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

DEFENDERS OF WILDLIFE, CENTER )  
FOR BIOLOGICAL DIVERSITY, )  
CONSERVATION NORTHWEST, FRIENDS ) Cause No. CV-08-139-M-DWM  
OF THE CLEARWATER, GREATER )  
YELLOWSTONE COALITION, IDAHO )  
CONSERVATION LEAGUE, JACKSON ) **COMPLAINT FOR DECLARATORY**  
HOLE CONSERVATION ALLIANCE, ) **AND INJUNCTIVE RELIEF**  
KLAMATH-SISKIYOU WILDLANDS )  
CENTER and WYOMING OUTDOOR )  
COUNCIL, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
DIRK KEMPTHORNE, in his official )  
capacity as Secretary of the Interior; and H. )  
DALE HALL, in his official capacity as )  
Director, U.S. Fish and Wildlife Service, )  
)  
Defendants. )  
\_\_\_\_\_ )

1. In this action, plaintiffs Defenders of Wildlife, Center for Biological Diversity, Conservation Northwest, Friends of the Clearwater, Greater Yellowstone Coalition, Idaho Conservation League, Jackson Hole Conservation Alliance, Klamath-Siskiyou Wildlands Center and Wyoming Outdoor Council challenge the U.S. Fish and Wildlife Service’s negative 12-month finding on a petition to list the wolverine (Gulo gulo) in the lower-48 United States as an endangered or threatened species and to designate critical habitat for the wolverine under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 et seq. See Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the North American Wolverine as Endangered or Threatened, 73 Fed. Reg. 12,929 (Mar. 11, 2008).

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 16 U.S.C. § 1540(g) (ESA citizen-suit provision), and 28 U.S.C. § 1361 (mandamus). Defendants’ sovereign immunity is waived by 16 U.S.C. § 1540(g).

3. Plaintiffs have provided 60 days’ written notice of the violations alleged herein pursuant to 16 U.S.C. § 1540(g).

4. Venue lies in this judicial district pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because a substantial part of the ESA violations alleged herein occurred in this district.

### **PARTIES**

5. Plaintiff Defenders of Wildlife (“Defenders”) is a non-profit conservation organization based in Washington, D.C., with offices across the country. Defenders has more than 1 million members and supporters across the nation, many of whom reside within the historic and current range of the wolverine. Defenders is dedicated to protecting and restoring all

native wild animals and plants in their natural communities. Defenders has invested time and resources protecting the wolverine and its habitat, including advocating for monitoring and conservation of the species, and for listing the wolverine as an endangered or threatened species under the ESA. In addition, Defenders regularly publishes information regarding species, including the wolverine, for the use of its members and the public.

6. Plaintiff Center for Biological Diversity is a nonprofit organization dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. The Center was founded in 1989, and is based in Tucson, Arizona with offices in California, Oregon, New Mexico, Montana, and Washington, D.C. The Center has more than 40,000 members, including many who reside in, explore, and enjoy the northern Rockies.

7. Plaintiff Conservation Northwest, formerly the Northwest Ecosystem Alliance, is a non-profit conservation organization based in Bellingham, Washington. Conservation Northwest was founded in 1988 and now has more than 10,000 members. Conservation Northwest seeks to maintain the ecological integrity of the Northwest's wildlands, and advocates for protection of imperiled wildlife such as the lynx, the fisher, and the wolverine.

8. Plaintiff Friends of the Clearwater ("Friends") is a non-profit conservation organization based in Moscow, Idaho. Friends is dedicated to protecting the National Forests and public lands of the Greater Salmon-Selway Ecosystem in central Idaho. Friends has actively advocated for protection of the wolverine by sponsoring free public-education presentations about the wolverine in Idaho, publishing articles about the wolverine in its newsletter, gathering wolverine sightings information from the public agencies in the region, and participating in public-involvement processes that affect wolverines and their habitat.

9. Plaintiff Greater Yellowstone Coalition (“GYC”) is a conservation organization dedicated to protecting and restoring the Greater Yellowstone Ecosystem and the unique quality of life it sustains. Formed in 1983, GYC is a non-profit corporation and has approximately 9,000 members. Central to GYC’s mission is maintaining the Greater Yellowstone Ecosystem’s signature populations of rare and imperiled wildlife, including the wolverine.

10. Plaintiff Idaho Conservation League (“ICL”) is a non-profit conservation organization based in Boise, Idaho, that seeks to preserve Idaho’s clean water, wilderness and quality of life through citizen action, public education, and professional advocacy. ICL was founded in 1973 and today has approximately 9,500 members. ICL seeks to preserve Idaho’s wildlife habitat for a variety of species, including the wolverine.

11. Plaintiff Jackson Hole Conservation Alliance is a non-profit organization based in Jackson, Wyoming with more than 1,800 members. The Jackson Hole Conservation Alliance is dedicated to responsible land stewardship, and to ensuring that human activities are in harmony with the area’s irreplaceable wildlife, scenery, and other natural resources.

12. Plaintiff Klamath-Siskiyou Wildlands Center (“KS Wild”) is a non-profit conservation organization based in Williams, Oregon. KS Wild advocates for the forests and wildlife of the Klamath and Rogue watersheds of northwest California and southwest Oregon, within the historic range of the wolverine. With approximately 1,500 members, KS Wild uses science, collaboration and education to defend healthy ecosystems and help build sustainable communities.

13. Plaintiff Wyoming Outdoor Council (“WOC”) is a non-profit membership organization founded by Wyoming residents in 1967 to conserve the state’s biological diversity and to protect its environment by promoting sound natural resources policies. WOC works to

safeguard the state's spectacular national parks and protected areas, vast national forests and other public lands, world-renowned wildlife and wildlife habitat, blue-ribbon fisheries and air and water quality. WOC has approximately 1,400 individual members, along with many organizational members.

14. Plaintiffs' members and staff seek to observe and study the wolverine and/or signs of the wolverine's presence in its native habitat. Plaintiffs derive aesthetic, recreational, scientific, inspirational, educational, and other benefits from these activities, for the reclusive wolverine is a living symbol of our nation's remaining wilderness. As the pioneering American wildlife biologist and conservationist Olaus Murie once wrote, "I wonder if there is another inhabitant of northern wilderness that so excites the imagination." Murie described coming upon a wolverine trail in an early winter snowfall: "Merely seeing those tracks in the snow made it a red-letter day." Plaintiffs have an interest in preserving the possibility of such experiences and activities in the future. An integral aspect of Plaintiffs' interest in the wolverine is the expectation and knowledge that the wolverine is present, healthy, and wild in its native range. For this reason, Plaintiffs' interest in the wolverine is entirely dependent on the continued existence of a healthy wolverine population in the wild.

15. Members and staff of the plaintiff organizations live and/or recreate throughout the current and historic range of the wolverine. Plaintiffs use and enjoy, on a continuing and ongoing basis, the habitat of the wolverine and the larger ecosystem upon which it depends. Plaintiffs' members and staff derive aesthetic, recreational, scientific, inspirational, educational, and other benefits from the wolverine's existence in the wild on a regular and continuing basis and intend to do so frequently in the future. Plaintiffs' members and staff have participated in efforts to protect and preserve the habitat essential to the continued survival of the wolverine.

Plaintiffs bring this action on their own institutional behalf and on behalf of their adversely affected members and staff.

16. The above-described aesthetic, recreational, scientific, inspirational, educational, and other interests of the plaintiffs have been, are being, and, unless the relief prayed for is granted, will continue to be adversely and irreparably injured by defendants' negative 12-month finding on the wolverine listing petition and their refusal to list the wolverine as an endangered or threatened species and to designate critical habitat for the species under the ESA. These are actual, concrete injuries to plaintiffs, caused by defendants' failure to comply with the ESA and its implementing regulations and policies. These injuries would be redressed by the relief requested in this complaint. Plaintiffs have no other adequate remedy at law.

17. Defendant Dirk Kempthorne is the Secretary of the Department of the Interior. The Secretary of the Interior is the federal official vested with responsibility for properly carrying out the ESA with respect to terrestrial mammals such as the wolverine. Defendant Kempthorne is sued in his official capacity.

18. Defendant H. Dale Hall is the Director of the U.S. Fish and Wildlife Service ("FWS"). FWS is the federal agency to which the Secretary of the Interior has delegated the responsibility for implementing the ESA with respect to terrestrial mammals such as the wolverine. Defendant Hall signed the negative 12-month finding challenged in this case. Defendant Hall is sued in his official capacity.

### **THE WOLVERINE**

19. The wolverine is the largest terrestrial member of the weasel family. It combines the weasel's ferocity and energy with a larger and stronger body that has frequently been described as bear-like in its appearance. Adult wolverines normally weigh 20 to 40 pounds and

are three to four feet long. Wolverines typically have a thick, glossy, dark-brown coat of fur, often with a pale buff stripe running laterally from the shoulders along the animal's side and crossing the rump just above a long, bushy tail. The elusive wolverine has long been a subject of folklore. Native American mythology describes the wolverine as a trickster-hero, and a link to the spirit world.

20. Wolverines once ranged across the northernmost tier of the United States from Maine to Washington, and south into the Adirondacks of New York, the Rocky Mountains as far south as New Mexico, and the Sierra Nevada-Cascade and Siskiyou Mountains as far south as California.

21. The wolverine has been eliminated from all but a fragment of this historic range due to destruction of its wilderness habitat and trapping by European settlers. Wolverines were extirpated from the upper Midwest states by the early 1900s, and from the Northeast shortly thereafter. Although occasional unconfirmed wolverine sightings continue to be reported in Oregon, and recently lone wolverines were reported in Michigan and California, today wolverine populations are known to exist in the lower-48 states only in the northern Cascades of Washington and the Rocky Mountain regions of Idaho, Montana, and Wyoming.

22. Wolverines feed primarily by scavenging ungulates killed by other predators or by natural causes such as disease, injury, or weather. Wolverines also prey on rodents, and are capable of taking even large ungulates such as deer, elk, and moose as live prey when the opportunity arises.

23. Individual wolverines require large home ranges to access sufficient food to sustain themselves throughout the year, with the size of those ranges varying by habitat and food conditions, and by the age and gender of the individual wolverine. Home ranges of studied

wolverines in Idaho averaged approximately 1,522 square kilometers for adult males and 384 square kilometers for adult females. In northwest Montana, adult males had home ranges of 422 square kilometers, while females occupied ranges averaging 288 square kilometers.

24. Wolverines have a low reproductive rate. Female wolverines attain sexual maturity at about 15 months, but fewer than half of potentially reproducing females actually produce young, known as kits, in any given year. Wolverine litter sizes average two to three kits. An Idaho study found that wolverines reproduced at a rate of less than one kit per female per year.

25. All available information indicates that the wolverine population in the lower-48 United States is significantly imperiled with extinction. According to FWS's analysis in the challenged listing determination, the current wolverine population in the United States comprises an estimated 500 wolverines in the northern Rocky Mountains in Idaho, Wyoming and Montana, and a small population in the North Cascades mountain range in Washington State. See 73 Fed. Reg. at 12,935. However, FWS's population analysis likely overestimates the northern Rockies population. FWS's analysis apparently assumed 126,470 acres of suitable wolverine habitat in Montana, Idaho and Wyoming based on non-peer-reviewed scientific evidence reported in B.L. Brock et al., Broad-Scale Wolverine Habitat in the Conterminous Rocky Mountain States, in Greater Yellowstone Wolverine Program Cumulative Report 21 (May 2007), and then estimated how many wolverines that habitat could support based on wolverine population densities observed in non-peer-reviewed scientific research reported in the Madison and Teton ranges by Robert M. Inman et al., Wolverine Space Use in Greater Yellowstone, in Greater Yellowstone Wolverine Program Cumulative Report 1, 13 (May 2007). See 73 Fed. Reg. at 12,935. FWS calculated that this methodology yielded a range of 499 to 655 wolverines in the three-state

region, and adopted a “lower range estimate” of 500 individuals. Id. In fact, however, the lower end of this range, based on the minimum density estimate of 1 wolverine/321 square kilometers reported by Inman, supra, in his study area, is 394 wolverines—not 499 ( $126,470 \div 321 = 393.99$ ). Moreover, all such population estimates assume full occupancy of suitable wolverine habitat in the northern Rockies, which FWS admits “is not the case.” 73 Fed. Reg. at 12,935. Accordingly, the actual wolverine population in the northern Rockies may be lower than 394 individuals.

26. Moreover, FWS admits that only a small percentage of the total wolverine population successfully breeds. FWS reports that the “effective population size” for wolverines in the lower-48 states is estimated at just 39 individuals. See id. at 12,937. A population’s “effective” size is a “measure of the proportion of the actual population that contributes to future generations.” Id. at 12,936. “Effective population size is important because it determines rates of loss of genetic variation, fixation of deleterious alleles, and the rate of inbreeding,” and as a general rule, “the short-term effective population size should not be less than 50, and the long-term effective population size should not be less than 500.” Id. at 12,937. FWS reports that the wolverine’s effective population size of only 39 individuals in its last remaining range in the lower-48 United States “is exceptionally low... and is below what is required for short-term maintenance of genetic diversity.” Id. FWS further acknowledges that, “[o]ver time, if the current effective population size remains stable, the population will be at risk of extinction due to inbreeding depression or stochastic demographic effects.” Id.

### **THREATS TO THE WOLVERINE**

27. Exacerbating the threat of extinction posed by its tiny effective population size, the wolverine is beset by numerous threats where it persists in the lower-48 states. One such

threat is isolation of remaining wolverine populations. The wolverine currently exists “in an archipelago of semi-isolated, suitable habitats near mountain tops, surrounded by a sea of unsuitable habitats.” Id.; see also id. at 12,936 (the wolverine has been relegated to “small, fragmented, and semi-isolated populations” found in “isolated, ‘sky island’ patches separated by unsuitable habitats”). The intermountain valleys between these refugia significantly restrict wolverine movement as they have become clogged with “residential and commercial developments and transportation corridors.” Id. at 12,937. Yet, as FWS recognizes, “to avoid further inbreeding or local extirpation due to demographic stochasticity, regular exchange of individual wolverines between islands of habitat must occur.” Id.; see also id. at 12,938 (“In the contiguous United States, wolverines must cross unsuitable habitats to achieve connectivity among subpopulations, which is required to avert further genetic drift and continued loss of genetic diversity.”). The current fragmented and disjointed nature of wolverine habitat “results in a contiguous U.S. population that is more vulnerable to extirpation because of lack of connectivity between subpopulations, which contributes to inbreeding and reduces the chances of recolonization of habitat patches after local extinction.” Id. As a result, FWS determined, the wolverine is “at greater risk of being lost due to catastrophic or stochastic events than those populations to the north in Canada and Alaska.” Id. at 12,936.

28. FWS acknowledges that, not only are wolverine populations largely isolated from one another within the lower-48 states, they are isolated from Canadian wolverine populations as well:

Genetic drift has occurred in the remaining populations in the contiguous United States where wolverines contain four of nine haplotypes found in Canadian populations. The reduced number of haplotypes indicates not only that genetic drift is occurring, but also that there is some level of genetic separation; if these populations were freely interbreeding, they would share more haplotypes. The reduction of haplotypes is likely a result of the fragmented nature of wolverine

habitat in the United States and is consistent with an emerging pattern of reduced genetic variation at the southern edge of the range documented in a suite of boreal forest carnivores. As stated previously, the low effective population size and accompanying reduction in genetic diversity is a concern because populations with low genetic diversity are more vulnerable to extinction.

Id. at 12,937 (citations omitted). A haplotype is a group of alleles of different genes on a single chromosome that are closely enough linked to be inherited, usually as a unit.

29. Wolverines continue to suffer mortality from trapping that is permitted under state law in Montana, “where the bulk of the species resides.” Id. at 12,939. Wolverines are vulnerable to bait trapping because their scavenging nature and long distance travel patterns increase the overall probability of their encountering traps, even in remote areas. In recent years, Montana’s wolverine trapping season annually has removed an average of 10.5 individuals from the state’s population. See id. at 12,934. Research indicates that an untrapped wolverine population is capable of increasing at 6.4 percent each year. Accordingly, FWS in its negative listing determination assumed that trapping mortality of 6 percent of a wolverine population each year is sustainable. See id. at 12,936. However, FWS failed to acknowledge that this 6-percent threshold has been regularly exceeded in numerous mountain ranges that constitute suitable habitat for the highly fragmented Montana wolverine population. Indeed, a recent study of the wolverine population in Montana’s Pioneer, Beaverhead, Anaconda-Pintler, and Flint Creek Mountain Ranges observed a 30 percent population decline over the four-year study period due to trapping, with 6 of 8 known wolverine mortalities in these ranges caused by trapping. Given that “regular exchange of individual wolverines between islands of habitat must occur” to avoid inbreeding and local extirpations, id. at 12,937, such excessive localized trapping mortality, particularly in these “island” mountain ranges located between larger areas of suitable wolverine habitat such as Glacier National Park and the Greater Yellowstone Ecosystem, presents a

significant threat to the species' viability. Further underscoring this threat, the best available scientific information indicates that a 2:1 ratio of habitat where trapping is prohibited versus habitat where trapping is permitted is necessary for a sustainable wolverine population, but one recent study documented that the ratio in Montana is 1:9. Although Montana recently reduced its annual trapping quota for wolverines, trapping continues to present a threat of direct mortality each year for the already-insufficient wolverine population that remains in the state.

30. Wolverines also are threatened by the disturbance of their denning habitat due to escalating motorized winter recreation, such as snowmobiling and helicopter skiing. Female wolverines typically give birth to their kits from early February through April in high alpine cirque basins above timberline, tunneling through several meters of snow to excavate a denning area at ground level. Denning females are extremely sensitive to human disturbance. Such disturbance frequently results in den abandonment, often forcing the female to move to a less suitable site. Denning females have been observed to abandon their dens even upon discovering human snowshoe tracks in the area. Despite the steep terrain that characterizes typical den sites, recent advances in snowmobile technology have enabled snowmobilers to reach previously inaccessible areas of suitable wolverine denning habitat. Further, an expanding helicopter skiing industry is impacting otherwise remote and inaccessible wolverine denning habitats in some areas with the noise and disturbance associated with numerous helicopter flights and landings throughout the winter months. A study of suitable wolverine denning habitat in the southwestern portion of the Greater Yellowstone Ecosystem concluded that “[w]inter recreational use, particularly snowmobile and heli-skiing, may be having potentially severe localized habitat impacts on wolverines.” Kimberly S. Heinemeyer *et al.*, [Aerial Surveys for Wolverine Presence and Potential Winter Recreation Impacts to Predicted Wolverine Denning Habitats in the](#)

Southwestern Yellowstone Ecosystem 18 (Jan. 2001). The study noted, for example, that aerial surveys over two years had failed to detect wolverine presence in the Palisades area on the Wyoming-Idaho border south of Jackson Hole, Wyoming, despite the fact that this area “appears to contain high quality wolverine habitat”; however, “these habitats appear to be incurring potentially large impacts due to the widespread winter recreational activities.” Id. This Palisades area is particularly significant because it appears to constitute a major obstacle in a potential migration route from occupied wolverine habitat in the Greater Yellowstone Ecosystem south to unoccupied suitable habitat in the southern Rockies.

31. Global warming also presents a dire threat to the lower-48 United States wolverine population. As FWS observed, “[s]pring snow cover (April 15 to May 14) is the best overall predictor of wolverine occurrence,” and “[a]ll of the areas in the lower 48 States for which good evidence of persistent wolverine populations exists (i.e., Cascades, Sierra Nevada, northern and southern Rockies) contain large and well-distributed areas with deep snow cover that persists through the wolverine denning period.” 73 Fed. Reg. at 12,934-35. Female wolverines depend on adequate snowpack for maternal den sites. Id. at 12,934. Climate change already has decreased spring snow cover in the wolverine’s range, and that trend is likely to continue and escalate over time. This loss of spring snow cover will cause critical reductions in wolverine denning habitat, as females will be unable to find adequate snow cover in many areas. Recent scientific studies document that areas of wolverine habitat have already lost up to 30% of their historic spring snowpack, and reductions could increase to 60% of historic levels by 2090. Snowpack reduction will thus place added pressure on wolverine populations as their denning habitat literally melts away, and, based on a recent wolverine range assessment reported in Keith B. Aubry et al., Distribution and Broad-scale Habitat Relations of the Wolverine in the

Contiguous United States, 71 Journal of Wildlife Management 2147 (Sep. 2007), is likely to result in further range constriction for the species. In addition to reductions in denning habitat, warmer winters are also likely to reduce mortality of prey species such as bighorn sheep, mountain goats, and elk, thereby decreasing the amount of winter-killed carrion available for scavengers such as wolverines. Combined with information showing that the availability of winter food is a limiting factor for female wolverine reproduction, this indicates that even greater declines in wolverine populations may be imminent.

### **THE ENDANGERED SPECIES ACT**

32. The ESA was enacted to “provide a program for the conservation of . . . endangered species and threatened species” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). To receive the full protections of the ESA, a species must first be listed by the Secretary as “endangered” or “threatened” pursuant to ESA section 4. Id. § 1533.

33. Under the ESA, an “endangered” species “means any species which is in danger of extinction throughout all or a significant portion of its range.” Id. § 1532(6). A “threatened” species “means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20).

34. The ESA requires the Secretary to “determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;

- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.”

Id. § 1533(a)(1). The Secretary must make these determinations “solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species.” Id. § 1533(b)(1)(A).

35. Upon listing a species under the ESA, the Secretary must, “to the maximum extent prudent and determinable,” designate critical habitat for such species. 16 U.S.C. § 1533(a)(3). Under the ESA, “critical habitat” means “the specific areas within the geographical area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and . . . specific areas outside the geographical area occupied by the species at the time it is listed . . . , upon a determination by the Secretary that such areas are essential for the conservation of the species.” Id. § 1532(5)(A).

36. Once a species is listed as “endangered” or “threatened” under the ESA, it is protected under the Act’s substantive and procedural provisions. The ESA prohibits any federal agency from taking any action found “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat].” Id. § 1536(a)(2). The ESA also makes it unlawful for any person to “take” – *i.e.*, injure or kill – a member of an endangered species. Id. § 1538(a)(1)(B); *see id.* § 1532(19).

37. The ESA’s text and legislative history reflect a “consistent policy decision by Congress that the United States should not wait until an entire species faces global extinction before affording a domestic population segment of a species protected status.” Sw. Ctr. for Biological Diversity v. Babbitt, 926 F. Supp. 920, 924 (D. Ariz. 1996). Indeed, in establishing

that a species may be deemed endangered or threatened based on threats “throughout ... a significant portion of its range,” Congress sought to provide for “the possibility of declaring a species endangered within the United States where its principal range is in another country, such as Canada or Mexico, and members of that species are only found in this country insofar as they exist on the periphery of their range.” H.R. Rep. No. 93-412, at 10 (1973). Moreover, in authorizing the listing of distinct population segments (“DPSs”) under the ESA, Congress recognized “that there may be instances in which FWS should 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, 96th Cong., 1st Sess. (1979), reprinted in A Legislative History of the Endangered Species Act, 97th Cong., 2d Sess. 1397 (1982). This statutory authority to provide differing levels of protection to different populations is a key feature of the ESA. Many of the most prominent species protected under the ESA, including the gray wolf, grizzly bear, and bald eagle, were listed as populations in the lower-48 states despite the presence of more robust populations in Alaska and Canada.

38. Under the ESA, a “species” that may receive the protections of the Act includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” Id. § 1532(16). Congress did not define “distinct population segment,” or “DPS,” in the ESA, and the term has no generally accepted scientific meaning. See Nat’l Ass’n of Home Builders v. Norton, 340 F.3d 835, 842 & n.8 (9th Cir. 2003). In 1996, the Service issued a policy interpreting the phrase “distinct population segment” that requires the consideration of the discreteness of the population segment in relation to the remainder of the species to which it belongs; the significance of the population

segment to the species to which it belongs; and the population segment's conservation status in relation to the Act's standards for listing. 61 Fed. Reg. 4,722, 4,725 (Feb, 7, 1996).

39. With respect to the discreteness element, “[t]he standard established for discreteness is simply an attempt to allow an entity given DPS status under the Act to be adequately defined and described.” Id. at 4,724. A population may be discrete if it meets one of the following conditions:

1. It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.
2. It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

Id. at 4,725. In determining a population's significance, the Service's evaluation may include:

1. Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon;
2. Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon;
3. Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or

4. Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Id. Significance is to be considered “in light of Congressional guidance” and may be established based on, “but is not limited to,” the above listed factors. Id.

40. The ESA and its implementing regulations similarly fail to define what constitutes a “significant portion of [a species’] range” for the purpose of the listing determination. 16 U.S.C. § 1532(6). FWS relies on a recent Memorandum from the Department of Interior’s Office of the Solicitor which concludes, in part, that the analysis of whether a portion of a species’ range is “significant” is limited to the species’ current, rather than historic, range, and must focus on the biological significance of the region regardless of its geographic scope. See Department of Interior, Office of the Solicitor, Memorandum on the Meaning of “In Danger of Extinction Throughout All or a Significant Portion of its Range” M-37013 (March 16, 2007). The Solicitor’s conclusions, however, defy the plain meaning of the text, the intent of the ESA and a controlling judicial decision addressing the issue. See Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145 (9th Cir. 2001) (holding that evaluation of “significant portion” of a species’ range must consider historic range).

#### **THE CHALLENGED LISTING DECISION**

41. The FWS decision challenged in this case represents the agency’s long-delayed final word on a petition to extend ESA protections to the wolverine in the lower-48 United States. On July 14, 2000, various conservation organizations, including certain of the plaintiffs here, submitted a petition to list the wolverine within the contiguous United States as a threatened or endangered species and to designate critical habitat for the species. The ESA required FWS to render a preliminary determination “whether the petition presents substantial

scientific or commercial information indicating that the petitioned action may be warranted” within 90 days after receiving the petition “[t]o the maximum extent practicable.” 16 U.S.C. § 1533(b)(3)(A). After extensive delay that required court action to resolve, the Service finally published a negative 90-day petition finding in the Federal Register on October 21, 2003. See 68 Fed. Reg. 60,112 (Oct. 21, 2003). On June 8, 2005, a coalition of conservation organizations filed a complaint in this Court challenging the Service’s negative 90-day finding. On September 29, 2006, this Court ruled that the 90-day petition finding was arbitrary and capricious and “violated the [ESA] through the erroneous application of a standard that looks to conclusive evidence.” Defenders of Wildlife v. Kempthorne, CV 05-99-M-DWM, slip op. at 18-19 (D. Mont. Sep. 29, 2006). According to this Court, FWS ignored “substantial scientific information” when it erroneously determined that the petition failed to show that listing the wolverine may be warranted. Id., slip op. at 14. This Court concluded that the “petition also included enough information to allow the Secretary to conclude the distribution of the species is substantially diminished and the wolverine’s existence is threatened.” Id., slip op. at 20. The court ordered the Service to prepare a 12-month finding on the wolverine listing petition. See id., slip op. at 21. On April 18, 2007, this Court granted the Service’s motion to extend the status review and 12-month finding deadline for the wolverine by five months, to February 28, 2008.

42. FWS finally published its 12-month finding denying ESA protections for the wolverine on March 11, 2008. See 73 Fed. Reg. at 12,929. In the finding, FWS never addressed the question whether the wolverine population in the lower-48 United States constitutes an endangered or threatened species due to small effective population size or any other factors, including those identified in paragraphs 27 to 31, supra. Instead, FWS determined that this population “does not constitute a listable entity under the Act.” 73 Fed. Reg. at 12,929. FWS

first determined that the wolverine population in the lower-48 United States does not constitute a DPS under the ESA and as a result the population cannot be separately listed under the ESA. FWS then found that the portion of the wolverine's range lying within the United States is not "significant" to the North American population and therefore, despite the dire status of the species in the contiguous United States, the species is not in danger of extinction throughout a "significant portion of its range."

### **FWS's DPS Finding**

43. Under FWS's DPS policy, a wildlife population is "discrete" if it is "markedly separated from other populations of the same taxon," and such a separation may be evidenced by "[q]uantitative measures of genetic or morphological discontinuity." 61 Fed. Reg. at 4,725.

44. FWS's finding acknowledged that the best available science demonstrates genetic discontinuity between wolverines in the lower-48 states and Canadian wolverine populations. FWS concluded that "[g]enetic drift has occurred in the remaining populations in the contiguous United States where wolverines contain four of nine haplotypes found in Canadian populations." 73 Fed. Reg. at 12,937. FWS stated that "[t]he reduced number of haplotypes indicates not only that genetic drift is occurring, but also that there is some level of genetic separation; if these populations were freely interbreeding, they would share more haplotypes." Id.

45. In fact, FWS's genetics findings understate the evidence: The best available scientific information demonstrates substantial genetic discontinuity between the wolverine population in the contiguous United States and populations in Canada. There is no evidence indicating genetic exchange between Canadian wolverines and the Idaho population. There is also no evidence of migrants or signatures of genetic admixture between wolverine populations in Canada and Wyoming. With respect to genetic exchange between wolverines in Montana and

Canada, the best available scientific evidence indicated that the Rocky Mountain Front wolverine population in Montana had “received one recent migrant” from Canadian populations, but found no evidence of “ongoing migration.” C.C. Cegelski et al., Genetic diversity and population structure of wolverine (*Gulo gulo*) populations at the southern edge of their current distribution in North America with implications for genetic viability, 7 Conservation Genetics 197, 207 (2006). Moreover, this evidence “suggest[s] that the number of migrants may not be large enough to counter genetic drift and indicates that migration may be rare and/or not result in successful reproduction.” Id. at 208. Accordingly, Cegelski, supra, found that “data indicates that significant differentiation has resulted between most of the populations in Canada and the United States despite evidence of some migration.” Id. at 208. Notwithstanding this scientific information, FWS summarily disposed of the issue of marked separation between wolverine populations in the contiguous United States and Canada, stating that “[t]he U.S. population is connected to wolverine populations in Canada and is likely dependent on them to some degree for maintaining genetic diversity.” 73 Fed. Reg. at 12,936.

46. A population of a species is also “discrete” under FWS’s own DPS policy if it is “delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.” 61 Fed. Reg. at 4,725.

47. Addressing the international boundary issue in the challenged finding, FWS recounted major differences in conservation status between the wolverine populations in Canada and Alaska, on the one hand, and the wolverine population in the lower-48 states, on the other, including: (1) wolverines in the lower-48 United States are more imperiled because they are far less numerous than in Canada and Alaska, with FWS offering its inflated estimate of 500

wolverines in the lower-48 states and estimating more than 23,000 wolverines in Canada and Alaska, see 73 Fed. Reg. at 12,936; (2) wolverines in the lower-48 United States exist in fragmented, isolated populations that place them at greater risk of extinction than the larger, well-distributed and more contiguous populations in Canada and Alaska, see id.; (3) wolverines in the lower-48 United States suffer from a low effective population size of only 39 individuals, unlike wolverines in Canada and Alaska which do not face such extinction pressure from limited effective population, see id. at 12,937; and (4) because of their small isolated populations, wolverines in the lower-48 United States depend upon regular exchanges of individuals between population “islands” to maintain genetic diversity and to repopulate areas after natural or human-caused mortalities have depleted local populations, whereas the much larger size and more contiguous distribution of wolverine populations in Canada and Alaska make exchange of individuals less important for wolverine conservation, see id. at 12,937-38.

48. Nevertheless, despite acknowledging these stark differences in conservation status defined by the U.S.-Canada border, FWS dismissed them as irrelevant to the DPS inquiry by repeatedly concluding its discussions of each of these differences with the refrain that “they are not significant in light of section 4(a)(1)(D)” of the ESA—i.e., that portion of the ESA requiring FWS to determine whether a wildlife species, subspecies, or population is endangered or threatened because of “the inadequacy of existing regulatory mechanisms.” Id. at 12,937, 12938. FWS reached this conclusion by asserting that the differences in the wolverine’s conservation status across the U.S.-Canada border are irrelevant to the DPS inquiry unless they are “a result of inadequate regulatory mechanisms.” Id. at 12,938, 12,940. In other words, FWS focused solely on the question whether the wolverine’s more precarious status in the lower-48 states was caused by inadequate regulatory mechanisms. FWS did not address the question that is actually posed

by ESA section 4(a)(1)(D): Whether, given the heightened conservation needs of the wolverine population on the U.S. side of the Canadian border, the existence of inadequate regulatory mechanisms to protect the lower-48 wolverine population justifies listing this population as endangered or threatened under the ESA.

49. FWS undertook a similar analysis in assessing whether the lower-48 United States wolverine population is “discrete” from Canadian populations because “differences in control of exploitation ... or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.” 61 Fed. Reg. at 4,725. FWS found that regulation of wolverine trapping in Canada varies by province and even by local trapping region, and that this treatment of the wolverine differs from that afforded in the lower-48 states. See 73 Fed. Reg. at 12,939. In FWS’s 2000 listing rule for the Canada lynx, FWS relied upon a similar finding to justify treating the lower-48 United States lynx population as a DPS. In that listing rule, FWS stated that,

in Canada, lynx harvest regulations, such as length of season and quotas, vary, being regulated by individual Provinces or, in some cases, individual trapping districts. Therefore, we conclude that the contiguous United States population of the lynx is discrete based on the international boundary between Canada and the contiguous United States due to differences in management of lynx and lynx habitat.

65 Fed. Reg. 16,052, 16,060 (2000). In contrast to the lynx conclusion, FWS in the challenged wolverine finding determined “that the differences in control of exploitation between the United States and Canadian wolverine populations are not significant in light of section 4(a)(1)(D) of the Act because in both countries exploitation appears to be adequately regulated according to what the overall population can sustain.” 73 Fed. Reg. at 12,939.

50. In so concluding, FWS again failed to consider the more imperiled circumstances of the lower-48 wolverine population and the resulting need for more stringent regulatory

protections than may be needed to conserve more robust Canadian populations. FWS apparently considered only whether trapping mortality of wolverines in Canada, Alaska, and the lower-48 United States exceeds the basic 6 percent threshold that research suggests is necessary for a sustainable population. See id. Nowhere did FWS assess the specific needs of the lower-48 wolverine population to be free from direct trapping mortality given that the effective population size of the lower-48 population is only 39 individuals, which FWS itself deemed “exceptionally low... and is below what is required for short-term maintenance of genetic diversity.” Id. at 12,937. Nor did FWS consider, or even mention, documented excessive trapping exploitation in “island” mountain ranges—such as the Pioneer, Beaverhead, Anaconda-Pintler, and Flint Creek Mountain Ranges discussed supra—located between remaining wolverine population centers. FWS ignored this key factor despite acknowledging that “[t]he low population densities and reduced genetic diversity of wolverines in the contiguous United States means that, to avoid further inbreeding or local extirpation due to demographic stochasticity, regular exchange of individual wolverines between islands of habitat must occur.” Id. at 12,937. FWS even stated that, although “protection and intensive management are not necessary to conserve wolverines in western Canada[, t]his situation contrasts with the situation in the contiguous United States, where habitat is fragmented and limited to higher elevations over portions of four States.” Id. at 12,939. Despite recognizing these factors, FWS failed to undertake the key inquiry whether the highly imperiled circumstances of the lower-48 states’ wolverine population render inadequate those regulatory mechanisms to control wolverine exploitation that might be adequate for the larger and more well-distributed wolverine populations persisting in Canada and Alaska.

51. FWS also failed to consider other differences in regulatory mechanisms for wolverine conservation between the United States and Canada. Despite extensive information in

the scientific literature documenting the harmful effects of snowmobiling, helicopter skiing, and other human activities and developments in remote, alpine wolverine habitat, FWS merely asserted that “little habitat management occurs in areas frequented by wolverines” and, “[t]herefore, we find there are no significant differences” between its management in the two countries. *Id.* at 12,936.

### **FWS’s “Significant Portion of the Range” Finding**

52. In addition to its DPS finding, FWS concluded that the wolverine’s remaining range in the lower-48 United States does not constitute a “significant portion” of the species’ range under the ESA, and, therefore, that the wolverine is not endangered or threatened throughout a significant portion of its range.

53. The best scientific and commercial data available establish that the range of the wolverine is severely diminished. Having been extirpated from large portions of its historic range, particularly in California, Utah, Colorado, and the Great Lakes Region, the wolverine’s range within the contiguous United States is now limited to Idaho, Montana, Washington and Wyoming. Nevertheless, FWS dismissed this loss of historic range as irrelevant to the listing analysis, asserting that a “portion of a species’ range is significant if it is part of the current range of the species.” 73 Fed. Reg. at 12,940.

54. Turning to the wolverine’s remaining current range in the lower-48 United States, FWS applied a standard that deemed this range “significant” for purposes of the ESA listing analysis only if “its loss would result in a decrease in the ability of the species to persist.” *Id.* FWS then cited the wolverine’s imperiled status in the lower-48 United States as a basis not to list the species, claiming that the contiguous United States’ wolverine population is not significant because it has been reduced to nearly a remnant population, accounting for only two

percent of the species' total population, and relegated to a few fragmented, non-unique habitat areas. See id. at 12,940-41. In so concluding, FWS effectively departed, without any explanation, from numerous past ESA listings of species such as the grizzly bear and the gray wolf in the lower-48 United States despite their expansive ranges in Canada and Alaska and only peripheral ranges in the lower-48 states.

55. In closing, FWS offered its conclusion that:

the contiguous United States population of the North American wolverine does not constitute a distinct population segment (DPS) under the Act and therefore a listable entity unto itself. We also find that the contiguous United States population of the North American wolverine is not a significant portion of the range of the North American subspecies and does not warrant further consideration under the Act. Therefore, we find that the petition to list the North American wolverine that occurs in the contiguous United States is not warranted for listing.

Id. at 12,941.

#### **FIRST CAUSE OF ACTION**

##### **(Violation of Section 4 of the ESA and FWS DPS Policy in Assessing Marked Separation of Lower-48 Wolverine Population)**

56. Plaintiffs hereby reallege all of the allegations in the preceding paragraphs.

57. Defendants violated section 4 of the ESA, 16 U.S.C. § 1533, and the FWS DPS Policy, 61 Fed. Reg. at 4,722, in issuing their negative 12-month finding on the petition to list the wolverine under the ESA.

58. In determining that the lower-48 United States wolverine population did not constitute a listable DPS pursuant to ESA section 4, defendants purported to rely on FWS's DPS Policy criteria for discreteness of such populations. Under FWS's DPS policy, a wildlife population is "discrete" if it is "markedly separated from other populations of the same taxon," and such a separation may be evidenced by "[q]uantitative measures of genetic or morphological discontinuity." 61 Fed. Reg. at 4,725. Defendants determined that the lower-48 United States

wolverine population was not discrete from Canadian populations under this criterion because “[t]he U.S. population is connected to wolverine populations in Canada and is likely dependent on them to some degree for maintaining genetic diversity.” 73 Fed. Reg. at 12,936.

59. FWS violated the ESA and its own DPS Policy by insisting on complete genetic isolation, rather than evidence of genetic discontinuity, to satisfy the “discreteness” requirement. The DPS Policy makes clear that FWS does not “require absolute reproductive isolation as a prerequisite to recognizing a distinct population segment.” 61 Fed. Reg. at 4,724. The policy further states that “the standard adopted does not require absolute separation of a DPS from other members of its species, because this can rarely be demonstrated in nature for any population of organisms.” *Id.* Here, the best available scientific information, cited by FWS itself, evidences only “one recent migrant from the Canadian populations” and no “ongoing migration.” Cegelski, *supra*, at 207. Reliance on evidence of only one recent migrant from Canadian populations to disqualify the lower-48 United States wolverine population from satisfying the “markedly separated” criterion for discreteness cannot be reconciled with the DPS Policy’s insistence that absolute reproductive isolation is not required to satisfy this criterion.

60. Accordingly, defendants’ determination that the lower-48 United States wolverine population does not constitute a DPS was arbitrary, capricious, and contrary to law in violation of the ESA’s requirement to use the best scientific and commercial data available in determining whether a species is an endangered or threatened species, 16 U.S.C. § 1533(a), (b)(1)(A), and the FWS’s DPS Policy, 61 Fed. Reg. at 4,722.

## **SECOND CAUSE OF ACTION**

### **(Violation of Section 4 of the ESA and FWS DPS Policy in Assessing Delimitation of Lower-48 Wolverine Population by International Boundary)**

61. Plaintiffs hereby reallege all of the allegations in the preceding paragraphs.

62. Defendants violated section 4 of the ESA, 16 U.S.C. § 1533, and the FWS DPS Policy, 61 Fed. Reg. at 4,722, in issuing their negative 12-month finding on the petition to list the wolverine under the ESA.

63. In determining that the lower-48 United States wolverine population did not constitute a listable DPS pursuant to ESA section 4, defendants purported to rely on FWS's DPS Policy criteria for discreteness of such populations. Under that policy, defendants must determine whether "differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms" across international boundaries "exist that are significant in light of section 4(a)(1)(D) of the Act." 61 Fed. Reg. at 4,725. In turn, the inquiry mandated by ESA section 4(a)(1)(D), 16 U.S.C. § 1533(a)(1)(D), is "whether any species is an endangered species or a threatened species because of ... the inadequacy of existing regulatory mechanisms." Thus, defendants were required to determine whether observed differences in control of wolverine exploitation, the wolverine's conservation status, and regulatory mechanisms to protect the wolverine in the lower-48 states, as compared to Canada, are significant in light of the statutory question whether existing regulatory mechanisms are adequate to safeguard the species.

64. Defendants did not undertake this inquiry. Instead, defendants dismissed the major differences in conservation status of the wolverine on either side of the U.S.-Canada border as "not significant in light of section 4(a)(1)(D)," 73 Fed. Reg. 12,937, 12,938, without ever addressing the question whether the wolverine population's more imperiled conservation status on the U.S. side of the Canadian border is significant in determining whether existing regulatory mechanisms are adequate to protect the contiguous U.S. population. Defendants likewise dismissed the differences in control of wolverine exploitation and regulatory

mechanisms on either side of the U.S.-Canada border as irrelevant based on conformance with generally sustainable trapping rates for wolverine populations stated in the scientific literature, without ever considering whether the exceptionally precarious status of the lower-48 wolverine population rendered those trapping rates excessive and inapplicable.

65. Accordingly, defendants' determination that the lower-48 United States wolverine population does not constitute a DPS was arbitrary, capricious, and contrary to law in violation of the ESA's requirement to use the best scientific and commercial data available in determining whether a species is an endangered or threatened species, 16 U.S.C. § 1533(a), (b)(1)(A), and the FWS's DPS Policy, 61 Fed. Reg. at 4,722.

### **THIRD CAUSE OF ACTION**

#### **(Violation of Sections 3 and 4 of the ESA in Assessing "Significant Portion of its Range" Issue)**

66. Plaintiffs hereby reallege all of the allegations in the preceding paragraphs.

67. Defendants violated ESA sections 3 and 4, 16 U.S.C. §§ 1532 and 1533, in issuing their negative 12-month finding on the petition to list the wolverine under the ESA.

68. Defendants determined that the range occupied by the wolverine in the lower-48 United States did not constitute a significant portion of the range of the North American wolverine subspecies, such that this subspecies could not be deemed endangered or threatened throughout "a significant portion of its range." *Id.* § 1532(6), (20). In so determining, defendants relied on a recent memorandum from the Department of the Interior's solicitor concerning the "significant portion of its range" language in the ESA. Defendants summarized their direction from the solicitor as follows:

A portion of a species' range is significant if it is part of the current range of the species and is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species. The

contribution must be at a level such that its loss would result in a decrease in the ability of the species to persist.

73 Fed. Reg. at 12,940.

69. Consistent with this direction, defendants erroneously analyzed the “significant portion of its range” issue only with respect to the wolverine’s current, rather than historic, range in the lower-48 United States. Contrary to defendants’ approach, a species may be endangered or threatened throughout a significant portion of its range “if there are major geographical areas in which it is no longer viable but once was.” Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145 (9th Cir. 2001). Here, wolverines have been extirpated from vast portions of their historic range east of the Rockies, as well as the southern Rockies and California, and today persist in only a small fragment of their historic range in the northern Cascades and northern Rockies. See 73 Fed. Reg. at 12,934 (“Historical wolverine records were found across the northern tier of the lower 48 States with peninsular extensions south into the southern Rockies and the Sierra Nevada”). Further, “[l]arge areas of habitat with characteristics suitable for wolverines still occur in the southern Rocky Mountains and Sierra Nevada where wolverines have been extirpated.” Id. at 12,935. Defendants violated the ESA in refusing to consider the wolverine’s historic range in the lower-48 United States in their “significant portion of its range” analysis.

70. Defendants also erroneously treated the wolverine’s range as “significant” under the ESA only where “its loss would result in a decrease in the ability of the species to persist.” 73 Fed. Reg. at 12,940. However, if a portion of a species’ range is significant only where its loss would threaten the persistence of the entire species, then there is no distinction between the statutory terms “all ... of its range” and “a significant portion of its range” in 16 U.S.C. §§ 1532(6) and (20). Defendants violated the ESA by failing to accord different meaning to these two statutory phrases, and by instead treating them as functional equivalents.

71. Defendants also erroneously deemed the range of the lower-48 United States wolverine population to be insignificant to the range of the North American wolverine subspecies based on the lower-48 population's critically imperiled status and the characterization of this portion of the wolverine's range as peripheral to the larger range of the subspecies. FWS found that the contiguous United States wolverine population has been reduced to nearly a remnant population, accounting for only 2 percent of the subspecies' total population, and relegated to a few fragmented, non-unique habitat areas, and therefore was not "significant." See 73 Fed. Reg. at 12,940-41. This interpretation of the "significant portion of its range" ESA language turns Congress' intent on its head. Congress added this language to the ESA to provide for "the possibility of declaring a species endangered within the United States where its principal range is in another country, such as Canada or Mexico, and members of that species are only found in this country insofar as they exist on the periphery of their range." H.R. Rep. No. 93-412, at 10 (1973). Yet here FWS determined that the wolverine's range in the contiguous United States does not qualify as "significant" precisely because it "exist[s] on the periphery of [the wolverine's] range." Id.; see, e.g., 73 Fed. Reg. at 12,941 ("The portion of the range that extends into the contiguous United States is small in relation to the entire range of the subspecies."). The approach adopted by FWS in the wolverine finding would preclude ever deeming such "peripheral" ranges to be "significant" as Congress intended, and therefore violates the ESA.

72. Accordingly, defendants' determination that the range of the lower-48 United States wolverine population does not constitute a "significant portion" of the range of the North American wolverine subspecies was arbitrary, capricious, and contrary to law in violation of the ESA's requirement to determine whether any species is an endangered or threatened species

“throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6), (20); see also id. § 1533(a).

### **REQUEST FOR RELIEF**

THEREFORE, plaintiffs request that this Court:

1. Declare that defendants violated the ESA and the DPS Policy by issuing a negative 12-month finding on the petition to list the wolverine as an endangered or threatened species;
2. Set aside and remand the defendants’ March 11, 2008, 12-Month Finding on a Petition To List the North American Wolverine as Endangered or Threatened;
3. Issue a permanent injunction requiring defendants to reconsider their 12-month finding on the wolverine listing petition and to issue a new finding within 60 days after this Court’s judgment in this action;
4. Award plaintiffs their costs, expenses, and attorney fees pursuant to the citizen-suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g)(4); and
5. Grant such other relief as the Court deems appropriate.

Respectfully submitted this 30th day of September, 2008.

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