

**FILED**

**MAR 06 2015**

Clerk, U.S. District Court  
District Of Montana  
Helena

Jeffrey M. Hindoien  
Gough, Shanahan, Johnson  
& Waterman, PLLP  
33 S. Last Chance Gulch  
Helena, MT 59601  
T: (406) 442-8560  
F: (406) 442-8783  
[jeffh@gsjw.com](mailto:jeffh@gsjw.com)

Michael J. McGrady  
Wyoming Attorney General's Office  
123 State Capitol  
Cheyenne, WY 82002  
T: (307) 777-6946  
F: (307) 777-3542  
[mike.mcgrady@wyo.gov](mailto:mike.mcgrady@wyo.gov)  
(Admission *pro hac vice* pending)

*Attorneys for Proposed Defendant-Intervenor  
State of Wyoming*

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

---

DEFENDERS OF WILDLIFE,	)	Cause No. 9:14-CV-246-M-DLC
	)	
Plaintiffs,	)	(Consolidated with 9:14-CV-247
	)	and 9:14-CV-250)
vs.	)	
	)	
SALLY JEWELL, Secretary, U.S.	)	STATE OF WYOMING'S
Department of the Interior, in her official	)	MEMORANDUM IN
capacity; DAN ASHE, Director, U.S. Fish	)	SUPPORT OF MOTION TO
and Wildlife Service, in his official	)	INTERVENE
capacity,	)	
	)	
Defendants.	)	

---

These CONSOLIDATED actions initiated by the Plaintiffs Defenders of Wildlife and other conservation groups (Conservation Groups) seek judicial review of the U.S. Fish and Wildlife Service's (Service's) August 13, 2014 decision withdrawing a proposed rule to list a distinct population segment of the North American wolverine as threatened under the Endangered Species Act (ESA). *See Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States*, 79 Fed. Reg. 47,522 (Aug. 13, 2014). For the reasons set forth below, the Court should allow the State of Wyoming to intervene as a party Defendant. Wyoming has substantial sovereign interests in managing the wolverine within its borders and in preventing the imposition of the regulatory burdens that would flow from the listing decision the Conservation Groups ultimately seek. Absent intervention, Wyoming's interests will not be represented in this matter because no party can represent its unique sovereign interests.

## **BACKGROUND**

### **I. The wolverine and efforts to force the Service to list the species.**

The southernmost portion of the wolverine's range, and the only portion within the contiguous United States, encompasses high-elevation areas of Wyoming, Washington, Idaho, Montana, California, and Colorado. *See* 78 Fed. Reg. 7864, 7867 (Feb 4, 2013). Since 1994, the Service has addressed various

petitions to list the wolverine under the ESA and, in 1995 denied a petition by some of the same conservation groups in this matter to list the wolverine because the petition failed to adequately demonstrate that listing was warranted. *Id.* at 7865. In 2000, several conservation groups again petitioned the Service to list the wolverine under the ESA, and the Service again found that the groups failed to present scientific information substantial enough to demonstrate that listing of the species was warranted. *Id.*

That decision was challenged and, in 2006, this Court found that the Service used the wrong standards to assess the listing petition and ordered the agency to submit a 12-month finding for the species. *See Defenders of Wildlife v. Kempthorne*, 05-CV-99-DWM (D. Mont., Sept. 29, 2006) (Dkt. 52). That finding was issued in March 2008, with a determination that listing the wolverine was not warranted and that the population in the contiguous United States did not constitute a distinct population segment [“DPS”]. *See 12-Month Finding on a Petition To List the North American Wolverine as Endangered or Threatened*, 73 Fed. Reg. 12,929 (March 11, 2008).

That decision also resulted in litigation, which was settled by the Service with an agreement to voluntarily remand the challenged finding and issue a new one. 78 Fed. Reg. at 7866. The new 12-month finding, issued in December 2010, recognized the wolverine population in the contiguous United States as a DPS and

determined that listing the segment was “warranted but precluded.” *Id.* Further litigation resulted in a multidistrict litigation settlement in which the Service agreed to either publish a proposed rule to list the wolverine or withdraw its finding of warranted but precluded. *Id.*

On February 4, 2013, the Service published a proposed rule to list the wolverine DPS in the contiguous United States as threatened, stating that habitat loss resulting from climate change could reduce wolverine habitat to the extent that the segment would be at risk of extinction. *Id.* at 7865. In reaching that conclusion, the agency relied primarily on two studies: (1) the Copeland study that attempted to model and map wolverine habitat in the contiguous United States based on all areas continuously covered by snow from mid-winter until mid-May; and (2) the McKelvey study that attempted to employ downscaled global climate models to predict the impacts of climate change on the wolverine habitat identified in the Copeland study. *Id.* at 7874, 7876.

After publishing the proposed rule, the Service asked seven independent scientific peer reviewers to evaluate the proposed rule and ensure it was based on sound science. 79 Fed. Reg. at 47,522. The agency later convened a panel of experts to evaluate potential climate change-driven impacts on wolverine habitat. *Id.* at 47,523. The panel issued a report of its findings which called the Service’s proposed rule into question because of the scientific uncertainty surrounding the

applicability of the two studies described above, along with the emergence of new scientific information and modeling techniques. *Id.* Accordingly, the Service re-evaluated the effects of climate change on wolverines and determined that existing scientific data does not support its conclusions in the proposed rule that climate change will reduce wolverine habitat to the extent described in the rule or with the other associated effects that were identified. *Id.* at 47,533. Consequently, the Service withdrew the proposed rule, stating “the factors affecting the DPS as identified in the proposed rule are not as significant as believed at the time of the proposed rule’s publication” and “we have determined that factors affecting the DPS cited in the proposed listing are not threats to the DPS such that it meets the definition of an endangered or threatened species under the Act.” *Id.* at 47,522.

## **II. Wyoming’s wolverine management**

Wyoming has an established track record of successfully managing wildlife species within its borders, including the wolverine, and it takes this responsibility very seriously. (*See* Lanka Aff. at ¶ 4–5, attached hereto as Exhibit “A”). All wildlife in Wyoming is the property of the State. Wyo. Stat. Ann. § 23-1-103. As a result, Wyoming currently maintains management authority over wolverines within its borders. Wyo. Stat. Ann. §§ 23-1-101 and 302. Wyoming law classifies wolverines as “protected animals” and prohibits the trapping or hunting of wolverines within the state. *Id.*

In 2010, the Wyoming Game and Fish Department conducted a statewide inventory and prioritization of the conservation status of 180 wildlife species within Wyoming, including the wolverine. *See* Wyoming Game and Fish Department, State Wildlife Action Plan IV-i-5-9 (2010)<sup>1</sup>. Based on the Department's analysis, the Wyoming Game and Fish Commission ranked the wolverine in Tier II, indicating the species is of moderate conservation priority. (Lanka Aff. at ¶ 6).

While wolverines only regularly dwell in the subalpine coniferous forests and alpine habitats of northwest Wyoming, dispersing individuals have been documented wandering into other areas of the state. (State Wildlife Action Plan at IV-2-94, IV-2-9). Though wolverine population density remains low, the Wyoming Game and Fish Department believes the wolverine population in Wyoming is actually at its highest level in the past 100 years and is increasing in size. (*Id.* at IV-2-94; Lanka Aff. at ¶ 8). According to Department data, wolverine “population size and distribution are restricted but extirpation is not imminent, [and] slow population growth limits colonization of previously vacated habitat due to harvest prior to 1973.” (State Wildlife Action Plan at IV-2-94). Importantly, wolverine distribution in Wyoming is limited because wolverine habitat itself is limited—not because of any external factors or influences. (Lanka Aff. at ¶ 6).

---

<sup>1</sup> Available at [https://wgfd.wyo.gov/wtest/Departments/Wildlife/pdfs/SWAP\\_2010\\_FULL\\_OCT0003090.pdf](https://wgfd.wyo.gov/wtest/Departments/Wildlife/pdfs/SWAP_2010_FULL_OCT0003090.pdf)

In addition to classifying and protecting the species, Wyoming has expended resources to study the wolverine. State Wildlife Grants have supported baseline data collection and surveys on wolverines. (State Wildlife Action Plan at I-1-3). For example, a wolverine study in the Yellowstone ecosystem researched wolverine densities and population viability, habitats important to wolverine persistence, travel corridors between isolated mountain ranges, effects of human recreation, reproductive and survival rates, and mortality factors. *Id.* The Department has also studied the effects of winter recreation trails on wolverines and other small to midsized mammals. *Id.*

Furthermore, the Department promotes the conservation of Wyoming wolverines by actively participating in interagency conservation efforts, conducting inventories for wolverines in all suitable habitats in the state, integrating management actions with those that benefit other boreal forest carnivore species, monitoring population densities and trends, improving survey methodology, determining the effects of recreational and commercial activities on populations and working cooperatively with the U. S. Forest Service to conduct surveys for species in all potential wolverine habitat. (State Wildlife Action Plan at IV-2-95). All of the above demonstrates the active role that Wyoming's agencies play in studying and managing the species and illustrate the State's significant interest in the wolverine.

## ARGUMENT

### I. Intervention as a matter of right

Intervention as a matter of right is governed by Fed. R. Civ. P. 24(a)(2). An applicant seeking to intervene as of right must show that: (1) its motion is timely; (2) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the its ability to protect its interest; and (4) the existing parties may not adequately represent the its interest. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011). The Ninth Circuit normally interprets the rule “broadly in favor of proposed intervenors”, because “. . . [a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to courts.” *Id.* at 1179 (quoting *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 397–98 (9th Cir. 2002)).

Here, Wyoming satisfies all four requirements for intervention as of right: (1) its motion is timely because the case is only in its early stages and allowing Wyoming to join the action will not cause prejudice or delay; (2) Wyoming has significant protectable interests in retaining management authority over the wolverine population within its borders, conducting future biological studies of the population; and in maintaining the viability of legal furbearer trapping and winter recreation activities in wolverine habitat; (3) disposition of this case in the



Conservation Groups' favor would impair Wyoming's interest by stripping the State of its management authority over wolverines; and (4) neither the named Federal Defendants, nor any of the other proposed Intervenor, can adequately represent Wyoming's narrow, sovereign interests.

**A. Wyoming's Motion to Intervene is timely**

Courts use three factors to assess the timeliness of a motion to intervene: (1) the stage of the proceeding when intervention is sought; (2) the prejudice to the parties if intervention is permitted; and (3) the reasons for and length of any delay. *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Of the three factors, prejudice is the most important for determining timeliness. *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). Existing parties will not suffer prejudice when an entity moves to intervene "before the district court ha[s] made any substantive rulings." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996).

Wyoming satisfies all three timeliness factors. First, this case is in its earliest stages -- the Federal Defendants only recently filed their Answers and submitted the Administrative Record, and the Court has not made any jurisdictional or merits rulings. Second, Wyoming's participation will not prejudice any of the other parties -- it is prepared to comply with the Court's established schedule, and its participation will not delay resolution of the case.

Moreover, Wyoming will comply with the *States' Stipulation on Intervention and Briefing*, filed March \_\_, 2015, should the Court accept the proposal agreed to by the proposed State intervenors and the Conservation Groups. (Dkt. \_\_). Finally, Wyoming did not delay filing this motion. After evaluating the potential impacts of the consolidated litigation on its interests and finding those impacts to be significant, Wyoming has submitted this Motion to Intervene.

**B. Wyoming has significant interests in the subject of this action.**

As the owner of all wildlife within its borders, through the Wyoming Game and Fish Department, Wyoming currently manages the wolverines inhabiting its northwest corner as “protected animals” and prohibits their trapping or hunting. Wyo. Stat. Ann. §§ 23-1-101 and 302. In addition, the Department, both alone and in partnership with various academic and federal entities, has conducted significant biological studies of the species. (Lanka Aff. at ¶ 7).

As such, Wyoming has a significant interest in retaining management authority over its wildlife. As the Supreme Court has noted with respect to a state’s authority over wildlife:

The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the state may regulate and control the taking, subsequent use and property rights that may be acquired therein.

*Lacoste v. Dep’t of Conserv. of the State of Louisiana*, 263 U.S. 545, 549 (1924).

Here, the Conservation Groups challenge the Service's withdrawal of the proposed listing rule. If the Conservation Groups succeed and the species is listed under the ESA, Wyoming would effectively lose its ability to autonomously manage the wolverine population within its borders. In light of that, the Conservation Groups' lawsuits directly implicate Wyoming's sovereign interest in retaining management authority over its wolverines, satisfying the "significant interest" element of the test for intervention as of right.

**C. Wyoming's interests will be impaired if the Court rules in the Conservation Groups' favor.**

"[A] prospective intervenor 'has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.'" *See Wilderness Soc'y*, 630 F.3d at 1179 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)). To satisfy the "practical impairment" requirement, the applicant need only show that the disposition of the action **may** impair its protectable interest. *City of Los Angeles*, 288 F.3d at 401 (emphasis added). "[T]he interest of a prospective defendant-intervenor may be impaired where a decision in the plaintiff's favor would return the issue to the administrative decision-making process, notwithstanding the prospective intervenor's ability to participate in formulating any revised rule or plan." *See WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010).

In this case, if the Court grants the Conservation Groups' requested relief, this matter would be remanded to the agency, presumably for the Service to issue a warranted finding along with a proposed listing rule. 16 U.S.C. § 1533(b)(3)(B), (b)(5), (b)(6). Having to go through the listing process all over again would impair Wyoming's interests, as it would be forced to spend money and time to examine a new rule and prepare comments. In essence, Wyoming would have to duplicate efforts that it has already made and devote more resources to an issue it believed had already been satisfactorily addressed. (Lanka Aff. at ¶ 8). Additionally, Wyoming supports the Service's decision to withdraw the proposed rule. (*Id.* at ¶ 8–9). If the Court grants the relief requested by the Conservation Groups, Wyoming would be deprived of the beneficial result it secured by engaging in the prior rulemaking process.

Listing the wolverine DPS as threatened would also restrict Wyoming's ability to study and manage the wolverine population within its borders. (Lanka Aff. at ¶ 9). For example, the ESA prohibits the "take" of any listed species and, as the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, **trap, capture, or collect**, or to attempt to engage in any such conduct," Wyoming's ability to conduct scientific studies of the wolverine population within its borders would be compromised by a listing under the ESA. *See* 16 U.S.C. § 1532(19) (emphasis added).

Moreover, if the Service lists the wolverine DPS, the agency will likely restrict activities and land use within the habitats critical to survival of the species. *See* 16 U.S.C. §§ 1532(b)(5)(A)(i); 1533(a)(3); 1538(a). The ESA would prohibit Wyoming from violating the prescriptive measures in the Service's critical habitat rule, potentially injuring Wyoming's interest in various activities such as winter recreation in wolverine habitat and licensing of legal furbearer trapping. *Id.*

Though incidental take of wolverines is exceedingly rare, Wyoming may, at a minimum, be forced to revise its existing trapping regulations and increase enforcement presence in wolverine habitat to ensure compliance. (Lanka Aff. at 4-5). A listing of the wolverine could potentially have negative implications for continued permitting of legal furbearer trapping in wolverine habitat. Also, a listing could adversely affect Wyoming's management efforts on behalf of other species by requiring the Game and Fish Department to divert effort from management of many other species to focus on one species historically present at low densities in the state. *Id.* at 5.

Additionally, winter recreation activities such as backcountry skiing and snowmobiling regularly occur in wolverine habitat in the state. *Id.* With the potential to render those activities off-limits in habitat designated as critical, an ESA listing of the wolverine could adversely affect both the ability of Wyoming residents to recreate in these areas, and the continued flow of revenue derived by

communities in the area from tourism-related and winter recreation.

Thus, disposition of this case in the Conservation Groups' favor would impair Wyoming's interests in retaining management authority over wolverines, conducting future biological studies of the wolverine population, and maintaining the viability of established activities in wolverine habitat. As a practical matter, any of this Court's rulings could impact Wyoming's interests. Therefore, the Court should allow Wyoming to participate in the matter to protect its interests.

**D. Wyoming's interests cannot be adequately represented by existing parties.**

In determining adequacy of representation, a court considers whether: (1) a present party will undoubtedly make all the intervenor's arguments; (2) the present party is capable and willing to make such arguments; and (3) the intervenor would offer any necessary elements to the proceedings that other parties would neglect. *City of Los Angeles*, 288 F. 3d at 398 (quoting *Nw. Forest Res. Council*, 82 F.2d at 838). "However, the burden of showing inadequacy is 'minimal,' and the applicant need only show that representation of its interests by existing parties 'may be' inadequate." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822–23 (citations omitted).

The Service cannot adequately represent Wyoming's sovereign interests. While the Federal Defendants have a duty to represent the interests of the general public across the United States, states generally have a variety of differing

obligations -- states must represent the specific interests of their residents, maintaining the fish and wildlife species within their borders while at the same time protecting and promoting their economies and safeguarding their tax revenue. *See Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992). The federal government has no duty to represent the personal or economic interests of a single group or state. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (finding that the federal government is “required to represent a broader view than the more narrow, parochial interests” of a proposed state or county intervenor), *abrogated on other grounds by Wilderness Soc’y*, 630 F.3d at 1173, 1177–78, 1180.

The fact that the Service and Wyoming seek the same outcome in this litigation does not mean that the Federal Defendants and Wyoming share the same interests. Here, the Conservation Groups ask this Court to set aside the Service’s withdrawal of its proposed wolverine listing rule and remand the issue to the agency, presumably for issuance of a warranted finding and proposed listing rule. In attempting to protect its interests, the Service will defend its actions in withdrawing the rule.

At this point, Wyoming’s interests diverge from those of the Service as Wyoming has additional interests in preventing the adverse effects that a wolverine listing would have on Wyoming by retaining management authority over the



wolverine population within its borders. The statutory mission of the Wyoming Game and Fish Department includes “provid[ing] an adequate and flexible system for control, propagation, management, protection and regulation of **all** Wyoming wildlife,” an interest that the Federal Defendants do not share and therefore cannot protect. *See* Wyo. Stat. Ann. § 23-1-103 (emphasis added). The United States District Court for the District of Idaho found this divergence of interests sufficient to grant Wyoming the right to intervene in a case that challenged the Service’s “warranted but precluded” finding on the greater sage-grouse:

On one level, the applicants and the [Service] share an objective: Both seek to affirm the ‘precluded’ portion of the [Service’s] decision. But they diverge on their ‘ultimate objective,’ which is the test the Court must apply. The ultimate objective of the applicants is to prevent, or at least delay as long as possible, the effects of listing; the [Service] simply seeks confirmation of its administrative process. Because they do not share the same ultimate objective, no presumption arises of adequate representation.

*See W. Watersheds Project v. U.S. Fish and Wildlife Serv.*, 10-cv-229-BLW, 2011 WL 2690430, at \*4 (D. Idaho July 9, 2011).

The circumstances in this case are similar: the Federal Defendants have an interest in upholding their administrative process while Wyoming has significant interests in (1) reducing the effects of a wolverine listing decision on its operations and (2) retaining management authority over wolverines in Wyoming. As such, Wyoming has met its minimal burden of showing that the Federal Defendants cannot adequately represent its interests in this case.



Neither can the other proposed state intervenors adequately represent Wyoming's interests in this litigation. Other state intervenors will represent only the interests of their own citizens, not the citizens of Wyoming or the goals and interests of Wyoming's state agencies. This point was also recognized in *W. Watersheds Project, supra*, where the Court allowed both Wyoming and Utah to intervene in the case because both states host populations of sage grouse and grouse habitat. The situation in this case is similar in that Wyoming and the other states in the region each host a population of wolverines.

Finally, the remaining proposed intervenors consist of trade associations representing oil and gas companies and Farm Bureaus that have economic interests and operations in wolverine habitat. (Dkts. 12 and 16). Because these organizations are intervening solely to protect their members' economic interests in continuing to engage in their respective businesses and in avoiding the cost increases associated with a listing of the wolverine, these proposed intervenors cannot adequately represent Wyoming's sovereign and other interests.

## **II. Permissive Intervention**

In the event the Court does not grant intervention as a matter of right, the should still allow Wyoming to permissively intervene pursuant to Fed. R. Civ. P. 24(b)(1)(B). That standard provides that "[o]n timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main

action a common question of law or fact.” If the applicant satisfies this requirement, “it is then discretionary with the court whether to allow intervention.” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc’y*, 630 F.3d at 1173, 1177–78, 1180.

As explained above, Wyoming’s motion is timely and will not result in any delay for these proceedings. Under the second factor, an applicant for permissive intervention satisfies the “common question” requirement where it will assert defenses that squarely respond to the claims asserted by the Conservation Groups in their respective complaints. *Kootenai Tribe of Idaho*, 313 F.3d at 1111. Here, Wyoming’s Proposed Answers directly contest the Conservation Groups’ claims challenging the Service’s withdrawal of its proposed wolverine listing rule.

Wyoming supports the Service’s decision as being procedurally sound, and this direct response to the Conservation Groups’ claims satisfies the “common question” requirement for permissive intervention. *Kootenai Tribe of Idaho*, 313 F.3d at 1110 (finding intervenor defendants alleged common questions of law and fact by raising defenses “directly responsive” to plaintiff’s claims). As Wyoming’s timely participation will directly address the issues of law raised in this case, it meets the criteria for permissive intervention.

//

## CONCLUSION

For the reasons set forth above, Wyoming respectfully requests that the Court grant it leave to intervene as a Defendant as a matter of right or, alternatively, grant it leave to intervene permissively.

DATED this 6<sup>th</sup> day of March, 2015.

GOUGH, SHANAHAN, JOHNSON & WATERMAN PLLP

By: 

Jeffrey M. Hindoien

*Attorneys for Proposed Defendant-Intervenor  
State of Wyoming*

## CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2), the undersigned hereby certifies that this Memorandum/Brief contains 3,973 words as calculated by MS Word, excluding the caption, certificates of service and compliance, and any Table of Contents, Table of Authorities and Exhibit Index.

  
Jeffrey M. Hindoien

*Attorneys for Proposed Defendant-Intervenor  
State of Wyoming*