



January 16, 2020

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RE: Sixty-Day Notice of Intent to Sue to Remedy Violations of the Endangered Species Act in the United States Fish and Wildlife Service's Failure to Meet the Statutory Deadline for a Final Determination on the Proposed Rule to List the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States as Threatened

Dear Secretary Bernhardt and Director Everson,

On behalf of the Center for Biological Diversity, Conservation Northwest, Defenders of Wildlife, Friends of the Clearwater, Greater Yellowstone Coalition, Idaho Conservation League, Jackson Hole Conservation Alliance, Klamath-Siskiyou Wildlands Center, and Rocky Mountain Wild, in accordance with the citizen suit provision of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1540(g), I hereby provide notice that the U.S. Fish and Wildlife Service ("FWS" or "Service") is in violation of the ESA, 16 U.S.C. § 1533, and its implementing regulations, 50 C.F.R. § 402 *et seq.*, with regard to the Service's failure to meet the statutory deadline for a final determination regarding the proposed listing of the distinct population segment ("DPS") of the North American wolverine occurring in the contiguous United States as threatened under the ESA. *See* 79 Fed. Reg. 6,874 (February 5, 2014) ("Listing Determination Extension").

FWS on February 4, 2013 published a proposed rule to list the wolverine DPS within the contiguous United States as threatened. 78 Fed. Reg. 7,864 (Feb. 4, 2013) ("Proposed Rule"). FWS subsequently withdrew its Proposed Rule on August 13, 2014. 79 Fed. Reg. 47,522 (Aug. 13, 2014). Conservation organizations challenged this withdrawal decision in court and, on April 4, 2016, the U.S. District Court for the District of Montana held that the Service's

withdrawal of the proposed rule was arbitrary and capricious. Defenders of Wildlife v. Jewell, 176 F. Supp. 3d 975, 1011 (D. Mont. 2016). The court vacated and remanded the decision to the Service for further consideration consistent with the court's ruling. Id. at 1011-1012. As a matter of law, the Montana court's 2016 decision reinstated the ESA's statutory deadline for a final determination on the proposed rule. Three years have passed since the Montana court's decision with no action by the Service on this issue. The Service is, therefore, in violation of the ESA because it has failed to meet the mandatory ESA deadline governing the required listing determination. 16 U.S.C. § 1533(b)(6)(A)(i), (B)(i).

Pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2), this letter provides you with notice that, unless within 60 days of receipt of this letter FWS promulgates a final rule listing the North American wolverine as threatened within the contiguous United States, we intend to challenge in federal district court the Service's failure to meet the ESA deadline for a final determination of the proposed listing of the North American wolverine DPS as threatened.

I. The Wolverine

The wolverine (*Gulo gulo*) 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 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.

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. The wolverine has been eliminated from all but a fragment of this historic range by the 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 one wolverine each has in recent years traveled to California and Colorado, wolverine populations are known to exist in the contiguous United States only in the Rocky Mountain regions of Idaho, Montana, and Wyoming, in the Cascade Mountains of Washington, and in eastern Oregon. The entire population in the contiguous United States is estimated at just 300 wolverines or fewer.

Wolverines are adapted to live in high-altitude and high-latitude ecosystems characterized by deep snow and cold temperatures. At least at the southern portion of the wolverine's North American range, deep snow is particularly important for wolverine reproduction: females create dens by tunneling deep into the snowpack, where they give birth in protected den cavities at ground level. Wolverines of both sexes also rely on these same cold, snowy areas year-round, perhaps because snow helps provide "refrigeration" for the carcasses that wolverines feed on, and perhaps also because there is less competition for food in these cold,

harsh regions. 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 other small mammals, and are capable of taking even large ungulates such as deer, elk, and moose as live prey when the opportunity arises.

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, age, and gender. 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.

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 in the years when a female does give birth. An Idaho study found that, on average, wolverines reproduced at a rate of less than one kit per female per year.

In sum, the remaining wolverines in the contiguous United States exist in low numbers, require large home ranges in cold and snowy areas, and have low reproductive rates. These characteristics leave the wolverine vulnerable to localized or even range-wide extinctions due to escalating threats from climate change, human disturbance, and trapping.

II. The Endangered Species Act

Congress enacted the Endangered Species Act in 1973 with the goal of protecting and recovering species that are in danger of extinction or are likely to become so within the foreseeable future. In the words of the Act, its purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” and “to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). In the seminal case on the purpose of the Endangered Species Act, *Tennessee Valley Authority v. Hill*, the Supreme Court confirmed that it is “beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” 437 U.S. 153, 174 (1978). FWS highlighted this goal in its Proposed Rule to list the wolverine as threatened, stating that the “primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems on which they depend.” 78 Fed. Reg. at 7,886.

To achieve the goal of conserving threatened and endangered species, section 4 of the Act requires the Secretary of the Interior to determine whether a species is threatened or endangered, 16 U.S.C. § 1533(a)(1), designate critical habitat for the species, *id.* § 1533(a)(3), and promulgate a recovery plan for the species, *id.* § 1533(f). During this process, the ESA sets mandatory deadlines for agency action. One such deadline is that after publishing a proposed rule, the ESA requires the Service to publish a final rule or withdraw the proposed rule within one year, 16 U.S.C. § 1533(b)(6)(A)(i), except that, upon finding “substantial disagreement regarding the sufficiency or accuracy” of available scientific data, the Secretary may extend the

period for no more than 6 months for the purpose of “soliciting additional data,” *id.* § 1533(b)(6)(B)(i).

III. History of Wolverine Listing Efforts

Despite significant and escalating threats, FWS has repeatedly refused to apply the ESA’s protections to the North American wolverine. The Service’s failure to meet its deadline to make a final determination regarding the proposed listing rule published in 2013 represents the latest chapter in a nearly 20-year saga in which the public’s repeated attempts to secure protections for this imperiled species have met with continuous resistance from FWS, frequently requiring judicial intervention to compel FWS to take the actions required by the ESA.

On July 14, 2000, conservation groups 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. After initial delay that required court action to resolve, the Service published a negative 90-day petition finding in the Federal Register on October 21, 2003. 68 Fed. Reg. 60,112 (Oct. 21, 2003). On June 8, 2005, a coalition of conservation organizations filed a complaint in the U.S. District Court for the District of Montana challenging the Service’s negative finding. On September 29, 2006, the Montana court ruled that the 90-day petition finding was arbitrary and capricious and violated the ESA. Defenders of Wildlife v. Kempthorne, CV 05-99-M-DWM, slip op. at 18-19 (D. Mont. 2006). According to the court, the “petition ... 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.* at 20. The court ordered the Service to prepare a 12-month finding on the wolverine listing petition, *see id.* at 21, and then later granted the Service’s motion to extend the status review and 12-month finding deadline by five months, to February 28, 2008.

FWS published its first 12-month finding, denying ESA protections for the wolverine, on March 11, 2008. 73 Fed. Reg. 12,929 (Mar. 11, 2008). The basis of this negative finding was FWS’s determination that “the contiguous United States population of the North American wolverine does not constitute a distinct population segment (DPS) under the Act,” and that the population “is not a significant portion of the range of the North American subspecies and does not warrant further consideration under the Act.” *Id.* at 12,941. Conservation groups again brought suit to challenge this finding, and on March 6, 2009, the Service agreed to settle that case by voluntarily retracting the challenged 12-month finding and issuing a new finding by December 1, 2010. *See* 78 Fed. Reg. at 7,866. On December 14, 2010, the Service finally published this second 12-month finding, which determined that the wolverine within the contiguous United States constituted a distinct population segment that warranted listing under the Act due to the predicted impacts of climate change and other threats. 75 Fed. Reg. 78,030 (Dec. 14, 2010). In its finding, the Service estimated that wolverines were “likely to lose 63 percent of their current habitat area over the next century,” and that “by 2045, maintenance of the contiguous U.S. wolverine population in the currently occupied area will require human intervention to facilitate genetic exchange.” *Id.* at 78,054. Yet the Service still refused to extend ESA protections to the wolverine, finding that an actual listing decision was “precluded by higher priority listing actions.” *Id.*

The Service did not even set a timetable for issuing a listing decision on the wolverine until it was required to do so by a court settlement addressing FWS's chronic backlog of listing determinations. Endangered Species Act Section 4 Deadline Litig., Misc. Action No. 10-377 (EGS), MDL Docket No. 2165 (D.D.C. Sept. 9, 2011). As part of this settlement, the Service agreed to issue a proposed listing rule for the wolverine, or withdraw the "warranted" 12-month finding, by the end of the 2013 Fiscal Year. Id.; see also 78 Fed. Reg. at 7,866. On February 4, 2013, FWS finally issued a proposal to list the distinct population segment of the North American wolverine occurring within the contiguous United States as threatened. 78 Fed. Reg. at 7,864. The Proposed Rule found that climate change posed a primary threat to the wolverine's survival, and that trapping and small population size also posed threats when acting in concert with climate change. Id. at 7,885-86.

As discussed above, after publishing a proposed rule, the ESA requires the Service to publish a final rule or withdraw the proposed rule within one year, 16 U.S.C. § 1533(b)(6)(A)(i), except that the Secretary may extend the period for 6 months for the purpose of "soliciting additional data," id. § 1533(b)(6)(B)(i). In this case, the Service took the 6-month extension. Just months before the final rule was due, agency documents indicate that FWS abruptly changed course from its previous finding, rejecting the science it had previously relied on. Compare Memorandum from Theresa Rabot, Assistant Reg'l Dir. for Ecological Servs., U.S. Fish & Wildlife Serv., to Noreen Walsh, Reg'l Dir., Region 6, U.S. Fish & Wildlife Serv. (May 2014) (recommending finalization of the Proposed Rule with minimal changes) with Memorandum from Noreen Walsh, Reg'l Dir., Region 6, U.S. Fish & Wildlife Serv., to Theresa Rabot, Assistant Reg'l Dir. for Ecological Servs., Region 1, U.S. Fish & Wildlife Serv., 17 (May 30, 2014) (ordering staff to "prepare a withdrawal of the proposed rule"). The Service ultimately issued a withdrawal of its proposed wolverine listing on August 13, 2014, once again denying ESA protections to the wolverine. 79 Fed. Reg. 47,522.

In 2014, conservation organizations filed suit in Montana challenging the Service's withdrawal of the Proposed Rule. On April 4, 2016, the Montana court ruled in favor of the conservation organizations, holding that the Service erred in the withdrawal decision by dismissing threats to the lower-48 wolverine population arising from climate change and small population size. See Defenders of Wildlife v. Jewell, 176 F. Supp. 3d at 1011. The court concluded that, "[b]y incorporating these determinations into the [w]ithdrawal, the Service's decision against listing the wolverine as threatened under the ESA is arbitrary and capricious." Id. The court therefore vacated and remanded the Service's withdrawal decision. Id. at 1011-12. The court underscored the necessity for immediate action in this matter, noting that "[i]t has taken us twenty years to get to this point. It is the [Court's] view that if there is one thing required of the Service under the ESA, it is to take action at the earliest possible, defensible point in time to protect against the loss of biodiversity within our reach as a nation. For the wolverine, that time is now." Id. at 1011.

IV. FWS's Failure to Meet Its Statutory Deadline

Notwithstanding the Montana court's explicit admonition for the Service to take action on the wolverine listing proposal "at the earliest possible, defensible point in time"—a time that the court characterized in 2016 as "now," id. (emphasis added)—the Service has failed to take

any action to finalize the wolverine listing in the more than three years that have passed since the Montana court's decision. While the Service has continued to identify the wolverine as a candidate for listing, the agency has failed to take any action to render a final decision on the wolverine listing. See 81 Fed. Reg. 87,246 (Dec. 2, 2016); 84 Fed. Reg. 54,732 (Oct. 10, 2019) (candidate notices). Most recently, the Interior Department's Fall 2019 Regulatory Agenda promised a final wolverine listing decision in November 2019. See Dep't of the Interior, Fall 2019 Unified Agenda of Regulatory and Deregulatory Actions RIN: 1018-BB78, Office of Information and Regulatory Affairs, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1018-BB78> (last accessed Dec. 12, 2019) (scheduling "Final Action" on wolverine listing for "11/00/2019"). However, November 2019 passed with no final determination on the proposed listing.

FWS's failure to take the required final action on the wolverine listing decision violates the ESA. Where, as here, an agency's final decision is challenged, and subsequently invalidated by a court, the status quo at the time of the unlawful decision is restored and the deadline for the action is reinstated. See Sierra Club v. U.S. E.P.A., 850 F. Supp. 2d 300, 304 (D.D.C. 2012) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect ..."); (internal quotations omitted); Sierra Club v. Johnson, 374 F. Supp. 2d 30, 32-34 (D.D.C. 2005) ("status quo ante ... was created by the [court's] vacatur of [the agency's] earlier action ... that left unfulfilled [the agency's] duty to take final approval/disapproval action"); Env'tl. Def. v. Leavitt, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect ..."); Oxfam Am., Inc. v. Sec. & Exch. Comm'n, No. 14-13648-DJC, 2015 WL 5156554, at *3 (D. Mass. Sept. 2, 2015) (holding that "the district court's decision to vacate the final ... rule simply returned matters to where they stood before and that, in general, remand orders only serve to restore the status quo ante") (internal quotations omitted). Accordingly, the Montana district court's 2016 decision vacating the Service's 2014 withdrawal decision restored the status quo before the unlawful withdrawal decision took effect—i.e., the status quo under which FWS faced the running of its deadline for a final decision pursuant to the 6-month extension that the agency took pursuant to 16 U.S.C. §1533(b)(6)(B)(i). FWS has long since violated that deadline requirement. Accordingly, by failing to make a final decision on the listing of the wolverine population in the lower-48 states as a threatened species under the ESA, FWS is in violation of 16 U.S.C. § 1533(b)(6)(A)(i) and (B)(i).

V. Conclusion

As set forth in this letter, FWS violated the ESA in failing to meet its deadline for a final decision on listing of the North American wolverine distinct population segment in the contiguous United States as a threatened species under the ESA. If the Service does not issue a

final rule listing the North American wolverine as threatened within the contiguous United States within 60 days of the receipt of this letter, the parties to this notice letter will institute a legal action to challenge the Service's unlawful conduct in federal district court.

Sincerely yours,



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