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

DEFENDERS OF WILDLIFE,

Plaintiff,

v.

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

Defendants,

CV 14-246-M-DLC

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

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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**DEFENDANT-INTERVENOR STATES OF IDAHO, MONTANA, AND  
WYOMING’S REPLY IN SUPPORT OF THEIR COMBINED CROSS-  
MOTION FOR SUMMARY JUDGMENT**

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The Federal Defendants and the States have already addressed the vast majority of the arguments raised by the Conservation Organizations in their respective response briefs. (*See* Dkt. Nos. 73, 76, 79, 94 and 95). Accordingly, consistent with this Court's instruction to avoid duplication, (Dkt. No. 34), the States limit their reply brief to the few discrete issues that have not been addressed already by the Federal Defendants and the States.

**I. The Service relied upon the objections of the peer reviewers in deciding to withdraw the proposed listing.**

As the States discussed in their opening brief, following the outcome of the peer review process, the United States Fish and Wildlife Service no longer had a sound basis for listing the wolverine as a threatened species. (Dkt. No. 79 at 21-23). In an attempt to sidestep this argument without addressing its substance, the Conservation Organizations assert that the opinions of the peer reviewers were irrelevant to the Service's decision to withdraw the proposed listing rule. (Dkt. No. 92 at 5-6). In support, the Conservation Organizations rely on what they purport to be the position of the Federal Defendants. (*See id.*) (alleging that the Service did not rely on objections from peer reviewers in arriving at its decision). As an initial matter, the documents in the administrative record refute this allegation. (*E.g.*, AR-FR00014, 15 and 23). Moreover, the Federal Defendants expressly disavowed the Conservation Organizations' misrepresentation in their latest filing with the Court. (Dkt No. 94 at 18 n.6) ("The results of the peer review, including Magoun and

Inman’s concerns, absolutely played a role in the Withdrawal.”). Accordingly, the simple fact remains that the objections lodged by the peer reviewers eroded any basis for listing the wolverine as threatened, and the Service relied upon the objections in determining to withdraw the proposed listing rule. (Dkt. No. 79 at 21-23). Accordingly, the Service’s decision to withdraw the proposed listing was rational and should be upheld. (*Id.*).

**II. The Service reasonably relied upon Dr. Inman’s critique of the McKelvey study.**

Despite their incorrect assertion that the Service did not rely upon the opinions of the peer reviewers in making its decision to withdraw the proposed listing rule, the Conservation Organizations nevertheless attack the validity of the objections lodged by one of those very same peer reviewers – Dr. Robert Inman. (Dkt. No. 92 at 6-7). Specifically, the Conservation Organizations allege that Dr. Inman was incorrect when he warned the Service that the McKelvey study might dramatically overestimate the projected future impacts of climate change on the wolverine. (*Id.*).

Dr. Inman’s criticism was that the McKelvey study did not properly account for the fact that snow cover on north-facing slopes was of primary concern due to heavy reliance by the wolverine on these areas for denning, whereas snow cover on the other cardinal aspects was of far less importance. (*See* AR-PI000751). In support of their argument, the Conservation Organizations cite to a document in

the administrative record, which records a single instance of a wolverine denning on an eastern slope and a single instance of a wolverine denning on a western slope. (Dkt. No. 92 at 6-7). The Conservation Organizations assert that this negates the value of Dr. Inman's critique. (*Id.*). Not so.

Statistically speaking, even if there are two recorded instances where wolverine dens occurred on an east- or west-facing slope, at most their existence reduces the potential margin of error in the McKelvey study by a tiny fraction.<sup>1</sup> Such an adjustment is not nearly enough to address the potential for the McKelvey study to overstate the impact to wolverine from climate change by **as much as 75%**. (*See* AR-PI000751). Dr. Inman's ultimate point was that wolverine rely heavily on north-facing slopes for denning, and his corresponding critique of McKelvey's failure to account for this fact was still critical to the Service's decision. Dr. Inman, after all, is a leading authority on wolverine, and the Service reasonably relied upon his expert opinion in making its withdrawal determination. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir.

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<sup>1</sup> The report cited by the Conservation Organizations does not include specific den locations. (Dkt. No. 92 at 6 (citing AR-FR959, 961-62)). While it is certainly possible for the slopes of a mountain to point directly in each of the four cardinal directions, it is understandably more common for a slope to point somewhere in between. In this instance, a slope can have a "macro" orientation towards one cardinal direction, while also having a "micro" orientation toward another cardinal direction. Accordingly, while the dens in question may have a "macro" orientation that is either west- or east-facing, the dens in question may also have a "micro" orientation to the north. If this were the case, it would be entirely consistent with Dr. Inman's original point.

2014) (“The determination of what constitutes the ‘best scientific data available’ belongs to the agency’s ‘special expertise . . . . When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.’”) (quoting *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983)); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). Accordingly, the criticism advanced by the Conservation Organizations has little relevance here.

### **III. The Service properly considered the potential impacts from trapping.**

The Conservation Organizations continue to allege that the Service failed to adequately consider the potential impacts of trapping in Montana. (Dkt. No. 92 at 14). Specifically, the Conservation Organizations argue that, because Montana **could** authorize a trapping season in the future, the Service was required to assume that trapping **would** take place. (*Id.*). This is not the law; a fact reflected by the complete lack of legal authority offered by the Conservation Organizations to support their argument. (*See id.*).

Courts review the legality of agency action based on the record in front of the agency at the time that the agency made the decision. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). At the time that the Service made its decision with regard to the listing rule, Montana’s wolverine trapping season was closed

indefinitely. (Dkt. No. 79 at 27). That remains the case today.<sup>2</sup> Accordingly, the Service properly determined that Montana’s trapping regulations did not pose a threat to the wolverine sufficient to warrant listing. (*Id.* at 27). Speculation that Montana **could** authorize trapping in the future does not change the calculus. *See Overton Park v. Volpe*, 401 U.S. at 419-20; *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997) (The “obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.”). As a result, the Conservation Organizations’ argument is without merit.<sup>3</sup>

### CONCLUSION

The Conservation Organizations’ objections to the Service’s decision represent nothing more than competing interpretations of the available science and a disagreement with the Service’s ultimate findings. Such difference of opinion does not justify setting aside this federal agency action.

The Service conducted the ESA analysis in accordance with law and determined that the best available science did not support a “threatened” listing for

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<sup>2</sup> <http://fwp.mt.gov/hunting/planahunt/huntingGuides/furbearer> (last visited Nov. 9, 2015).

<sup>3</sup> In the event that Montana decides to authorize trapping of wolverine in the future, the Conservation Organizations may petition the Service to list the wolverine in light of this new development. 16 U.S.C. § 1533(b)(7). The Service may also propose to list a species on the agency’s own initiative and may do so on an emergency basis where appropriate. *Id.*

the wolverine. In so doing, the Service considered the relevant factors and presented a rational connection between the facts found and the choices made. As a result, the Service's decision should be upheld. The States of Idaho, Montana, and Wyoming therefore respectfully request that this Court deny the summary judgment motions filed by the Conservation Organizations and grant the summary judgment motions filed by the United States Fish and Wildlife Service and the States.

Dated this 20th day of November, 2015.

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