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

DEFENDERS OF WILDLIFE,	)	Cause No. _____
PREDATOR CONSERVATION	)	
ALLIANCE, FRIENDS OF THE	)	
CLEARWATER, SUPERIOR	)	
WILDERNESS ACTION NETWORK,	)	
KLAMATH-SISKIYOU	)	COMPLAINT FOR
WILDLANDS CENTER, and	)	DECLARATORY AND
NORTHWEST ECOSYSTEM	)	INJUNCTIVE RELIEF
ALLIANCE,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
GALE NORTON, in her official capacity	)	
as Secretary of the Interior; and STEVEN A.)	)	
WILLIAMS, in his official capacity as	)	
Director, U.S. Fish and Wildlife Service,	)	
	)	

Defendants.)
_____)

1. In this action, plaintiffs Defenders of Wildlife, Predator Conservation Alliance, Friends of the Clearwater, Superior Wilderness Action Network, Klamath-Siskiyou Wildlands Center, and Northwest Ecosystem Alliance challenge the U.S. Fish and Wildlife Service’s failure to enter a 90-day finding and a 12-month finding on a petition for a rule to list the wolverine (Gulo gulo) as an endangered species or a threatened species and designate critical habitat under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 et seq.

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).

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 the ESA violations alleged herein occurred in this district and plaintiff Predator Conservation Alliance resides 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, including in Missoula, Montana. Defenders has more than 400,000 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 into protecting the wolverine and its habitat, including advocating for monitoring and conservation of the species, and for listing the wolverine as an endangered species or a threatened species under the ESA. In addition, Defenders regularly publishes, for the use of its members and the public, information regarding species and their habitat, including the wolverine.

6. Plaintiff Predator Conservation Alliance (“PCA”) is a non-profit conservation organization based in Bozeman, Montana. Founded in 1991, PCA is dedicated to conserving, protecting, and restoring native predators and their habitats in the Northern Rockies and Northern Plains. PCA advocates on behalf of 14 species, including the wolverine.

7. 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.

8. Plaintiff Superior Wilderness Action Network (“SWAN”) is a non-profit conservation organization based in Sandstone, Minnesota. SWAN advocates for ecosystem preservation in the Upper Great Lakes region of Minnesota, Wisconsin, and Michigan, within the historic range of the wolverine.

9. Plaintiff Klamath-Siskiyou Wildlands Center (“KSWC”) is a non-profit conservation organization based in Williams, Oregon. KSWC seeks to defend the outstanding biological diversity of the Klamath and south Cascadian provinces of southern Oregon and northern California, within the historic range of the wolverine.

10. Plaintiff Northwest Ecosystem Alliance (“NWEA”) is a non-profit conservation organization based in Bellingham, Washington. NWEA was founded in 1988 and now has more than 10,000 members. NWEA 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.

11. 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, 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.

12. 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 also enjoy these values of the area inhabited by the species, and appreciate the complex interactions of terrestrial species that indicate the health of the ecosystem. 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.

13. 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 the defendants' failure to issue a 90-day finding and a 12-month finding on plaintiffs' petition to list the wolverine as an endangered species or a threatened species under the ESA. These are actual, concrete injuries to plaintiffs, caused by defendants' failure to comply with the ESA and its implementing regulations. These injuries would be redressed by the relief requested in this complaint. Plaintiffs have no adequate remedy at law.

14. Defendant Gale Norton is the Secretary 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 Norton is sued in her official capacity.

15. Defendant Steven A. Williams 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 Williams is sued in his official capacity.

THE WOLVERINE

16. 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 between 20 and 30 pounds and are three to four feet long. Wolverines typically exhibit 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.

17. 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 Arizona and New Mexico, and the Sierra Nevada-Cascade and Siskiyou Mountains as far south as California.

18. 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 today the wolverine has been extirpated from all of the northern states east of Montana.

Although sporadic, unconfirmed wolverine sightings continue to be reported in Oregon and California, today the wolverine is known to exist only in the northern Cascades of Washington and the Rocky Mountain regions of Idaho, Montana, and Wyoming.

19. Wolverines are rare even in those few areas where they persist today. Studies in Montana and Idaho have estimated wolverine density at one wolverine per 40 to 70 square miles. One study estimated that only 20 wolverines inhabited a 500-square-mile study area in northwestern Montana.

20. Wolverines primarily rely on 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.

21. Individual wolverines require large areas to access sufficient foods to sustain themselves throughout the year. Home ranges of studied male wolverines in Idaho averaged approximately 950 square miles.

22. 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 size averages two to three kits. An Idaho study found that wolverines reproduced at a rate of less than one kit per female per year.

23. In sum, the remaining wolverines in the lower-48 states exist in low numbers, require large home ranges, and have low reproductive rates. These

characteristics leave the wolverine vulnerable to localized or even range-wide extinctions due to escalating threats from trapping and habitat destruction.

THREATS TO THE WOLVERINE

24. The wolverine is beset by numerous threats even where it persists in the lower-48 states. Wolverines in Montana continue to suffer mortality from trapping that is permitted under state law. 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. Despite a recent study indicating that every studied wolverine population that was subjected to trapping was in decline, Montana continues to allow wolverine trapping during a season that runs from December 1 to February 15 of the following year. Montana allows each trapper to take one wolverine, with no limit on the number of trappers that may set bait for this rare animal or the areas in which trapping may occur. Over the past decade, an average of ten wolverines have been killed in Montana each year due to trapping. Advances in snowmobile technology have permitted trappers to intrude ever further into previously inaccessible areas in search of wolverines. Recent surveys suggest that wolverine populations are declining in at least two mountain ranges in southwest Montana where trapping occurs.

25. Aside from direct mortality due to trapping, wolverines also face a major threat from destruction of their remaining wilderness habitat. Studies indicate that wolverines prefer forest environments, especially in winter. However, the dominant character of wolverine habitat is its isolation from the presence and influence of humans. Winter surveys and other studies indicate that wolverines typically avoid areas of human

activity, and wolverines remain today primarily in areas where large roadless and wilderness areas afford sufficient undisturbed habitat. However, such areas face an increasing threat of destruction through logging and mining and associated road construction and human traffic. In particular, degradation of suitable wolverine habitat corridors between larger areas of undisturbed lands threatens to isolate small wolverine subpopulations, thereby increasing their vulnerability, and the vulnerability of the entire wolverine species, to extinction due to trapping and other threats.

26. 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 den from early February through April in high alpine cirque basins above timberline, tunneling through deep snow to excavate a denning area at ground level. Denning females are extremely sensitive to human disturbance. Such disturbance most often results in den abandonment, forcing the female to move to a less suitable site. Female wolverines have been observed to abandon their dens even upon discovering human snowshoe tracks in the area.

27. Recent advances in snowmobile technology enable snowmobilers to reach areas of suitable wolverine denning habitat that previously were inaccessible due to steep and rugged terrain. Further, an expanding helicopter skiing industry is impacting otherwise remote and inaccessible wolverine denning habitats with the noise and disturbance associated with numerous helicopter flights and landings throughout the winter months. A study of winter recreation impacts on suitable wolverine denning habitat during 1999 and 2000 in the southwestern portion of the Greater Yellowstone Ecosystem in Idaho, Wyoming and Montana found that approximately a third of all

suitable wolverine denning habitat was impacted by snowmobiling or helicopter skiing in some portions of the study area.

28. This same study suggested that wolverines may also avoid areas of human winter recreation activities while foraging. Aerial surveys undertaken in the study observed that wolverine tracks showed no evidence of foraging behavior in areas that had been impacted by winter recreation activities. Instead, the tracks indicated that wolverines moved directly through such areas without searching for food. In other areas of similar habitat that were not impacted by recreational activities, wolverine tracks showed typical foraging-type behaviors, such as circling search patterns and digging in the snow. This suggests that wolverines need secure areas for foraging as well as for denning, and that winter recreation activities may prevent wolverine use of otherwise productive foraging habitats.

29. State and local governments, as well as the federal agencies that manage public lands containing wolverine habitat, have failed to take steps to address these threats to wolverines. Montana continues to allow trapping of wolverines. State and federal agencies continue to allow logging, mining and roadbuilding in the wolverine's remaining wilderness habitat. These agencies also continue to allow widespread use of snowmobiles and have permitted expansion of helicopter skiing operations throughout the wolverine's range.

30. The U.S. Forest Service has designated the wolverine as a "sensitive species," meaning a species "for which population viability is a concern, as evidenced by:

a. Significant current or predicted downward trends in population numbers or density. b.

Significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution.” Forest Service Manual § 2670.5.19.

THE ENDANGERED SPECIES ACT

31. 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.

32. 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).

33. 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).

34. Any interested person may submit a petition to the FWS to begin the process to list a species under the ESA. Id. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a). The Secretary must, “[t]o the maximum extent practicable, within 90 days after receiving the petition ... make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted,” and must publish that finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(A). This is termed the “90-day finding.” Although this 90-day finding may be delayed in circumstances where a finding within 90 days is not practicable, the Secretary must make the required 90-day finding within 12 months of receiving a petition to list a species under the ESA. See id. § 1533(b)(3)(B).

35. Further, where a 90-day finding indicates that a petition to list a species under the ESA “present[s] substantial information indicating that the petitioned action may be warranted,” the Secretary must make an additional finding within 12 months of receiving the petition. Id. That finding must conclude whether the petitioned listing action is warranted, not warranted, or warranted but precluded by work being conducted on matters of a higher priority, and the Secretary must publish that finding in the Federal Register. See id.; 50 C.F.R. § 424.14(b)(3). This is termed the “12-month finding.” Accordingly, the Secretary must make both the 90-day finding and the 12-month finding within 12 months of receiving a petition to list a species under the ESA.

36. 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 for 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).

37. 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 – an endangered species. Id. § 1538(a)(1)(B); see id. § 1532(19).

THE WOLVERINE LISTING PETITION

38. On July 11, 2000, the Biodiversity Legal Foundation, Predator Conservation Alliance, Defenders of Wildlife, Northwest Ecosystem Alliance, Friends of the Clearwater and Superior Wilderness Action Network submitted a petition to the FWS pursuant to 5 U.S.C. § 553(e) and 50 C.F.R. § 424.14 requesting that the FWS list the wolverine as an endangered species or a threatened species and designate critical habitat under the ESA. The petition detailed the reasons such action is required, describing past

and present numbers and distribution of the wolverine, the threats to the species within its present range, and the status of the species over its range. The petition included comprehensive scientific data, bibliographic references, and other documentation to support petitioners' request.

39. On August 15, 2000, FWS sent a letter to the petitioners acknowledging receipt of the petition on July 14, 2000. The letter stated that the petition had been assigned to the FWS Ecological Services Field Office in Montana, but that FWS would not review the petition within the 90 days required by the ESA. FWS asserted that it need not comply with the ESA's 90-day finding requirement because the agency chose to devote its limited resources to listing decisions involving other species.

40. On December 20, 2000, pursuant to the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g), plaintiffs provided FWS with written notice that FWS was in violation of the ESA and its implementing regulations by failing to issue a 90-day finding on the wolverine listing petition.

41. On February 8, 2002, again pursuant to the citizen-suit provision of the ESA, plaintiffs provided FWS with a further written notice that FWS was in violation of the ESA and its implementing regulations by failing to issue both the 90-day finding and the 12-month finding on the wolverine listing petition.

42. The 90-day finding and the 12-month finding were due, at the latest, on July 16, 2001.

43. The 90-day finding and the 12-month finding required by the ESA and its implementing regulations are now more than a year overdue. Meanwhile, threats to the existence of the wolverine continue to mount.

FIRST CAUSE OF ACTION

(VIOLATION OF SECTION 4 OF THE ESA

BY FAILURE TO MAKE 90-DAY FINDING)

44. Plaintiffs hereby reallege and incorporate paragraphs 1 through 43, supra.

45. Defendants have violated section 4(b)(3)(A) of the ESA, 16 U.S.C. § 1533(b)(3)(A), and its implementing regulation, 50 C.F.R. § 424.14(b)(1), by failing to issue a 90-day finding on the petition to list the wolverine as an endangered species or a threatened species under the ESA and to promptly publish this finding in the Federal Register.

SECOND CAUSE OF ACTION

(VIOLATION OF SECTION 4 OF THE ESA

BY FAILURE TO MAKE 12-MONTH FINDING)

46. Plaintiffs hereby reallege and incorporate paragraphs 1 through 45, supra.

47. Defendants have violated section 4(b)(3)(B) of the ESA, 16 U.S.C. § 1533(b)(3)(B), and its implementing regulation, 50 C.F.R. § 424.14(b)(3), by failing to issue a 12-month finding on the petition to list the wolverine as an endangered species or a threatened species under the ESA and to promptly publish this finding in the Federal Register.

REQUEST FOR RELIEF

THEREFORE, plaintiffs request that this Court:

1. Enter a declaratory judgment that defendants' failure to issue a 90-day and a 12-month finding on the petition to list the wolverine as an endangered species or a threatened species are violations of the ESA and its implementing regulations;

2. Issue a preliminary and permanent injunction requiring defendants to issue and publish the 90-day and 12-month findings on the wolverine listing petition;
3. Award plaintiffs their costs, expenses, and attorneys' fees pursuant to the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g)(4), and any other applicable statute; and
4. Grant plaintiffs such further relief as may be appropriate.

Respectfully submitted this 7th day of October, 2002,

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