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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
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Re: Public comment on the U.S. Fish and Wildlife Service's proposed rule to establish a Non-essential Experimental Population of the North American Wolverine in Colorado, Wyoming, and New Mexico (Docket No. FWS-R6-ES-2012-0106).

Thank you for providing this opportunity to comment on the U.S. Fish and Wildlife Service's (Service's) proposed rule to establish a nonessential experimental population of wolverine in Colorado, Wyoming, and New Mexico.

These comments are submitted by the Western Environmental Law Center (WELC) on behalf of WildEarth Guardians, High Country Citizens' Alliance, the Wildlands Network, and Western Wildlands Conservancy. These comments explicitly incorporate by reference WELC's comments on the proposed threatened status for the distinct population segment (DPS) of the North American Wolverine (Docket No. FWS-R6-ES-2012-107). Those comments are attached to this letter as Exhibit A.

Each of these organizations is committed to ensuring the long-term survival and recovery of wolverine in the contiguous United States, including the species' Southern Rocky Mountain range which includes south-central Wyoming, Colorado, and north-central New Mexico (hereinafter "the Southern Rockies"). These comments, which supplement and do not replace individual comments that may be submitted by each of the above mentioned organizations, are submitted in furtherance of that commitment and to ensure the Service bases its final decision on the best available science on the status of and threats to wolverine in the contiguous United States.

We strongly support the reintroduction of wolverine to the Southern Rockies and agree with the Service’s finding “that releasing North American wolverines into Colorado will further the conservation of the species.” 78 Fed. Reg. at 7910. That said, we believe wolverine should be reintroduced as a fully protected endangered species, as part of a comprehensive recovery plan, and not classified as a non-essential experimental population (hereinafter “non-essential”) pursuant to Section 10(j) of the Endangered Species Act (“ESA”), 16 U.S.C. 1531 et. seq. In the alternative, the reintroduced population of wolverines in the Southern Rockies should, at a minimum, be considered “essential” and given greater protections than those currently proposed. The following comments are offered in the spirit of improving this important step towards full recovery of the wolverine.

1. Reintroduced wolverine should be given endangered status.

The proposed rule to establish a non-essential population of wolverine in the Southern Rockies is premised on the proposed listing of a distinct population segment (“DPS”) of wolverine in the contiguous United States being listed as a “threatened” species under the ESA. But the best scientific and commercial data available reveals the wolverine DPS qualifies for endangered status under the ESA (the reasons and authority supporting endangered status for the DPS are outlined in WELC’s comments on the proposed listing rule and are hereby incorporated by reference). Accordingly, while we support reintroduction of the wolverine in the Southern Rockies, the introduced individuals should be entitled to the heightened protections offered as an endangered species.

2. The Service should designate critical habitat for wolverine, including habitat within the Southern Rockies.

When enacting the ESA, “Congress recognized the destruction of ‘natural habitat’ to be the main threat to the species.” *TVA v. Hill*, 437 U.S. 153, 179 (1978). The principled conceptual basis of the ESA provides “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). Under the ESA, therefore, the Service is directed, “to the maximum extent prudent and determinable,” to designate critical habitat for listed species concurrently with listing. 16 U.S.C. § 1533(a)(3).

By definition, the term “critical habitat” means: (1) the specific areas occupied by the species (at the time of listing) on which are found those physical or biological features that are essential to the conservation of the species and require special management considerations and protection; and (2) specific areas that are not currently occupied by the species (at the time of listing) but that are—upon a determination by the Secretary—essential for the conservation of the species. *Id.* at § 1532(5)(A).

The Service should designate critical habitat for wolverine in the Southern Rockies (as well as the other areas described in WELC's comments on the proposed listing rule, attached as Exhibit A) in concert with a robust reintroduction program to ensure the long-term survival and recovery of the DPS in the Southern Rockies. Anything less condemns the wolverine to a population size too small to retain genetic viability.

As mentioned in WELC's comments on the proposed listing rule, the Service anticipates a loss of 63% of the wolverine habitat in the contiguous United States by the time interval centered on 2085. 78 Fed. Reg. at 7876 (citing McKelvey et al. (2011)). And this loss in habitat "is likely to result in a loss of wolverine numbers that is greater than the overall loss of habitat area." 78 Fed. Reg. at 7876 (emphasis added). This means that greater than 63% of the wolverine we now have in the contiguous United States will be gone in the foreseeable future.

Moreover, as the Service concedes, a substantial number of the estimated 250-300 wolverines in the DPS are likely unsuccessful breeders or non-breeding subadults. That means the effective population size is dangerously low. By definition, the effective population only considers those individual wolverines that are reproductive.

For example, if a population contains 100 individuals but in any year 50 of those individuals are juveniles (pre-reproductive) and 30 individuals are post-reproductive age, then only 20 individuals are contributing genetically to population maintenance and species survival and are part of the "effective" population. Most biologists consider this number—the effective population size—to be the most important number for conservation purposes because it measures the potential for inbreeding and/or population extirpation. Effective population size determines rates of loss of genetic variation, fixation of deleterious alleles and the rate of inbreeding. A small effective population size also shows reductions in population growth and increases the likelihood of extinction.

The best available science reveals the effective population of the DPS is extremely small, likely less than 50 and well below the number needed for maintenance of genetic diversity. *See* 78 Fed. Reg. at 7884 (citing Franklin (1980) and Allendorf and Luikart (2007)). Schwartz et al. (2009) states, "Estimates for wolverine populations in Montana, Idaho, and Wyoming, where most of the wolverines in the contiguous United States exist, indicate a small population (effective population size, 35 individuals; credible limits, 28-52 individuals)." This is exceptionally low and well below what is thought to be adequate for genetic diversity.

As explained by the Service, the "concern with low effective population size was highlighted in a recent analysis which determined that without immigration from other populations at least 400 breeding pairs [of wolverine] would be necessary to sustain the

long-term genetic viability of the contiguous U.S. wolverine population.” 75 Fed. Reg. at 78053 (citing Cegelski et al. (2006)). As the Service now recognizes, the current population of wolverine in the contiguous United States is nowhere close to 400 breeding pairs and well below the number needed to sustain genetic viability.

As such, based on the best available science, the DPS is extremely vulnerable due to small total and effective population size, is not presently viable or sufficiently connected to the Canadian population (no migrants to buttress population), and is in danger of extinction throughout the entirety of its range within the boundaries of the DPS.

The same is true for any reintroduced population in the Southern Rockies: low population size and the isolated “island” population that would be created would result in an unreasonable risk that the population would not survive absent efforts to create connectivity to other populations, either existing or introduced. This is particularly true as the Service is not proposing any regulation of existing activities that contribute to habitat fragmentation and isolation, and may preclude future connectivity between existing and introduced populations.

For these reasons, we respectfully request a comprehensive designation of critical habitat in the Southern Rockies as part of the reintroduction effort. As noted by the Service, the Southern Rockies, and specifically high elevation areas in Colorado, are home to some of the best wolverine habitat within the range of the DPS, as well as habitat that will be resilient to the impacts of climate change. 78 Fed. Reg. at 7894-96. Because these areas of Colorado provide some of the best habitat for wolverine in a climate changed environment, these areas are essential to the conservation of the wolverine and should be conserved as critical habitat. The designation should include core habitat in the area for reintroduction along with connectivity area linking areas currently occupied with areas where reintroduction can occur. This requires that an introduced population be fully protected or declared essential, not nonessential as proposed. And, at a minimum, the Service must consider a range of alternatives that evaluates various recovery scenarios, with and without critical habitat designations for wolverine as part of the proposed reintroduction in Colorado.

3. Reintroduction should be a part of a broad recovery plan for wolverine rather than as part of an experimental population.

An important part of any recovery plan for the DPS should be reintroducing wolverine to regions where suitable habitat is most likely to continue to be present in the face of climate change. This includes the Southern Rockies and other regions in the West (as mapped by the Service). The Service knows where these regions are, as demonstrated by this proposed reintroduction in Colorado as well as the draft Recovery Outline released by the Service in February 2013.

Reintroducing wolverines as an endangered species is the most appropriate way for the Service to ensure the long-term survival and recovery of the DPS. This is an independent, federal obligation under the ESA. The Service must take steps to conserve the DPS and this obligation is not dependent on any state action (nor should it be). It is unnecessary and less effective to pursue reintroduction as a threatened species pursuant to an experimental designation as the 10(j) approach contemplates.

4. The Service is not relieved of its federal responsibility for the conservation of wolverines by supporting a reintroduction by the State of Colorado or any other state.

The fundamental flaw in the Service's proposed 10(j) rule, which resonates throughout the plan as demonstrated by specific comments below, is that it is not a true 10(j) proposal. Rather it amounts to an advisory statement of the broad outlines of what "regulatory assurances" the Service is offering Colorado to facilitate its creation of a State reintroduction plan. 78 Fed. Reg. 7890.

The Service admits, for instance, that "the proposed action would not result in reintroduction of the wolverine; rather, the [non-essential] area designation would provide the regulatory assurances necessary to facilitate a State-led reintroduction effort, should the State of Colorado determine to reintroduce the wolverine." *Id.* (emphasis added). It goes on to state that "wolverines would be released only after necessary approvals from the Parks and Wildlife Commission and State Legislature were received after which a suitable management framework would be developed by the State of Colorado, in cooperation with the Service and other partners." *Id.* at 7896 (emphasis added).

While we applaud the apparent willingness of the State of Colorado to pursue reintroduction of wolverine, and the Service's support for reintroduction, we also note that such willingness is at this time ephemeral. The State has not approved any such plan nor can the Service compel it to do so. Absent a thoroughly developed plan, that has been adequately vetted under the National Environmental Policy Act (NEPA), and agreed to through a binding Memorandum of Understanding (MOU) between the States and the Service, there is simply no proposal before the public to be considered.

For this reason, the proposed 10(j) rule is merely a paper exercise. The Service has conditioned the reintroduction on not only the actions of Colorado Parks & Wildlife, but also the State legislature. It is not possible to effectively comment or participate in a reintroduction plan that is subject to the discretion of a legislative body and a state agency in the absence of a commitment from the legislature, and a fully drafted state plan to analyze. This inherent uncertainty is demonstrated by the repeated qualifications made by the Service.

In effect, the Service has put the cart before the horse; it is conceding significant protections that the ESA offers the wolverine to stakeholders protecting their economic interests before the State has even committed to the release of a single wolverine. At a minimum, the Service must be clear that there is no 10(j) rule, and no habitat within the historic range of the wolverine that is exempt from the protections afforded by listing the wolverine, unless and until an actual release, pursuant to a bona fide State plan, approved by the Service, occurs.

At present, the proposed rule reads as if the 10(j) area will be designated (reducing the ESA take protections and prohibiting the designation of critical habitat) regardless of whether the State proceeds with a release. *Id.* at 7894, 7903. The Service should affirmatively declare that it will not designate a potentially unused 10(j) area that could impede natural recovery. An explicit statement is required in the Rule's "effective date" provision that it doesn't go into effect unless and until the State proceeds with a release consistent with a properly vetted 10(j) rule. Further, the Service is specifically required to identify the number of wolverines to be released as part of the reintroduction process, and the Service should include such specificity in its final rule. 50 C.F.R. § 17.81(c). As a part of such a disclosure, the 10(j) rule should explicitly state a minimum number of wolverine that must be released by the State of Colorado before the reduced protections of the 10(j) rule would take effect.

Most disturbing is the Service's apparent willingness to walk away from its responsibility to conserve wolverines and its ceding of all its control under the ESA to States that have not offered anything in exchange. There is no assurance that Colorado (not to mention New Mexico and Wyoming) will do anything to protect and conserve wolverine, so why is the Service abdicating its responsibility in the absence of any enforceable assurance of action by the states? The federal government doesn't need state permission to release an endangered or threatened ESA listed species on Federal land, and its apparent unwillingness to do so has everything to do with politics and nothing to do with science or its obligations under the ESA: "[t]he designation of an [non-essential] area ... is designed to ... create public support for such a reintroduction effort by ensuring that compatible activities will not be subject to the regulation of the Act, which some perceive as an undesirable side-effect of reintroductions of listed species." 78 Fed. Reg. at 7894. If Colorado, and other states, want regulatory flexibility, the quid pro quo must be a legitimate plan that will promote the conservation of wolverine, firm commitments by any affected State, and a public process enabling citizens to gauge that bargain in advance, not after the fact.

For this to occur, the Colorado "approved plan" must be incorporated into the final 10(j) rule and subjected to a thorough NEPA analysis. This process must include the public, not just the federal and state agencies and unnamed "other partners." As it now stands, it is impossible for the public to adequately comment on this proposal as it is (1)

not a final decision by either the Service or the State; (2) too vague, lacking in detail, and subject to revision by the State as to the specifics of the reintroduction plan¹; and (3) there has been neither any analysis of the proposal nor any reasonable alternatives to be considered under NEPA. The Service must complete either an EA or EIS that analyzes the specific final plan by the State of Colorado before it can finalize its decision. Additionally, as a part of the NEPA process, the Service should analyze a range of alternatives, including both full ESA protection for the reintroduced population as an endangered species and designation of the reintroduced population as an essential experimental population.

5. Experimental population reintroductions do not effectively recover listed species nor do they meet the policy goals upon which the approach is based.

The purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may ‘be conserved, to provide a program for the conservation of such endangered species and threatened species’ and to achieve the purposes of international conservation treaties and conventions.” 16 U.S.C. § 1531(b). Consistent with the purposes of the ESA, Congress declared, “that all Federal departments and agencies shall seek to conserve endangered species and threatened species, and shall utilize their authorities in furtherance of the purposes” of the ESA. 16 U.S.C. § 1531(c)(1). Thus, under the express mandates of the ESA, the Service is obliged to affirmatively promote recovery of listed species until they are fully recovered and removed from the list of endangered species. The use of 10(j) has repeatedly failed to meet this mandate and there is little reason to believe it will do so here.

The Service has repeatedly justified use of the 10(j) rule on the premise that a “deal” under which, in exchange for reduced regulatory protections for reintroduced wildlife—local economic interests “allow” a reintroduction to take place—which they would otherwise not allow, and this, in turn, advances the conservation of a species. But history and experience reveals otherwise. Designating gray wolves, for example, as an experimental population in the Northern Rockies has not increased social tolerance; indeed that species is once again being driven to population levels below that necessary for long term survival.² The situation is even worse in Arizona and New Mexico, where the Mexican gray wolf was introduced under a restrictive 10(j) rule in 1998 and is barely hanging on with an essentially “static” population needing continuous supplementation with new releases of captive animals (recovery is not happening). Fifteen years later,

¹ For example, the Service does not specify a number of wolverines that will be released under the 10(j) rule as required by 50 C.F.R. § 17.81(c), nor does it specify where in the reintroduction area releases will occur or how long, and at what frequency, releases will continue into the future.

² The experience with the delisting of gray wolves in the Northern Rockies also provides lessons with regards to potential political influence on a reintroduced population of wolverine in the Southern Rockies. See Bergstron, B.J., *Endangered Wolves Fall Prey to Politics*. Science, 333 Science at 1092 (2011); Bruskotter, J.T., et. al., *Rescuing Wolves from Politics: Wildlife as a Public Trust Resource*, 333 Science at 1828 (2011).

local interests continue to illegally take and voice strong opposition to the Mexican gray wolf despite its being designated a 10(j) population.

Courts have recognized the incongruence of this social tolerance rationale with the mandates of the ESA. *See e.g., Humane Society of the United States v. Kempthorne*, 481 F. Supp. 2d 53, 63 (D.D.C. 2006) (federal Judge Kollar-Kotelly agreeing with federal Judge Huvelle’s observation: “I have a hard time understanding the notion you kill the wolves to save the wolves”). In this instance, there is no legitimate conservation purpose of elevating perceived needs of ski areas, back country recreationists (such as helicopter skiers and snow machine riders), livestock growers, miners, and loggers over the need to protect and conserve wolverine, a species tilting towards extinction in a warming world. Nor does the ESA provide for such balancing: it is “beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).

Here, the Service should learn from these failed experiments of the past and provide as comprehensive protections for wolverines as allowed under the ESA. But instead, the Service has chosen to submit to unfounded economic interests, stating that “[s]everal affected parties have sought the highest degree of certainty possible that impacts to land use and recreation would not occur as a result of wolverine introduction.” 78 Fed. Reg. at 7900.

The unstated rationale behind this statement is that the reintroduction would be bad for local economic interests. But again, the reality appears far different. For instance, a multi-million dollar wolf watching economy has developed in areas around Yellowstone National Park, the value of which dwarfs the value of any cattle predated by wolves in the region. Nevertheless the Service appears to have done everything possible to accommodate similar interests in its draft wolverine 10(j) proposal, stating that “[e]stablishment of the [non-essential population] would satisfy most reservations expressed by affected stakeholders. Nothing in this rule requires any additional changes, protections, mitigation, or enhancement measures for wolverine.” *Id.* Indeed, under the rule not a single existing use in the area—not trapping, hunting, logging or winter recreation—will be affected even if harm to the reintroduced population occurs.

This excessive servitude to local demands is found nowhere in the ESA or any other federal law. Quite the contrary: the Service is empowered to issue “protective regulations” for the experimental population that include all relevant prohibitions and exceptions to the ESA’s prohibition of take as necessary to conserve the species. 16 U.S.C. § 1533(d); 50 C.F.R. § 17.82.

Moreover, wolverines are not wolves. They neither predate on cattle nor sheep and they do not live in regions prone to human development. Hence the human conflict experienced with other reintroductions of listed species is less likely to occur here.

Indeed, the stakeholders that could be affected by reintroduction are an extremely small group of interests with speculative economic concerns that cannot be allowed to trump the needs of a species fighting for its very existence. In other words, the need for a deal to enhance the acceptance of stakeholders is very, very low, if it truly exists at all.

The Service's rationale appears to be that because Colorado has much federally protected habitat in National Parks and Wilderness, and, as the wolverine historically has not been a major source of conflict, that it is not necessary to restrict existing human activity at all. But the ESA commands the exact opposite. If there is not likely to be conflict with human activity, then what are the stakeholders concerned about? The Service's approach ignores the fact that the ESA is a law of last resort that comes into play only when a species is on the brink of extinction. It commands exercise of the precautionary principle and any doubts in whether a restriction is necessary should favor protecting the wolverine, not a small population of economic interests.

The Service's approach also flies in the face of its recently issued National Fish Wildlife and Plants Adaptation Strategy (2012) (hereinafter "NFWP Strategy") for managing fish, wildlife, and plants in the face of the ongoing crisis of climate change. The strategy included seven goals: (1) "Conserve habitat to support healthy fish, wildlife, and plant populations and ecosystem functions in a changing climate." (2) "Manage species and habitats to protect ecosystem functions and provide sustainable cultural, subsistence, recreational, and commercial use in a changing climate"; (3) "Enhance capacity for effective management in a changing climate."; (4) "Support active management in a changing climate through integrated observation and monitoring and use of decision supporting tools."; (5) "Increase knowledge and information on impacts and responses to fish, wildlife, and plants to climate change."; (6) "Increase awareness and motivate action to safeguard fish, wildlife, and plants in a changing climate."; and (7) "Reduce non-climate stressors to help fish, wildlife, plants, and ecosystems adapt to a changing climate." (emphasis added).

At a minimum, the Service should evaluate the effectiveness of other 10(j) reintroductions and in so doing, endeavor to get any 10(j) proposal right from the start. The sad state of Mexican gray wolf recovery is damning proof that once the parameters of an experimental designation are set, it is very difficult if not impossible to make adjustments under adaptive management that strengthen those efforts.

6. The proposal to reintroduce wolverine under section 10(j) fails to meet the requirements of the ESA.

A proposed 10(j) regulation is promulgated under authority of ESA section 4(d) which states:

Any population determined by the Secretary to be an experimental population shall be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act with respect to such population. The Special rules (protective regulations) adopted for an experimental population under §17.81 will contain applicable prohibitions, as appropriate, and exceptions for that population.

50 C.F.R. § 17.82. ESA Section 4(d) regulations, and consequently any 10(j) rule, must be developed to promote conservation of the species. 16 U.S.C. § 1533(d). The proposed rule falls short of this requirement.

The first step in proposing a 10(j) rule is for the Service to determine whether an experimental population is “essential” or “nonessential.” An essential experimental population is one “whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild.” 50 CFR 17.80(b). Any experimental population that does not fit this definition is classified as nonessential. The basic difference between the two is that “essential” populations always receive the same protections as a threatened species and “nonessential” populations only have such protection within the National Wildlife Refuge System or the National Park System. Outside the borders of these areas, nonessential populations are treated as a species proposed to be listed as threatened (i.e., no protections at all) and are protected only according to the special rules established for them by the Secretary.

Here, the Service’s “non-essential” determination fails to promote the conservation of the species and is hence in violation of Section 4(d) of the ESA.

- a. The reintroduced population is essential to the recovery of wolverine.

As discussed in detail in Exhibit A, given the small number of wolverine in the United States, and the critical threat to the wolverine’s habitat due to climate change, it is nonsensical to consider an experimental population in the Colorado region as “nonessential.” The DPS likely will not survive unless it can recolonize habitat in Colorado that is more protected against climate change. The Service rationalizes its conclusion that this area is nonessential on the grounds that “the potential future loss of North American wolverines from the Southern Rocky Mountains would not reduce the likelihood of the species’ survival throughout its current range...” 78 Fed. Reg. 7892. But this conclusion is an answer to the wrong question.

The ESA requires that the Service examine whether “loss would be likely to appreciably reduce the likelihood of the survival of the species [in this case the proposed DPS] in the wild” in making the essential/nonessential determination. Having concluded that, among other things, over 63% of the available wolverine habitat in the contiguous

United States, and a greater percentage of the population (currently only 250-300 animals), will be lost due to climate change, the assertion that also losing a subpopulation of the DPS in a region that will add to the available habitat cannot withstand logical or scientific scrutiny.

In fact, the Southern Rockies have the largest area of unoccupied suitable habitat in the contiguous U.S. The current estimated number of wolverines in the entire DPS is approximately 250-300. Using the amount of modeled habitat in the Southern Rockies and information from the literature on wolverine territory sizes/densities, experts estimate that habitat in the Southern Rockies could potentially support an additional 100 wolverines, maybe more. 78 Fed. Reg. at 7894. As such, re-establishment of a population in the Southern Rockies has the potential to increase the number of wolverines in the DPS by at least 33%, and the occupied range by a substantial amount.

Further, Colorado has the highest average elevation of any state in the contiguous U.S., including 54 peaks over 14,000 feet. The State's high elevations and rugged terrain may serve as a refuge for wolverine because they retain cold temperatures and snow cover necessary for wolverine to a greater degree than other portions of the species' range. Some climate models suggest that Colorado's higher elevations may retain large blocks of suitable wolverine habitat and be less affected by climate change than other parts of the species' range. *See* McKelvey et al. (2010) at 2888-89. Thus, restoration of wolverines to the Southern Rockies may be one of the most important steps that can be taken to conserve the species in the face of climate change. It is not nonessential but vital. Restoration would also provide an opportunity to reintroduce individuals from populations across North America that have a higher degree of genetic diversity than is currently present in the contiguous U.S. In short, this population is clearly essential for the survival of the wolverine in the lower 48 states.

The best available science reveals the best way to protect wolverine from climate change is to ensure we have more wolverines in more places historically occupied by the species. This assertion is fully developed in Exhibit A and is incorporated by reference. For the same reasons set forth in Exhibit A, we strongly support and encourage the Service to more fully protect wolverine in the proposed reintroduction area, and explore reintroduction efforts in other regions in the contiguous United States that were historically, but are no longer, occupied by wolverine. This includes Utah, California, Oregon, Washington, Idaho, New Mexico and Wyoming.

The Service acknowledges that in making a determination of whether an experimental reintroduction is required to conserve a species, such decision must be made "solely on the best scientific and commercial data available." 78 Fed. Reg. 7892. Yet the basic premise of the proposed 10 (j) rule is not driven by science but rather by the perceived need to offer "stakeholders" regulatory assurance that their economic interests

will not be affected in any manner by a reintroduction. This elevation of economic interests over best science based needs for the species is impermissible.

b. The proposed boundaries of the area for reintroduction are too small.

The Service should make protecting the few remaining areas in the contiguous United States that retain deep persistent spring snow (April 15 to May 14) a top priority. For this reason, the existing areas considered for reintroductions should be extended to include historic range in the Uinta Mountains of Utah and the Bighorn, Salt River, and Wyoming Ranges of Wyoming.

If an introduced population is to achieve long-term viability it will need genetic connectivity to the Northern Rockies. Releases in Wyoming and/or Utah, therefore, may be necessary to the success of the Colorado release to provide this connectivity; otherwise all that will be achieved is another isolated “island” population that is not sustainable.

The Service’s rationale for not including areas of Utah in the proposal “[b]ecause wolverine habitat in Utah is not contiguous with habitat in Colorado appears to be factually incorrect as there is evidence of a wolverine that had a cross-border territory between CO/UT in 1979. *See infra* at p. 12. Further, the Bear River Mountains and the Uinta Mountain range do indeed provide a nearly continuous migration corridor for many carnivore and ungulate species. These areas contain abundant wilderness areas, and many peaks over 13,000 feet in elevation.

Moreover, in discussing the wholly separate geographic requirement of the 10(j) regulation, the Service states that the nearest wolverine population to Colorado is in the Wind River Range in Wyoming, 137 miles from the 10(j) area. 78 Fed. Reg. 7895. The Service acknowledges this is within the dispersal distance of the male wolverine but indicates it is outside the dispersal range of female wolverines. While this seems to be contradicted in the same paragraph, in which they state that a female wolverine has dispersed 145 miles, if the Service is correct, and assuming natural dispersal won’t happen, then the Colorado population will remain isolated unless the Service releases additional wolverines in areas in Utah and Wyoming close to Colorado to provide genetic connection to the Northern Rockies. Accordingly, the proposed areas considered for reintroduction are simply inadequate to achieve the goal of a viable population centered in Colorado.

Also relevant to this issue is the Service’s request for evidence of wolverine occurrences in Colorado. 78 Fed. Reg. 7891. The information the Service appears to be working from is incomplete as there is more recent evidence of wolverine occurrence in Colorado than they acknowledge. The Service states that “the species is believed to have been extirpated from the southern Rocky Mountains ... by the early 1900s.” Yet, in the

July-August 1979 issue of Colorado Outdoors (the publication of the Colorado Division of Wildlife at the time) there is an article by Jim Hekkers which states: “On March 15 [1979] a male wolverine was shot near the Colorado-Utah border. While the man who shot the animal claims he did so two miles within Utah, some of the evidence indicates the wolverine may have actually been shot within Colorado. In any case, researchers are confident that at least part, if not all, of the animal’s range was within Colorado.” In addition to the information on the wolverine killed, this issue of Colorado Outdoors further disclosed that “Less than a month after the project started [an effort to find evidence of wolverine in Colorado conducted by the Colorado Division of Wildlife in 1979] a male and a female wolverine were released about 15 miles south of Aspen during filming of a segment for a John Denver television special which aired this past spring [1979].”

As such, there is evidence of wolverine in Colorado after the early 1900s that has not been conveyed to the Service by the State. It appears historically wolverines had territories crossing the Utah/Colorado Border (and potentially the New Mexico/Colorado border) and can be expected to do so again. This supports extending the reintroduction area into Utah. The public is entitled to a more thorough search for information regarding the presence of wolverine in the proposed reintroduction area. As a part of this process, the Service should request detailed data from the State of Colorado related to wolverine presence within the proposed reintroduction area, and provide that information to the general public for review.

- c. Any 10(j) rule must adequately address all threats facing wolverine.

To ensure the long-term survival and recovery of wolverine in the contiguous United States, the reintroduction of wolverine as an experimental population pursuant to section 10(j) of the ESA should adequately discuss and address all threats that are, may be, or are likely to harm wolverine (these threats are fully discussed in WELC’s comments on the proposed rule which are attached as Exhibit A and incorporated by reference into these comments).

At a minimum, a reintroduced population should be extended the same protections of any 4(d) rule issued in connection with the listing of the species as threatened. Specifically, any experimental population of wolverine reintroduced in Colorado should be protected from both intentional and incidental trapping of wolverine in the area. *See* Exhibit A.

- d. The 10(j) rule must specify the number of animals to be released and that number must be sufficient to conserve the species.

The Service acknowledges “all regulations designating experimental populations under section 10(j) must ... identify ... the number of specimens released or to be

released.” 78 Fed. Reg. at 7892 (citing 50 C.F.R. § 17.81(c)). The proposed rule doesn’t appear to do this—because it leaves that figure up to the State to be determined later. This requirement cannot be abdicated to a state agency, and it certainly cannot be abdicated to the legislature of a Western state. At the very least, the rule must set a minimum number before relying on the State to run a realistic program.

Further evidence that the Service has not done the requisite analysis to determine the appropriate number of animals to be released is disclosed in the proposed rule at 7897, when in discussing this issue the Service states: “We would consider the likely home range size, ideal sex ratio, and desired population density in determining the number of [wolverine] to be released.” This indicates that the Service has yet to perform its required regulatory duty. The Service goes on to state: “The exact reintroduction protocol that may be used will not be known until and unless a program is approved by the State of Colorado” and again “principals of adaptive management would be employed when determining composition of released animals.”

Once again, the Service’s proposal suffers from vagueness and uncertainty. What principals of adaptive management is the State of Colorado committing to and towards what end? Will it “adapt” to ensure minimum conflict between wolverine and stakeholders or “adapt” to ensure maximum success of wolverine recovery? What is the goal? Will reintroduction continue until the wolverine is deemed recovered and if so what are the metrics for making such a determination? Absent any discussion of these critical questions, the public is denied its right to effectively comment on this proposed rule.³

The Service does state, “[i]t is anticipated that this reintroduction project would require a minimum of 4 years of releases.” 78 Fed. Reg. at 7879. But again, the Service does not state how many animals would be released or how many would need to survive in the area before releases were stopped. Later, the Service states that “[a]n estimated 10 to 20 individuals would be taken annually for at least 4 years for translocation into Colorado.” 78 Fed. Reg. at 7898. If this is actually the plan it belongs in the “number of animals to be released” section of the rule and should be explicitly required. Moreover, there should be disclosure of how this number was arrived at and why the Service believes it will be sufficient to recover the Species.

Finally, the Service should provide details about the process for periodic review of the reintroduction process, including details about when and how frequently such a periodic review will occur, what such a review will entail, who will conduct the review, what factors will be examined in the review, and what changes to the reintroduction

³ For example, Dr. Richard Reading of the Denver Zoo has indicated that female wolverines need to be released before male wolverines to ensure that male wolverines do not leave the reintroduction area in search of a mate. Because the 10(j) rule does not specify whether this will occur, the public cannot meaningfully comment on this, and many other important aspects of the proposed reintroduction program.

program can or will be made as a result of the review. *See* 50 C.F.R. § 17.81(c)(4). Further, the Service should not just conduct a periodic review of the reintroduction program, but actually use the results of the periodic review in the adaptive management of the reintroduction program.

Thank you in advance for taking the time to carefully review and consider the issues and concerns raised in these comments. If you have any questions or wish to discuss the issues raised in greater detail, please do not hesitate to contact us.

Sincerely,

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