



Animal Welfare Institute

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BY ELECTRONIC MAIL

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Public Comments Processing
Attn: FWS-R6-ES-2012-0106
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS
2042-PDM
Arlington, VA 22203

Dear Sir or Madame:

Re: Establishment of a Nonessential Experimental Population of the North American Wolverine in Colorado, Wyoming, and New Mexico

On behalf of the Animal Welfare Institute (AWI), please accept the following comments on the above-referenced U.S. Fish and Wildlife Service (hereafter the Service) proposed rule to establish a nonessential experimental population (NEP) area for the North American wolverine (*Gulo gulo luscus*) in the Southern Rocky Mountains of Colorado, northern New Mexico, and southern Wyoming, and designate the distinct population segment (DPS) of the North American wolverine occurring in the contiguous United States as a threatened species under the Endangered Species Act (ESA). In addition, these comments address the Service's proposal to establish the NEP area for the wolverine in the Southern Rockies portion of the DPS under section 10(j) of the ESA, and to classify any wolverines introduced into the area as a nonessential experimental population within the Southern Rocky Mountains.

Since 1985, wolverines have been a candidate for listing; these forest carnivores are now in danger of extinction throughout their U.S. range. The number of wolverines in the United States has dropped significantly in the past 100 years. Fewer than 500 wolverines left in the lower 48 states represent a distinct population that is only tenuously linked to the Canadian population. Current regulatory mechanisms are not adequately reducing these threats and AWI is deeply concerned that the Service's proposal to list the wolverine is under-protective. Most critically, in its proposed rule, the Service has failed to even consider whether the wolverine is endangered within any significant portions of its range, a clear violation of the ESA. This omission is inconsistent with the Service's past practices and its own policies.

For these reasons, AWI supports listing the wolverine as an endangered species with the full protection of the ESA, including critical habitat areas. There is a sizeable body of research about the habitat and life-cycle needs of wolverines available, indicating it is in dire need of critical

habitat. Thus, the decision to not designate any critical habitat is not credible and inconsistent with best available science.

I. Listing Determination: The Wolverine is Endangered in a Significant Portion of its Range, therefore the DPS must be Listed as Endangered.

The Endangered Species Act (ESA) defines an endangered species as “any species which is in danger of extinction throughout all or a significant portion of its range,”¹ and defines a threatened species as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”² Accordingly, the Service is obligated to protect a species at risk of extirpation from a significant portion of its range (SPR)—well *before* the threats to that species render it at risk of global extinction. Long-standing agency policy and caselaw both clearly state that the significant portion of its range language provides an *independent* basis for listing a species, thereby *lowering* the threshold for protecting a species under the ESA.³

In addition, under the ESA, listing is to be based on the best available science *only*. The Service has stated that wolverines do not qualify for endangered status due to the lack of “immediacy, severity, and scope of the threats” facing them. However, this conclusion is inconsistent with best available science, which indicates that the DPS is presently in danger of extinction throughout all or a significant portion of its range. The Service estimates that there are approximately 250 to 300 wolverines total in the U.S., most in small, isolated subpopulations, including 10 in Washington, 5 in Oregon, 1 in California, 1 in Colorado, 175 in Montana, 75 in Idaho, and 15 in Wyoming.⁴ This estimate is not based on actual studies estimating population, thus there could be fewer. The Service has also noted that these wolverines are likely unsuccessful breeders or non-breeding adults, and in fact the “effective” population of the DPS is less than 50.⁵ These low estimates indicate that the DPS deserves to be classified as “endangered” instead of “threatened.”⁶

The Service’s determination also grossly underestimates the present effects of climate change on the species and its absence from plans to manage the species and ensure it does not go extinct. In its December 14, 2010 warranted but precluded finding, the Service conceded that warning temperatures are [present tense] reducing snow pack in wolverine habitat and this trend will continue.⁷ The Service is also clearly not taking steps to address climate change as a threat to

¹ 16 U.S.C. § 1532(6).

² 16 U.S.C. § 1532(20).

³ *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010); *WildEarth Guardians v. Salazar*, 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010).

⁴ See 78 Fed. Reg. at 7868.

⁵ See 78 Fed. Reg. at 7884.

⁶ The Service has concluded that species with similar numbers warrant listing as endangered, such as grizzlies in Cabinet-Yaak. See 64 Fed. Reg. 26725, 26732 (May 17, 1999).

⁷ See 75 Fed. Reg. at 78044 and 78 Fed. Reg. at 7876.

wolverines. Arguably, this threat warrants section 7 consultation in the same way that trapping, shooting, and incidental take do.⁸

Finally, AWI is deeply concerned that the Service has failed to follow the clear language of the ESA and its own draft policy on analyzing SPR by not conducting any analysis or discussing in the listing proposal whether the wolverine is threatened or endangered within a significant portion of its range. The failure to conduct such an analysis renders the listing proposal arbitrary and capricious, and a violation of the ESA because the clear language of the ESA requires the Service to analyze whether a species is endangered or threatened “throughout all *or* a significant portion of its range.”⁹ The listing proposal for the wolverine fails to conduct an independent assessment of each of the four possible listing options contemplated by the ESA (endangered throughout its range, endangered in a significant portion of its range, threatened throughout its range, and threatened in a significant portion of its range). The Service’s conclusory statement does not represent an analysis based on the best available science, and thus fails to meet the requirements of the ESA. The Service also fails to follow its own draft policy on SPR, which makes expressly clear the process for conducting an SPR analysis:

If we [the Service] determined that...the species was threatened throughout all of its range, *we would limit our SPR analysis to the question of whether the species is in danger of extinction in a significant portion of its range*; if so, we would list the species as endangered; if not, we would list the species as threatened.¹⁰

Nothing in the listing proposal or its supporting documents suggests that the Service ever conducted such an analysis for the wolverine by determining if the species is in danger of extinction in a significant portion of its range.

II. Rule Adoptions: AWI Supports Prohibition of Intentional Trapping and Incidental Take of Wolverines, but the Service must first take a Hard Look at Cumulative Effects to the DPS before Adopting a Final, Special 4(d) or 10(j) Rule.

The intentional trapping and killing of wolverines in Montana -- when combined with other existing threats (climate change and an already small population, for example) -- harms wolverines, as does trapping, snaring, and poisoning in occupied wolverine habitat. Wolverines are particularly susceptible to mortality via trapping due to their scavenging nature. As the Service noted, a trapping program, when combined with other threats, may contribute to the likelihood that the wolverine will become extirpated in the foreseeable future by increasing the

⁸ Under Section 7 each “federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.” 16 U.S.C. § 1536(a)(2). As an initial matter, therefore, the Service has no authority to exempt (and should not attempt to exempt) activities that would otherwise meet the statutory definition of “take” under the ESA. *See* 16 U.S.C. §§ 1532(19), 1538(a)(1)(B).

⁹ 16 U.S.C. 1532(6) & (20)

¹⁰ 76 Fed. Reg. at 77,002

speed with which small populations of wolverines are lost from isolated habitats, and also by increasing the mortality levels for dispersing wolverines that are required to maintain the genetics and demographics of wolverine populations in the contiguous United States.¹¹ Thus, states such as Montana cannot legally trap wolverines without first preparing a habitat conservation plan (HCP) and obtain an incidental take permit (ITP) in accordance with section 10, 16 U.S.C. § 1539.

The Service cannot, legally, adopt a special 4(d) rule that allows the states to authorize trapping and other forms of legal take in wolverine habitat. Incidental take of wolverines is another threat that the Service should seek to minimize. Not only have wolverines been killed incidentally in the process of Wildlife Services attempting to trap wolves, but their use of sodium cyanide M-44s also poses a huge threat to wolverines. The proposed 4(d) rule notes that all otherwise legal activities involving wolverines and their habitat (other than in association with trapping, hunting, shooting, collection, capturing, pursuing, wounding, killing, trading, or incidental take associated with these activities) are *not* considered to be take under the regulation, and this includes activities that could significantly modify wolverine habitat.¹²

While we are supportive of the Service's prohibition on take in the special 4(d) rule—including the prohibition on incidental take—we strongly disagree with the Service's exemption of certain activities, including but not limited to forest management and dispersed recreational activities, from the take prohibition. In its proposal, the Service has simply reiterated the requirements of section 9 of the ESA, which already prohibits any person from taking a threatened or endangered species, whether intentional or not. Nothing in the special 4(d) rule should be interpreted as providing—nor should a one-size-fits-all special 4(d) rule provide—cover for the incidental taking of wolverine, absent obtaining an individual ITP pursuant to Section 10 of the ESA, 16 U.S.C. §1539(a)(1)(B).

In addition, the Service arguably needs to conduct a NEPA analysis before adopting a special 4(d) rule. The Service must take into account and assess the direct, indirect, and cumulative impacts on the DPS. Cumulative impacts are “the impacts on the environment which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”¹³ The Service must give a “sufficiently detailed catalogue of past, present, and future projects and provide adequate analysis about how these projects, and the difference between the projects, are thought to have impacted the environment.”¹⁴ The Service should also prohibit all trade in wolverine skins as part of the special 4(d) rule.

Here, the Service acknowledges that the impacts from climate change, when combined with various threats to wolverines such as trapping (intentional and incidental), small population size

¹¹ 75 Fed. Reg. at 78050-78051.

¹² 78 Fed. Reg. at 7888.

¹³ 40 C.F.R. § 1508.7.

¹⁴ *Great Basin Mine Watch v. Hankins*, 456 F. 3d 955, 971 (9th Cir. 2006).

(total and effective), and increased isolation, are significant,¹⁵ but does not address additional, cumulative impacts to the DS from other factors such as loss of foraging opportunities, increased access to habitat, forest management, etc. The Service has considered some of these factors in isolation, but not in combination with other existing threats such as climate change, trapping, habitat loss,¹⁶ and incidental take. Incidental trapping or poisoning, in conjunction with the loss of individuals on highways, ski area expansion, travel planning, loss of prey species, winter recreation, and shrinking habitat may pose a threat to a subpopulation for the DPS that is greater than the sum of the individual parts.

III. AWI Supports Additional Reintroduction Efforts, Recovery Planning, the Development of Protection Management Practices on National Forest Service Lands, and Designating Critical Habitat for Wolverines.

AWI encourages the Service to explore the potential to reintroduce wolverine populations not only in Colorado but in other regions where wolverines were present historically, including Washington, Oregon, California, Utah, Michigan, Minnesota, Idaho, and Wyoming. In addition, because 94% of the currently occupied wolverine habitat in the contiguous United States is in Federal ownership, with most managed by the Forest Service,¹⁷ AWI encourages restrictions on all forms of trapping and snaring in occupied habitat on National Forest Lands to alleviate a major threat. In accordance with these restrictions, Land and Resource Management Plans should address specific standards for properly managing the species.

AWI disagrees with the Service's determination that the designation of critical habitat is "not determinable" at this time. The best available science reveals designating critical habitat is, in fact, determinable. First, the Service knows where all known den sites are located within the DPS and where required late spring snow persists (at least for now). Second, The Service also knows where key linkage zones for wolverine connectivity exist. In addition, it is generally known that areas in Colorado, Wyoming, Utah, Oregon and California that retain late spring snow and are essential to the long-term survival of wolverines.¹⁸ Designating critical habitat will provide the Service with the opportunity to determine the physical and biological features essential to the conservation of the species and provide additional regulatory protections by mandating consultations on any Federal agency actions that may affect and/or adversely modify critical habitat.

Finally, the Service should ensure that recovery planning occurs within a reasonable amount of time pursuant to section 4(f) of the ESA. As explained by the Service, the development and implementation of recovery plans is important because it spells out the variety of actions needed to achieve recovery. We also recommend that, as part of the recovery planning process, the Service take a hard look at reintroduction programs not only in Colorado but other areas in the

¹⁵ 78 Fed. Reg. 7885-86.

¹⁶ The Service anticipates loss of 63% of wolverine habitat by 2085, or a projected loss in habitat that will "result in a loss of wolverine numbers that is greater than the overall loss of habitat area. *See* 78 Fed. Reg. at 7876.

¹⁷ 78 Fed. Reg. at 7874.

¹⁸ *Id.* at 7868.

contiguous United States that were historically occupied by wolverine, still include suitable habitat (including late spring snow) but area currently unoccupied. This would include Oregon (central Cascades and the Wallowas), Washington (Olympics), California (Sierra Nevada), New Mexico, Utah, and areas in Wyoming (the Big Horns and Wind River Range).

Thank you in advance for providing this opportunity to comment on this proposal. Please send information about this proposal to: Tara Zuardo, Wildlife Legal Associate, Animal Welfare Institute, 900 Pennsylvania Ave., SE, Washington, DC 20003.

Sincerely,

A handwritten signature in cursive script that reads "Tara Zuardo".

Tara Zuardo
Wildlife Legal Associate
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