



State of Utah

GARY R. HERBERT  
*Governor*

SPENCER J. COX  
*Lieutenant Governor*

Office of the Governor  
PUBLIC LANDS POLICY COORDINATION OFFICE

KATHLEEN CLARKE  
*Director*

December 2, 2013

VIA FEDERAL RULE MAKING PORTAL

Public Comments Processing  
Attention: FWS-R6-ES-2012-0107  
Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, MS 2042-PDM  
Arlington, VA 22203

RE: Proposed Threatened Status for the Distinct Population Segment of the North American Wolverine in the Contiguous United States; Docket No. FWS-R6-ES-2012-0107

Dear Sir or Madam:

The State of Utah has reviewed the U.S. Fish and Wildlife Service (Service) proposed rule to list the North American wolverine as a threatened distinct population segment (DPS) in the contiguous United States under the Endangered Species Act (ESA). The state finds 1) that the proposal does not provide sufficient analysis to support a listing for the species as a distinct population segment, 2) that the proposed boundary for the distinct population segment is inaccurate and not supported by science because it includes habitat that was not historically occupied by the wolverine, and 3) that a conflict of interest exists for several of the scientific workers asked to review the proposed listing. In addition, because the Service has determined that the complete loss of the wolverine in the contiguous United States would not threaten the species with extinction<sup>1</sup>, the state questions the need for any listing for the species. For these reasons, the state specifically requests the proposed rule be withdrawn. There is no basis for concluding that the species is threatened as defined by the provisions of the ESA.

The state previously commented upon the proposed rule to list the species by a letter

---

<sup>1</sup> These conclusions are supported in the administrative record and proposed rules (78 FR 7864; 75 FR 78030) which report stable wolverine populations widely dispersed across North America with approximately 20,000 (75 FR 78041) individuals in Canada and Alaska and 250 to 300 individuals in the contiguous United States. The Service correctly concludes the loss of 300 individuals and their associated habitat in the contiguous United States would not threaten the North American wolverine with extinction, and that a species wide listing is not warranted under the Endangered Species Act.

dated May 2, 2013. The state reiterates those comments, and provides additional comments on related issues as stated below.

### **The Elements are Not Present to Support a Listing as a Distinct Population Segment**

Three elements are considered in recognizing and listing a DPS as endangered or threatened: 1) the discreteness of the population segment to the remainder of the species; 2) the significance of the population segment to the species; and 3) the conservation status of the population segment in relation to listing standards under the ESA. All three elements must be satisfied to list a DPS as threatened or endangered. The Service fails to demonstrate that the wolverine population within the contiguous United States qualifies as either *discrete* or *significant*. Consequently, the proposed rule to list the species as a DPS does not meet the requirements of the policy.<sup>2</sup>

#### ***Discreteness***

The Service proposes that the wolverine population within the contiguous United States meets the requirements of *discreteness* based on differences in *conservation status* between the United States and Canada in light of section 4(a)(1)(D) of the ESA (inadequacy of existing regulatory mechanisms). However, the Service has misinterpreted the meaning of the term *conservation status* as a qualitative measure of the comparative viability between wolverine populations in the contiguous United States and Canada/Alaska. This misinterpretation is outside the framework used in the DPS Policy which specifically addresses regulatory disparities. The DPS Policy includes the term *conservation status* in a series of other elements<sup>3</sup> that describe conditions when a population is considered delimited by an international boundary and consequently *discrete*. The Service concludes the wolverine population in the contiguous United States is *discrete* from its northern counterpart in Canada and Alaska solely because its populations are smaller and more vulnerable and thus delimited by international boundary. The Service reaches this conclusion despite recognizing in the proposed rules that regulatory protections for the species are generally more rigorous in the contiguous United States than in Canada. The interpretation and application of *conservation status* is inconsistent with the DPS Policy and, therefore, the wolverine population within the contiguous United States should not be considered *discrete*.<sup>4</sup>

In addition to misconstruing the legal meaning of *conservation status*, the comparisons

---

<sup>2</sup> The proposed rules identify the contiguous United States population of the wolverine as a distinct population segment likely to become endangered in the foreseeable future on account of habitat loss from projected climate change. Since this population and its associated range do not constitute a significant portion of the species' range and a species listing is not warranted, a DPS listing is the only tool available for a listing. However, the DPS analysis outlined in the proposed rules is inconsistent with the Service's policy on distinct population segments (61 FR 4722).

<sup>3</sup> These terms or conditions refer to differences in: 1) control of exploitation; 2) management of habitat; 3) conservation status; or 4) regulatory mechanisms -- that are significant in light of Section 4(a)(1)(D) of the ESA (inadequacy of existing regulatory mechanisms).

<sup>4</sup> In *National Association of Home Builders v. Norton*, 340 F.3d 835, 843 (9th Cir. 2003), the Court concluded the interpretation of conservation status as a comparative population measurement between two counties was not "plainly erroneous," but the interpretation was not specifically challenged or briefed in the case.

made and conclusions drawn between wolverine populations in the contiguous United States and Canada/Alaska fail to recognize or address the relationship of historic range and population densities to the current population disparities. The contiguous United States has never supported significant wolverine populations as compared to Canada and Alaska. In the United States, wolverines historically occupied the high alpine slopes of the northern and southern Rocky Mountains, Sierra Nevada Mountains and North Cascade Mountains. In contrast, vast reaches of Canada and Alaska provided suitable habitat for the species. The disparities in population and habitat size between the areas south and north of the Canadian border have always existed with the contiguous United States representing the southern extent of the species range where habitat is naturally fragmented and less abundant. The proposed rules acknowledge this fact by stating that historic populations of the wolverine in the contiguous United States have always been low, and that population levels and densities in the northern Rocky Mountains and the North Cascade where wolverines currently exist are likely not substantially lower than populations in these areas prior to European settlement.

Although differences in wolverine populations, effective populations, and habitat fragmentation exist between the United States and Canada, they represent historical occurrences and are not the result of disparate conservation efforts employed by either the United States or Canada. Indeed, the proposed rules recognize that United States regulations restricting wolverine take are more rigorous than Canada's. The Service fails to demonstrate that inadequate regulatory mechanisms account for or contribute to the naturally smaller wolverine populations in the contiguous United States. Under these circumstances, the contiguous United States population of the wolverine is not delimited by an international boundary and is not discrete from the remainder of the species' populations to the north.

The proposed rules erroneously interpret *conservation status* and fail to link status differences between wolverine populations in the United States and Canada to Section 4(a)(1)(D) and inadequate regulatory mechanisms. As such, the contiguous United States population of the wolverine is not *discrete* from its northern counterparts and is ineligible for further consideration as a DPS.

### ***Significance***

Assuming for purposes of argument the contiguous United States population segment of the wolverine were *discrete*, it would not be *significant* to the taxon as a whole.<sup>5</sup> The proposed rules state the gap created by losing the contiguous United States population of wolverines (estimated at 250 to 300 individuals) is *significant* to the taxon because it would: 1) "curtail the range of the wolverine by moving the southern range terminus 15 degrees of latitude to the north;" and 2) "eliminate wolverines from the fauna of the contiguous United States."

---

<sup>5</sup> Under DPS Policy, a population segment found *discrete* must also be *significant* to the species to which it belongs. Among the various factors recognized in the DPS Policy as indicative of *significance*, the proposed rules rely exclusively upon Factor 3 which requires "evidence that loss of the discrete population segment [will] result in a significant gap in the range of [the] taxon." The term significant or significance is used in the DPS Policy in two separate contexts: 1) as a standard for recognizing a discrete population as a DPS, i.e. the significance of the discrete population's biological and ecological contributions to the entire species; and 2) as a standard for establishing discrete population significance where loss of the discrete population would result in a significant gap in the range of a taxon.

However, the proposed rules do not explain how losing the geographic area comprising the species current or historic range in the contiguous United States would amount to a *substantial reduction* in the taxon's range; or how the loss of 300 wolverines in the contiguous United States would constitute a *large percentage* of the taxon's total population. Instead, the proposed rules state the "bulk" of the wolverine's habitat and population occurs in Canada and Alaska, and refers to the contiguous United States as the periphery or southernmost edge of the species' range.<sup>6</sup>

The first rationale offered in support of gap significance or the significance of losing the contiguous United States wolverine population is the assertion it would move the species' southern range terminus 15 degrees of latitude to the north. Although accurate, the statement provides little insight in determining whether loss of the population segment is significant to the taxon.<sup>7</sup>

The proposed rules do not quantify the wolverine's range in Canada/Alaska in geographic terms nor do they offer a comparative measurement or ratio contrasting its range between the two regions. As for population comparisons, the rules estimate wolverine numbers in Canada at 15,089 to 18,967 individuals<sup>8</sup> and populations in the contiguous United States at 250 to 300 individuals. Additionally, the rules repeatedly acknowledge that historic population numbers in the United States have always been low and that current wolverine populations in the northern Rocky Mountains and the North Cascades are comparable to population densities prior to European settlement. In short, the Service does not articulate how the loss of a very small percentage of the wolverine's range is *significant* to the taxon. The geographic area of lost range is not a "substantial reduction" in comparison to the species' range in Canada and Alaska, and 300 individuals is not a "large percentage" of a remaining population that undoubtedly exceeds 20,000 individuals widely dispersed across Canada and Alaska.

The second rationale offered in the proposed rules, ostensibly demonstrating the *significance* of the gap created by the potential loss of wolverines in the contiguous United States, is that such a loss would amount to the elimination of the species from the fauna of the contiguous United States. However, this is not an interest recognized in the plain language of the DPS Policy. The policy states that a discrete population is *significant* when there is evidence that loss of the discrete population [will] result in a *significant* gap in the range of a taxon. Since loss of the wolverine to the fauna of the contiguous United States is not *significant* to the taxon, the only remaining significance of such a loss would be to the people of the United States. The Ninth Circuit Court of Appeals<sup>9</sup> held that the gap resulting from loss of a discrete

---

<sup>6</sup> See 75 FR 78030, 78038, 78041 and 78 FR 7864, 7867, 7885.

<sup>7</sup> DPS Policy is clear that significance is evidenced by population losses that would "result in a significant gap in the range of [the] taxon." The Ninth Circuit Court of Appeals held that the term "significant" in the DPS Policy means "important." The Court concluded that a "gap" resulting in the curtailment of a species' range is "significant" when it represents a "geographic area that amounts to a substantial reduction of the taxon's range." *Id.* at 848. Similarly, a "gap" resulting in the loss of an entire discrete population is "significant" when it constitutes a "large percentage of the total number of the taxon's members." *Id.*

<sup>8</sup> The population estimate of 15,089 to 18,967 individuals in the proposed rules is confined to Western Canada. Wolverine populations in Alaska and Eastern Canada are unknown, but Alaska populations are believed to be at range capacity. (78 FR 7864, 7869 and 75 FR 78030, 78033, 78037).

<sup>9</sup> National Association of Home Builders v. Norton, 340 F.3d 835, 849 (9th Cir. 2003)

population must be *significant* to the taxon as a whole, not to the people of the United States.

The contiguous United States population segment of the North American wolverine does not qualify as a DPS since it is neither *discrete* from nor *significant* to the remainder of the species. The Service has not provided a factual or legal basis to list the wolverine as a threatened DPS. As such, the proposed rules should be withdrawn and replaced with a proposed rule finding listing not warranted.

### **Discrete Population Segment Boundary Inconsistencies**

The proposed rules identify the entire contiguous United States as the area comprising the wolverine DPS, however, the species' historic range in the contiguous United States was limited to the high alpine slopes of the northern and southern Rocky Mountains, Sierra Nevada Mountains and North Cascade Mountains. Congress created the DPS listing entity to protect and recover *distinct populations* and their associated habitat where a species or subspecies listing is not warranted. The DPS policy was not established as a surrogate for listing species or subspecies on a national basis. Establishing a DPS boundary that includes 39 states that are outside the species historic range and void of suitable habitat is a gross misapplication of the policy and is inconsistent with the purpose of protecting and recovering a discrete population. Otherwise, a DPS listing could be used to expand ESA restrictions beyond the area occupied by the imperiled discrete population to areas outside the species' historic range or even areas occupied by non-listed populations. This type of authority expansion is plainly inconsistent with the ESA and is *ultra vires*. Assuming a legal basis existed to establish a wolverine DPS, its boundary should include only the areas with suitable wolverine habitat and within the species' historic range.

### **Conflict of Interest by Scientific Workers Reviewing the Service's Proposal**

In accordance with the Service's July 1, 1994 review policy,<sup>10</sup> it is required to solicit the opinions of "appropriate and independent specialists" to ensure use of the best scientific and commercial data available and to maximize the quality, objectivity, utility, and integrity of the information relied upon and conclusions reached in a listing decision. The review solicitation for the proposed rule listing requested that potential scientific worker reviewers must be: 1) knowledgeable in wolverine biology; 2) independent from the Service and affected state fish and game agencies; 3) recognized by peers as objective, open-minded, and thoughtful; and 4) free from financial or other interests that conflict with or could impair objectivity in performing peer review.

The Service solicited and received scientific worker review on the proposed rule from seven individuals that appear to possess the necessary expertise in wolverine biology, but are not all independent and objective. The proposed rules list the contiguous United States DPS of the wolverine as threatened on the singular basis that habitat impacts from projected climate change will threaten the wolverine DPS with extinction in the foreseeable future. In reaching this conclusion, the proposed rules acknowledge the scientific uncertainties on many aspects of climate change and then accept the work in McKelvey et al. (2011, entire) as the best scientific

---

<sup>10</sup> 59 FR 34270

information available on the impacts of climate change to wolverine habitat.<sup>11</sup>

Four of the seven peer reviewers selected by the Service<sup>12</sup> to ensure the proposed rules used the best scientific and commercial data available are coauthors in McKelvey *et al.* These individuals were selected by the Service and asked to *objectively* comment on the quality, utility, and integrity of the very paper they authored. Not surprisingly, all four peer reviewers that coauthored McKelvey *et al.* supported the Services' reliance on the paper as the best scientific evidence available and agreed with its decision to list. The two peer reviewers<sup>13</sup> selected from the private sector that did not have a vested interest in validating McKelvey *et al.* (2011, entire), took exception with the conclusions reached in the paper and the Service's acceptance of it as the best scientific evidence available on the impacts of future climate change to wolverine viability. Additionally, four peer reviewers are employed by the United States Forest Service and all four generally supported the analysis and conclusions reached in the proposed rule.<sup>14</sup>

Peer review of the proposed rules is flawed on account four reviewers had an inherent interest in validating the key paper relied upon in listing the wolverine. The comments from these reviewers should be dismissed. The state recommends the comments from the remaining three reviewers may be considered alone or supplemented by additional peer review from individuals with the requisite expertise, independence, objectivity, and impartiality.

Utah requests the Service to extend by six months its final determination on the proposed rule to list the contiguous United States DPS of the wolverine as threatened<sup>15</sup>. An extension is appropriate based on the substantial disagreement among the peer reviewers and affected states on the sufficiency and accuracy of the data relied upon in the proposed rule to list the wolverine DPS; namely accepting the work in McKelvey *et al.* as the best scientific information available on the impacts of climate change to wolverine habitat and selecting four of its authors to peer review the proposed rule. The extension will allow time to: 1) select and convene an independent peer review council to review the proposed rule; and 2) evaluate and consider whether the listing decision in the proposed rules is consistent with the DPS Policy.

## CONCLUSION

The State of Utah respectfully requests that the Service withdraw the proposed rule to list the wolverine population within the contiguous United States because it does not meet the elements of *discreteness* or *significance* which are required to determine whether a population is a distinct population segment. The Service's disregard of historic wolverine habitat with a proposal to list the species in the entire contiguous United States, including several states (39) which have never hosted the species, is a dangerous misuse of the DPS policy. Further, the failure of to convene an objective review panel voids the entire suite of analyses within the proposed rule for failure to use the best scientific and commercial data in the decision making

---

<sup>11</sup> 78 FR 7864, 7874

<sup>12</sup> John R. Squires, Keith B. Aubry, Jeff Copeland, and Michael K. Schwartz.

<sup>13</sup> Robert M. Inman and Audry J. Magoun

<sup>14</sup> John R. Squires, Keith B. Aubry, Michael K. Schwartz, and William J. Zielinski.

<sup>15</sup> Pursuant to Section 4(b)(6)(B) of the ESA

process.<sup>16</sup> A thorough, complete and objective scientific review of the evidence would find that the North American wolverine is not at risk of extinction and, therefore, a listing under the Endangered Species Act is not warranted.

Thank you for the opportunity to comment. Again, these comments must be read in conjunction with the state's earlier comments filed on May 2, 2013. Please feel free to call John Harja, at (801) 537-9802 with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Clarke', with a long horizontal flourish extending to the right.

Kathleen Clarke  
Director

---

<sup>16</sup> 16 U.S.C. §§ 1801-1883 (2000)