-2021, reveal that small wolverine population size combined with low connectivity “has already resulted in low genetic diversity.” FR-5634; *see also* FR-022 (“Genetic drift has already occurred in the [wolverine] subpopulations . . .”); Doc. 70 at ¶¶ 42-46. Further “genetic impoverishment and possible demographic effects” are likely as habitat patches for wolverine become smaller and the effective population continues to shrink. *Id.*

As noted by the Service, the small wolverine population inhabiting the contiguous United States is “very low” and well below “what is thought necessary for short-term maintenance of genetic diversity.” FR-022. No scientific

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climate change . . . threatening wolverine throughout their geographic distribution.” LIT-3170. Likewise, Magoun co-authored a 1998 paper with Copeland finding that “a critical feature of wolverine denning habitat is dependability of deep snow throughout the denning period.” LIT-2312; *see also* FR-14834 (McKelvey noting that this finding from Magoun is all you need to support listing). Magoun, along with Inman, was also one of the co-authors of Copeland (2010), *see* LIT-981.

information suggests otherwise. Refusing to list species under these circumstances – i.e., when the available information and data reveals wolverine are already well below what is needed for genetic diversity but the Service decides against listing “based on a dearth of data” – violates the ESA’s best available science standard. *Rocky Mountain Wild v. USFWS*, 2014 WL 7176384, \*12 (D. Mont. 2014).

The only non-duplicative argument made by the Intervenors on the threat of small population size and low genetic diversity is the assertion that the Service “had reason to question the effective population estimate of 35,” which was derived from Schwartz (2009), LIT-3162. Doc. 85 at 42. This is inaccurate.

Schwartz (2009) estimated an effective wolverine population size of 35 individuals in Montana, Idaho, and Wyoming, where most wolverines in the contiguous United States live and there is no reason to question that estimate. LIT-3162; FR-022. Measures of effective population sizes in the few other areas occupied by wolverine outside this area (i.e., Washington’s Cascades) have not been completed but, based on total population size, are expected to be much smaller. FR-022. Regardless, the effective population number is well below what is needed to maintain the genetic diversity of wolverine in the contiguous United States. FR-022.

API also gets the total population numbers wrong: it is not “200-350”, *see* Doc. 85 at 46, but “250-300” and this number is merely a “ballpark population

estimate” based on a personal communication. LIT-1425 to LIT-1426; *see also* PI-1294. (questioning merit of estimate). Since there are no peer-reviewed papers or studies estimating the total population of wolverine in the contiguous United States and no systematic population census of wolverine in the contiguous United States, “the current population level and trends are not known with certainty.” PR-764.

The number of wolverines could be well below 250 if some of the areas the Service assumed to be occupied (like Idaho) are actually not. LIT-1426. Because it is unlikely that additional areas of modeled wolverine habitat are, in fact, occupied, a number higher than 300 is “very unlikely.” *Id.*

The Intervenors also note that wolverines occur in “low densities.” But the range of densities discussed in the scientific literature is vast, ranging from one animal per 25 square miles to one animal per 130 square miles. *See* FR-022 (citing studies). Based on Inman (2013), the Service now estimates available habitat capacity for wolverine in the contiguous United States is approximately 644 individuals. FR-014; LIT-1661. Assuming this habitat capacity estimate is accurate,<sup>3</sup> that means wolverines, even if they exist at “low densities,” currently

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<sup>3</sup> This capacity estimate conflicts with Cegelski (2006), LIT-662, and Hornocker and Hash (1980), LIT-1400, and excludes the Great Lakes region. There is also very little to no scientific evidence about historic wolverine numbers and densities in the contiguous United States and no evidence about wolverine numbers, densities, or range prior to indiscriminate trapping and predator poisoning or prior to significant changes in available-prey densities. The 644 estimate is thus a best-guess based on the amount of suitable wolverine habitat.

occupy less than 50 percent of their historic range in the western United States.

*Compare* LIT-398 (figure 1) *with* LIT-398 (figure 2).<sup>4</sup>

**F. The Intervenor cannot cure the Service’s failure to analyze the cumulative impacts from multiple threats.**

The Intervenor largely repeat the same cumulative impact arguments already made by the Service and addressed by Plaintiffs, *see* Doc. 87 at 14-15. The Intervenor rely on a single, conclusory statement that no stressors “individually or cumulatively” threaten wolverine even though this finding is unsupported by evidence in the record and entirely conclusory. *See WildEarth Guardians v. Salazar*, 741 F.Supp.2d 89, 102 (D.D.C. 2010) (a conclusion that no threat from cumulative impacts exists “does not constitute an analysis of the listing factors’ cumulative effect.”).

The States also rely on the Service’s “lengthy discussion of how each of the individual risk factors may affect” wolverine, Doc. 82 at 37, but an assessment or discussion about individual risk factors fails to account for the total combined or collective impacts of the various threats, as required by the ESA. 50 C.F.R. §

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<sup>4</sup>The Intervenor and Service fail to explain why the wolverine population in western Canada is “estimated to include approximately 15,089 to 18,967 individuals”, *see* PR-765, but the total habitat capacity for wolverine in the contiguous United States is restricted to only 644 individuals. As such, it remains unclear why western Canada (which is a slightly larger but a comparable region) contains two orders of magnitude more wolverines than the contiguous United States is capable of containing.

424.11(c); *WildEarth Guardians*, 741 F.Supp.2d at 101. Individually, each of the risks to wolverine may only have a limited impact. *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 994 (9th Cir. 2004). But collectively, the loss of additional wolverine habitat (and increased fragmentation) from climate change in concert with an already small population, the loss of individual wolverines (especially females) from trapping, disturbance of wolverine denning from winter recreation, and human development may be a significant. “Sometimes the total impact from a set of actions may be greater than the sum of the parts.” *Id.* A “small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where even a marginal increase will mean” the species does not survive. *Id.*

In this case, the record reveals the Service discounted threats to wolverine solely on the basis that they are individually insignificant. In so doing, the Service failed to consider and analyze the possibility that “when considered in conjunction with other activities, the resulting impact may be significant.” *Rocky Mountain Wild*, 2014 WL 7176384 at \*6, \*7.

**G. The Intervenors misinterpret Factor D.**

API largely repeats the same argument made by the Service regarding Factor D compliance, i.e., the Service need not evaluate whether wolverine warrant listing due to the “inadequacy of existing regulatory mechanisms,” 16 U.S.C. §

1533(a)(1)(D), because there are no threats from the other four listing factors. Doc. 85 at 44. As addressed in Plaintiffs' reply, this argument conflicts with the ESA and would render the obligation to evaluate Factor D superfluous. *See* Doc. 87 at 16-17.

The States pursue a different argument, asserting that the Service did evaluate Factor D by looking at how regulations promulgated under the Wilderness Act and Montana's trapping regulations might affect wolverine. Doc. 82 at 35. Wolverine certainly benefit from wilderness designations protect large amounts of wolverine habitat from direct loss and degradation. Likewise, Montana's trapping regulations – which temporarily prohibit the intentional, recreational trapping of wolverines until the 2017-2018 season – will directly benefit the species in Montana. But these positive regulatory changes do little to address the most significant threats facing the species. As this Court explained in *Rocky Mountain Wild*, when considering Factor D, the question is whether the existing regulatory mechanisms are adequate (or inadequate) to prevent a species from becoming threatened or endangered. 2014 WL 7176384 at \*10. The “‘adequacy’ of a regulation is tied to the level, or even existence, of any threat the regulation is designed to meet.” *Id.* (citing 16 U.S.C. § 1533(a)(1)(D)); *see also Friends of the Blackwater v. Salazar*, 691 F.3d 428, 436 (D.C. Cir. 2012) (same).

With respect to wolverine, the best available science reveals that existing regulatory mechanisms, including mechanisms in the Clean Air Act designed to mitigate climate change, *see* FR-5633, state trapping regulations that still allow all forms and types of trapping for other species in wolverine habitat, Doc. 70 at ¶¶ 58-62, and forest plans that include no standards for wolverine conservation (94 percent of all occupied habitat is located on National Forest lands) may be inadequate to address the threats to wolverine. Doc. 69 at 40. Inman (2013) also considers the lack of coordinated planning, management, and regulation of natural areas used by wolverine to be one of the greatest threats to the species persistence. LIT-1660 to LIT-1661. Yet the Service neglected to evaluate the potential threat these inadequate regulatory mechanisms pose to wolverine as required by the ESA. 16 U.S.C. § 1533(a)(1)(D).

**H. The Intervenor cannot salvage the Service’s unreasonable SPR interpretation.**

Only the States attempt to defend the Service’s new significant portion if its range (SPR) policy and only the States and API defend the application of the SPR policy to the wolverine listing decision at issue in this case. The States’ and API’s arguments, however, present no new or material arguments beyond those already raised by the Service and already addressed by Plaintiffs. *See* Doc. 87 at 17-19.

API also argues, without support, that the presence of a single wolverine in both California and Colorado “is a positive sign – an indicator of increased

abundance.” Doc. 82 at 40. This assertion is irrelevant to whether the Service’s SPR policy constitutes a reasonable interpretation of the ESA. Nor is it germane to the Service’s application of the SPR policy to wolverine. API’s argument is also too simplistic. While the presence of wolverine anywhere is positive, the presence of lone males in areas where female re-colonization is unlikely does not point to an “abundance” of wolverine and certainly does not mean wolverine have reestablished a population in those areas. *See* LIT-1661.

In sum, as explained in greater depth in Plaintiffs’ earlier briefing, and contrary to the States’ assertions, *see* Doc. 79 at 39, the Service is required to consider lost historic range in its SPR analysis and the failure to do so with respect to wolverine renders both the SPR policy itself and the SPR policy as applied invalid. *See* Doc. 87 at 17-19.

## CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request this Court grant their motion for summary judgment and the relief requested.

Respectfully submitted this 16<sup>th</sup> day of October, 2015.

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