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MISSOULA, MT
2006 SEP 29 PM 1 45
PATRICK E. DUFFY
BY _____
DEPUTY CLERK

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

DEFENDERS OR WILDLIFE, FRIENDS OF)	CV 05-99-M-DWM
THE CLEARWATER, KLAMATH-SISKIYOU)	
WILDLANDS CENTER, and NORTHWEST)	
ECOSYSTEM ALLIANCE,)	
)	
Plaintiffs,)	
)	
vs.)	ORDER
)	
DIRK KEMPTHORNE, in his official)	
capacity as Secretary of the)	
Interior; and H. DALE HALL, in his)	
official capacity as Director,)	
U.S. Fish and Wildlife Service,)	
)	
Defendants.)	

I. Introduction

Plaintiffs Defenders of Wildlife, Friends of the Clearwater, Klamath-Siskiyou Wildlands Center, and Northwest Ecosystem Alliance challenge the decision of Defendants Dirk Kempthorne and H. Dale Hall, acting through the U.S. Fish and Wildlife Service ("FWS"), to deny Plaintiffs' petition to list the wolverine and the concomitant decision not to conduct a status review of whether the wolverine should be designated as an endangered or

threatened species under Section 4 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.* (2000). The Parties have filed cross-motions for summary judgment. In my view the FWS did not comply with the law in its negative 90-day finding on Plaintiff's petition.

II. Factual and Procedural Background

A. The Wolverine.

The North American wolverine (subspecies *Gulo gulo luscus*) is the largest terrestrial member of the weasel family. Adult males typically weigh 26 to 40 pounds while adult females weigh 17 to 26 pounds. AR 801. They average three to four feet in length. *Id.* Wolverines are primarily scavengers but will prey on rodents and occasionally larger mammals. AR 46, 94, 801.

The wolverine's low reproductive rate is an obstacle to its prosperity. One study indicates that wolverines reproduce at a rate of less than one kit per female per year. AR 859-60. They breed from late spring to early fall and the litters are born between February and April. AR 801-02.

The typical wolverine requires large tracts of wilderness for its home range. They forage widely to find carrion, the mainstay of its diet. AR 801, 854-55. Depending on the terrain, a wolverine's home range may encompass over 500 square miles. *Id.*

Historically, wolverines inhabited the northern tier of the contiguous United States from Maine to Washington with populations in Utah, Arizona, New Mexico, and California as well.

AR 381, 801, 825-26. Currently the wolverine inhabits Montana, Idaho, Wyoming, Washington, and Oregon. *Id.*

B. Attempts to List the Wolverine.

In 1994, the Biodiversity Legal Foundation and the Predator Project petitioned the FWS to list the North American wolverine across its entire historic range in the contiguous United States. The ensuing 90-day finding explained that there was not "substantial information" available to indicate that the wolverine warranted listing as an endangered or threatened species. 60 Fed. Reg. 19567, 19568 (Apr. 19, 1995). The finding stated that both the North American wolverine and the California wolverine would retain their place as a candidate Category 2 species.¹ *Id.*

The FWS dropped the wolverine as a candidate species in 1996 when it redefined "candidate species." Under the new definition a "candidate species" was one where the FWS had sufficient information to issue a proposed rule to list the species due to its biological vulnerability, but the action was precluded by higher priority listing actions. 61 Fed. Reg. 7596 (Feb 28, 1996).

Plaintiffs Defenders of Wildlife and Friends of the Clearwater, among others, filed a petition in July 2000 seeking

¹This classification meant "information now in possession of the Service indicates that proposing to list as endangered or threatened is possibly appropriate, but for which conclusive data on biological vulnerability and threat are not currently available to support proposed rules." 50 Fed. Reg. 37958 (Sept. 18, 1985), AR 62.

to list the wolverine and to designate critical habitat for the species. AR 804. One month later the FWS responded explaining that it did not have the resources to conduct the review but would address it as soon as practicable. In October 2002, the petitioners filed suit, *Defenders of Wildlife v. Norton* CV 02-165, and in the subsequent settlement agreement the FWS agreed to submit a 90-day finding on the 2000 petition. The FWS submitted the negative 90-day finding on October 21, 2003. 68 Fed. Reg. 60112 (Oct. 21, 2003). In response Plaintiffs filed their Complaint on June 8, 2005.

C. The Contested 90-Day Finding.

The FWS found the petition to list the wolverine did not "present substantial scientific or commercial information indicating that listing the wolverine in the contiguous United States may be warranted." *Id.*; AR 800. The FWS stated that "little new information" had been presented since it denied the 1995 petition for a lack of substantial information. AR 800. It did allow that new research was underway that should provide better information. *Id.* at 800-01.

Throughout the finding the FWS returns to the point that the wolverine is "not well understood." *Id.* The FWS faults the petition for a lack of information about, among other things, the wolverine's historical and present range, the impact of trapping on wolverine populations, the impacts of human disturbances on wolverine reproduction, the impacts of landscape fragmentation, the wolverine's low fertility rate, and the inherent and problems

associated with lack of Federal protection. *Id.* at 801-803. At the same time, the FWS acknowledges the wolverine is "difficult and expensive to study." *Id.* at 801.

The finding concludes, "[t]he paucity of data on wolverine life history and habitat requirements leads us to conclude that there is insufficient evidence." It also added that the FWS "anticipate[d] that ongoing studies of wolverines . . . will improve our understanding of this species." *Id.* at 803.

D. Plaintiffs' Complaint.

The Complaint alleges that the wolverine deserves protection because of numerous threats to its survival. Plaintiffs state that legal trapping in Montana, the loss of wolverine habitat through fragmentation and development, increased human intrusions into wolverine habitat due to advances in snowmobile technology and the increase in helicopter skiing, and the failure of state and local governments to protect the wolverine have all contributed to the decline of the wolverine population.

Plaintiffs state two causes of action in the Complaint. First, they allege that the FWS violated section 4(b)(3)(A) of the ESA, 16 U.S.C. section 1533(b)(3)(A), and its implementing regulation, 50 C.F.R. section 424.14(b)(1) (2005) when the Agency issued its negative 90-day finding on the petition to list the wolverine under the ESA. The Plaintiffs' second cause of action alleges that the FWS violated the ESA and its implementing regulations through the application of different standards to petitions to delist species in comparison to petitions to list

species.

In their request for relief, Plaintiffs request the Court 1) find the FWS violated the ESA and its implementing regulations through its negative 90-day finding; 2) set aside the finding; 3) issue a permanent injunction requiring the FWS to proceed with a 12-month status review on the wolverine; 4) award Plaintiffs costs, expenses, and attorney fees pursuant to ESA, 16 U.S.C. section 1540(g)(4); and 5) grant other relief as deemed appropriate.

III. Analysis

A. Legal Standards.

1. Standard of Review for Agency Actions.

The parties have moved for summary judgment on all counts under the ESA. Because the ESA does not provide an independent basis for review, the action is governed by the Administrative Procedure Act ("APA"), which permits judicial review of final agency action. 5 U.S.C. § 706. Judicial review under the APA is limited to the question of whether the FWS acted arbitrarily, capriciously, or otherwise not in accordance with the law. 5 U.S.C. § 706.

Agency action can be set aside "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Alvarado Community Hospital v. Shalala*, 155 F.3d 1115, 1122 (9th Cir. 1998). Courts must ask "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment ... [courts] also must determine whether the [agency] articulated a rational connection between the facts found and the choice made. [The] review must not rubber-stamp ... administrative decisions that [courts deem] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108, 1119 (9th Cir. 2004) (internal citations and quotations omitted).

A court's review is limited to the information that was before the agency at the time it made its decision. *Friends of the Earth v. Hintz*, 800 F.2d 822, 828-29 (9th Cir. 1986). The basis for the decision must be articulated by the agency in the record. *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001); *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

2. Summary Judgment Standards.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P.; see also, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Summary judgment is particularly applicable to cases involving judicial review of final agency action. *Occidental Engineering Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985) (citation omitted).

3. Statutory Standards for the Endangered Species Act.

The purpose behind the ESA is enumerated in section 1531(b): "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 take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth [above]." The ESA defines an "endangered species" as one that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

Section 1533 addresses the ESA's method of determination of endangered and threatened species. In accordance with the submission of a petition pursuant to section 1533(b), the Secretary of the Interior must determine if any of the five factors, set forth in section 1533(a)(1), contributed to the species status as endangered or threatened:

- 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.

The Secretary shall list a species if "any one or a combination" of these factors causes a species to be endangered or threatened. 50 C.F.R. § 424.11(c).

The dispositive section, 1533(b)(3)(A), addresses the criteria for a "90-day finding." It states, "[t]o the maximum extent practicable, within 90 days after receiving the petition . . . the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." If there is a positive 90-day finding the Secretary has one year to make a "12-month finding." 12-month findings yield a conclusion that the petition is warranted, not warranted, or warranted but precluded. 16 U.S.C. § 1533(b)(3)(B). A negative 90-day finding ends the listing process but the ESA notes that such a finding is subject to judicial review. 16 U.S.C. § 1533(b)(3)(C)(ii).

"Substantial information," the pivotal aspect of the 90-day finding criteria is fleshed out in the federal regulations. "Substantial information" is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1). More specifically, the regulations enumerate four factors for consideration:

- I) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved;
- ii) Contains detailed narrative justification for the

recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species;

- iii) Provides information regarding the status of the species over all or a significant portion of its range; and
- iv) Is accompanied by appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps.

50 C.F.R. § 424.14(b)(2).

The burden to demonstrate the sufficiency of the information is placed upon the petitioner. The FWS asserts that pursuant to its Petition Management Guidance, an internal policy document, it is also allowed to consider additional information in its files, but this practice does not relieve the petitioner of its burden. The Petition Management Guidance also directs that the FWS may make a "not substantial" 90-day finding if "[t]he prospective listing of the petitioned species has weak or incomplete support in the submitted data, and the 'reasonable-person' test is not satisfied." AR 276-312, 1373-1583; PMG 12, 14.

B. Plaintiffs are Entitled to Summary Judgment Because the Petition Fulfilled the ESA Mandates and Provided Substantial Information on the Threats that Imperil the Wolverine's Future.

Plaintiffs set forth five points that show the petition presented substantial information that would lead a reasonable person to believe that listing the wolverine may be warranted.

1. The Loss of the Wolverine's Historic Range.

Information presented in both the FWS's own finding and

historical data from a peer-reviewed study (Hornocker and Hash (1981)) indicate that the wolverine has been largely extirpated from its historic range. There are some basic faults with FWS's arguments in its efforts to refute Plaintiffs' point on the loss of historic range. First, the FWS repeatedly falls back on the contention that since there is no new information since the 1994 petition the argument regarding loss of range is moot. The results of the unchallenged 1994 petition do not set the standard for judicial review here—rather, the Court's decision will be premised upon the information in the Administrative Record, including the 90-finding and the current petition, and the ESA legal standards.

Additionally, the FWS asserts that Plaintiffs' argument fails because of their inability to provide reliable data on the wolverine's historic range in accordance with FWS standards. Notably, the FWS's published finding acknowledges that the wolverine no longer inhabits Colorado, Maine, Michigan, Minnesota, New Hampshire, New York, North Dakota, Wisconsin, and Utah. Yet, the finding rationalizes that the extent of the historic range is unknown. AR 802. To follow the FWS's reasoning to its logical conclusion means that the loss of historical range can never be a factor in an ESA wolverine determination because there will never be conclusive data that delineates the historic range of the wolverine.² Even absent

²Later in the briefing sequence the FWS counters that pertinent habitat information would suffice as a means to

conclusive information that depicts the wolverine's exact historic range there is still substantial information to show that wolverine's range is a fraction of what it once was.

In support of its finding that the petition lacked substantial information on historic range, the FWS cites in part to an internal memorandum included in the Administrative Record, AR 1374-1375. The FWS uses this document to describe the standard applied in establishing "substantiality." The memo directs FWS personnel to look for "adequate and reliable information." In applying this standard the FWS disparages the published article by wildlife biologist Howard Hash because it relies on anecdotal information regarding the historic range of the wolverine. The FWS further asserts that anecdotal information must be corroborated in order for the information to be considered substantial. Based on this reasoning the FWS concluded the available information was not substantial.

This application of FWS methodology to Hash's conclusions is wrong. While the Court gives deference to Agency methods, findings, and expertise, the controlling law is set forth in Federal regulations and statutes, not in internal FWS memos. Moreover, the FWS overlooks portions of the memo that contradict its position. The memo states that "information provided by individuals with demonstrated expertise in the relevant subject

determine the wolverine range, but this suggestion belies its earlier reasoning as well as its reluctance to embrace basic facts that show a precipitous loss of range.

area can also generally be considered reliable." AR 1375. It further states there should be countervailing information to cast doubt on a peer-reviewed publication. The FWS does not question Hash's qualifications and nor does it present countervailing information from other experts in the field.³ Rather, the FWS selectively cites from an internal memo to conclude that the historic range information is inadequate and not substantial.

The petitioner does not have to present conclusive evidence; the petition need only present substantial scientific information that would lead a reasonable person to believe listing may be warranted. See *Moden v. U.S. Fish and Wildlife Serv.*, 281 F. Supp. 2d 1193, 1203 (D. Or. 2003) (FWS acted arbitrarily and capriciously because it required the petition to have conclusive evidence); *Center for Biological Diversity v. Morgenwreck*, 351 F. Supp. 2d 1137, 1141 (D. Colo. 2004) ("the ESA does not

³ In their Reply Brief Plaintiffs note that Hash's research relied on three published works that detailed the historic range of the wolverine. Hash's conclusions also echoed those of another biologist, Don E. Wilson, whose account is in the Administrative Record. See AR 51-61. Defendants' Reply Brief disputes the accuracy of this data as unverified, but it does not concretely rebut Hash's work, this is suspect in light of its admission in its finding that the wolverine once inhabited an extensive portion of the northern tier of the contiguous United States. The FWS makes suggestions on how Plaintiffs could have satisfied their burden here, but the information on historic range suffices to lead a reasonable person to conclude that the wolverine's historic range has diminished significantly. An interagency study included within the Record but not cited in this context, Heinemeyer (2001), also supports Plaintiffs' point regarding the historic range. In fact, it suggests that the only viable populations remaining are in Montana, Idaho, and Wyoming. AR 381. Cumulatively, there is a great deal of information that corroborates (another criterium in the FWS memo) Hash's report.

contemplate that a petition contain conclusive evidence of a high probability of species extinction to warrant further consideration . . .it sets forth a lesser standard”).

Here, the information in the petition on the wolverine’s loss of historic range is substantial scientific information that should have triggered a one year review of the pertinent law had it been correctly applied.

2. Human Intrusion: the Effects of Snowmobiles and Helicopter Skiing.

Increased back-country activity may have a negative impact on the wolverine. The Parties contest whether the FWS properly considered the 2001 Heinemeyer study in the process leading to its negative finding. A review of the finding shows that the FWS did address human intrusions in wolverine habitat, including winter denning areas. Nevertheless, the issue here is not whether the FWS evaluated the information, but what standard the FWS applied.

The Heinemeyer study would lead a reasonable person to believe that listing of the wolverine may be warranted. Contrary to the FWS’s assertion, the Heinemeyer study does not have to draw explicit conclusions between human activity and wolverine habitat and denning patterns in order for the study to provide substantial information. The FWS does not have to blindly accept the results of scientific studies and that the Court should defer

to the FWS's expertise,⁴ but the nature of the FWS criticism here revolves around the application of an incorrect standard. See *Moden* 281 F. Supp. 2d at 1201 (courts defer to agency expertise when agency experts apply the relevant factors). A standard that requires conclusive evidence is inappropriate.

The FWS faults the Heinemeyer study because it is focused on a "limited area"-the Greater Yellowstone region. However, a review of the study shows the scientists conducted aerial surveys in nine sampling areas in southern Montana, eastern Idaho, and western Wyoming. AR 383, 387. The only significant remaining populations of wolverines left in the contiguous United States are in Montana, Idaho, and Wyoming. The record substantiates this fact. While there may have been some other areas that would have provided additional data, the location of Heinemeyer's surveys cannot be faulted for lack of scope when the scope of the existing wolverine range is limited and seems to be getting smaller. There are limited geographic regions available for substantial wolverine study. This highlights what should have triggered this conclusion: listing the wolverine may be warranted.⁵

Finally, the petition included an array of scientific findings, substantial information and other information on the

⁴Note Heinemeyer is a 2001, post-1994 petition, interagency study.

⁵The Court need not defer to FWS expertise because they have "not articulated a rational connection between the facts" and its decision. *Moden* 281 F. Supp. 2d at 1201.

threat presented by increased human activity in wolverine habitat. Wolverines were not observed in the Palisades area, excellent wolverine habitat, where there was heavy helicopter activity. AR 391-92, 394-397. Wolverine denning activity was limited in areas with higher snowmobile activity. *Id.* The petition discusses the increased rate of human activity in wilderness areas, which the petition connects with increased snowmobile ownership and capability.⁶ AR 883-83. The 1996 Copeland study and the negative finding itself acknowledges that female wolverines leave their dens in the face of a human presence. AR 230, 802-03.

These facts raise questions that further substantiate Plaintiffs' point: listing the wolverine may be warranted.

3. Habitat Fragmentation and Population Isolation.

Plaintiffs presented substantial scientific information about the condition of the wolverine population—they are largely separated into subpopulations that constitute genetic islands—that meets the legal standard that warrants the more extensive study. The negative finding states that “transportation corridors and associated developments” are leading to landscape fragmentation, but it does not agree that this affects wolverine habitat. AR 802. The finding also notes that Cegelski's 2002 study on genetic isolation suggests that wolverine populations are genetically isolated due to habitat

⁶ Registered snowmobiles in Montana increased 50% from 1991 to 1999.

fragmentation; however, it asserts that "knowledge of possible causes of the genetic differences among these populations is speculative at this time" due to the lack of understanding of wolverine habitat. *Id.* The FWS has again abandoned the pertinent standard by seeking conclusive evidence when the applicable standard is much different.

Plaintiffs cited two scientific studies that present substantial information about habitat fragmentation and genetic isolation. The FWS counters by again selectively citing its internal memo in an effort to discredit these studies. After touting Cegelski's study as a possible link between genetic isolation and habitat fragmentation in its finding, the FWS then states that the Cegelski thesis is not "reliable" regarding fragmentation because her subject-matter expertise is genetics. Likewise, the FWS downplays the 2001 Kyle and Strobeck study as a study on genetics not fragmentation. (The peer-reviewed Kyle and Strobeck study found that the lower-48 wolverine subpopulations were fragmented due to human encroachment on wolverine habitat. AR 457.)

In both instances, the FWS dismisses the studies as speculative, yet the FWS does not offer countervailing information that would allow it, in accordance with its policy memo, to find the information "not substantial."⁷ AR 1375.

⁷Note that this applies to peer-reviewed publications. Cegelski's study was an unpublished master's thesis. This does not diminish the point that the FWS does not offer any contradictory information.

More significantly, it is not the conclusive link between the undisputed genetic isolation of wolverine subpopulations and habitat fragmentation that is important. It is undisputed that the wolverine populations in the contiguous United States are genetically isolated. That fact alone shows substantial scientific information that would lead a reasonable person to find that listing the wolverine may be warranted.

4. The Impact of Trapping.

There is no reason to question the FWS's finding that Plaintiffs did not present substantial information on the impact of trapping in Montana on the survivability of the wolverine. While trapping undoubtedly kills wolverines, Plaintiffs' data, cites to interactions at a wildlife conference in 2002 where wildlife biologist John Krebs made a presentation that is not substantial enough to overcome the level of deference to which the FWS is entitled.

5. The Effect of Dwindling Wilderness.

Plaintiffs allege one final threat, the wolverine's dependence on dwindling lands. This aspect of Plaintiffs' argument is really a catch-all that incorporates the previously asserted arguments and discussions on the loss of the wolverine's range, human incursions into wilderness, and habitat fragmentation. Even so, it is notable that the wolverine depends on land that sees little human impact. AR 69, 263, 504.

6. Summation of Substantial Information on Threats.

Cumulatively, the U.S. Fish and Wildlife Service violated

the Endangered Species Act through the erroneous application of a standard that looks to conclusive evidence. The 90-day finding ignores substantial scientific information that would lead a reasonable person to conclude that Plaintiffs' petition to list the wolverine as endangered or threatened may be warranted. It does not mean the wolverine must be listed but it does mean a closer look is required. This conclusion is analogous to the court's decision in *Moden v. U.S. Fish and Wildlife Service*, where it held that the Service violated the ESA when it acted arbitrarily and capriciously by applying a conclusive standard to its 90-day finding. 281 F. Supp. 2d at 1203; see also *Center for Biological Diversity*, 351 F. Supp. 2d at 1141.

Plaintiffs presented substantial information in accordance with 16 U.S.C. section 1533(b) (3) (A) and 50 C.F.R section 424.14(b) (1) that addresses three threats to the wolverine 1) the loss of almost all of its historic range; 2) increasing human encroachment into the wilderness where wolverines den and reproduce; and 3) the genetic isolation of wolverine subpopulations.

Plaintiffs petition is also supported by the four "guidance factors" set forth in 50 C.F.R. section 424.14(b) (2). The submitted information recommends the administrative measure, the listing of the wolverine as endangered or threatened and refers to the subject as the North American wolverine, *Galus galus*

luscus.⁸ The petition also included enough information to allow the Secretary to conclude the distribution of the species is substantially diminished and the wolverine's existence is threatened. Although the petition did not include specific population data that is beyond doubt, the evidence submitted shows a dramatic loss in range, the tangible decrease in population with the commensurate threat of genetic isolation of subpopulations, and the threat posed by human encroachment on wolverines. All of the relevant requirements are met by the submitted petition.

Substantial scientific information pertains to the factors delineated in 16 U.S.C. section 1533(a)(1) that the Secretary of the Interior must consider to make an ESA determination.

IV. Conclusion

The 90-day finding was in error. Plaintiffs produced substantial information to support further study and as a result the FWS must conduct a 12-month finding. The threshold for a 12-month finding is not high.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment (dkt #34) is GRANTED;

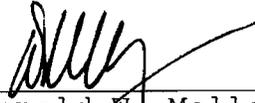
IT IS FURTHER ORDERED that Defendants' motion for summary

⁸The FWS's point in its Reply Brief about distinct population segment policy as a technical hurdle is not well taken. Plaintiffs have adequately enumerated why the wolverine's population is discrete and significant in their petition and the Administrative Record further supports this classification. The fact that the FWS did not raise this argument in its finding or primary brief underscores this conclusion.

judgment (dkt #40) is DENIED; and

IT IS FURTHER ORDERED that the case is remanded to the agency and that Defendants shall make a 12-month finding as required by law and this Order.

DATED this 29th day of September, 2006.


13:46 pm
Donald W. Molloy, Chief Judge
United States District Court
