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To: [Shoemaker, Justin](#); [Dana Jacobsen](#)
Subject: FYI - Another comment letter re DPS
Date: Thursday, March 9, 2017 8:41:28 AM
Attachments: [Int Snowmobile Manufacturers Assn Comment Ltr 2016.pdf](#)

I am re-reading some of the comment letters and thought I would share this one with you. See page 7.

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Director, U.S. Fish and Wildlife Service
Public Comments Processing
Attn: FWS-R6-ES-2016-0106
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**RE: Snowmobile Industry and Rider Comments on FWS's
Proposed Threatened Status for the North American Wolverine**

Dear Director:

The International Snowmobile Manufacturers Association (“ISMA”), the Idaho State Snowmobile Association (“ISSA”), and the American Council of Snowmobile Associations (“ASCA”) respectfully submit these comments to the U.S. Fish and Wildlife Service (“FWS”) in response to FWS’s renewed call for public comment on whether to list the wolverine in the contiguous 48 States (“Lower 48”) as “threatened” under the Endangered Species Act (“ESA”). 81 Fed. Reg. 71670 (Oct. 18, 2016).¹ We urge FWS to:

- (1) Make a decision on whether to list the wolverine population in the Lower 48 States under the ESA (and set the details of any listing) only after considering important new data emerging from a nearly-complete scientific study of wolverines funded by the U.S. Forest Service and various partners, as described further in these comments. This study is expected to provide additional data both on the size of the wolverine population in the Lower 48 States and on the impact or lack of impact of winter recreation on wolverines.
- (2) Reaffirm your prior findings that winter recreation, both motorized and non-motorized, is not a threat to wolverines, and explicitly state that federal land managers may rely on your findings when making decisions about access to federal lands. Should you decide not to list the Lower 48 wolverines under the ESA, this finding will help support your decision (you should also address the main alleged threat of climate change and genetics

¹ Endangered and Threatened Wildlife and Plants: North American Wolverine, 81 Fed. Reg. 71670 (Oct. 18, 2016).

issues). Should you decide to list, you should note that federal land managers in complying with Section 7 of the ESA (requiring all federal agencies to ensure their actions do not jeopardize the continued existence of the species and its critical habitat) may rely on your findings that winter recreation is not a threat to wolverines. If you decide to list, you should also adopt the special rule regarding incidental “take” included in your 2013 proposed listing rule which you then withdrew (the court remanded the withdrawal to FWS).

- (3) Before making and listing decision, reevaluate the issue of whether the Lower 48 wolverines are a Distinct Population Segment (“DPS”) with close attention to the “significance” element that must be present before FWS may recognize a DPS under its 1996 DPS Policy. Given that wolverines in the Lower 48 states are at the southernmost fringe of their natural range, and are far more abundant in Canada, Lower 48 wolverines are not a “significant portion of the taxon,” as needed to qualify for DPS status. Because wolverines in the Lower 48 are not a significant portion of the taxon, and the taxon as a whole does not qualify for listing (due to the relative abundance of wolverines in Canada), FWS must decline to list.

ISMA represents the world’s four major snowmobile manufacturers. The United States, where more than 1.2 million of our products are registered, enjoys an economic impact from our industry of \$26 billion annually. We coordinate committees within the industry to handle concerns such as snowmobile safety, the promotion of the lifestyle activity of snowmobiling, keeping accurate statistics, reporting the growth of the industry, and the positive economic impact of snowmobiling throughout the world. We have strong incentive to protect the environment while ensuring land access for our customers.

ACSA represents snowmobile users. ACSA is a national snowmobiling organization that represents approximately 23 state snowmobiling associations, approximately 2,392 snowmobile clubs and approximately 279,532 individuals. ACSA is actively involved in maintaining the long-term availability of public lands for use by snowmobilers.

ISSA is a statewide organization representing approximately 4,000 people, including 41 clubs, individuals and many businesses from throughout Idaho. We have a special relationship with the wolverine and are proud of the fact that we played a major part in starting the first study to ever look at the impacts of winter recreation on wolverines. We have a genuine interest and concern for this amazing animal.

1. FWS Should Await Results from a Nearly-Completed Scientific Study on Wolverines and Winter Recreation Sponsored by the Federal Government and Partners

The central Idaho wolverine winter recreation research project is making great strides in advancing the science on the reclusive wolverine.² The research is being led by two noted

² The Foundation’s work is available online at: <http://wolverinefoundation.org/resources/research-reports>.

scientists, including John Squires, a Research Wildlife Biologist in the U.S. Forest Service's Rocky Mountain Research Station. Funding, equipment, and logistic support for the project are coming from several government entities, including the U.S. Forest Service, Idaho Department of Fish and Game, Grand Teton National Park, Wyoming Department of Fish and Game, ISSA and the Nez Perce Tribe. ISMA, ISSA, and ACSA support this important work. The project started in 2008 with winter aerial surveys that found that wolverines and winter recreation coexist in many areas. The next phase began in 2009 and was heavily supported by snowmobilers, as many of them carried GPS data loggers and provided survey information to researchers.

The Wolverine Foundation scientists have now collected several winters' worth of data and they are analyzing the data and preparing a report for submission to a peer-reviewed journal. This will include data from 2013, 2014, and 2015 that will shed new light on FWS' 2013 listing proposal that has now been reopened. We would not presume to prejudge their scientific process, but their progress reports certainly suggest that updated science will further exonerate winter recreation from challenges to the wolverine population. In its 2014 Progress Report, the scientists stated that their preliminary findings included that "wolverines appear to tolerate winter recreation in their home ranges."³ The study may also expand FWS' understanding of the size and range of the wolverine population.

Given the important relevant data being developed by the federal government and its partners in this study, FWS should await the results of this study, currently expected in 2017, before making a decision whether to list the wolverine in response to the District of Montana's remand order.

2. Climate Change, not Winter Recreation, is the Purported Threat to the Wolverine

Though a few have suggested that winter recreation is a problem for the wolverine, FWS has correctly determined that the best available science shows otherwise. In 2013, FWS proposed listing the wolverine as threatened because the agency "determined that habitat loss due to increasing temperatures and reduced late spring snowpack due to climate change is likely to have a significant negative population-level impact on wolverine populations in the contiguous United States."⁴ The FWS shared its views related to recreational impacts, by saying:

[E]ach of [the nine relevant survey areas] has small (relative to wolverine home range size) areas of intensive recreational use (ski resorts, motorized play areas) surrounded by a landscape that is used for more dispersed recreation such as backcountry skiing or snowmobile trail use.

³ See page 4 of report, available online at: <http://wolverinefoundation.org/wp-content/uploads/2015/01/Wolverine-Winter-Recreation-Project-2014-Progress-Report-Final.pdf>.

⁴ Proposed Rule, Endangered and Threatened Wildlife and Plants: Threatened Status for the Distinct Population Segment of the North American Wolverine, etc., 78 Fed. Reg 7864 (Feb. 4, 2013).

Although we can demonstrate that recreational use of wolverine habitat is heavy in some areas, we do not have any information to suggest that these activities have negative effects on wolverines. No assessments of anthropogenic disturbance on wolverine den fidelity, food provisioning, or offspring survival have been conducted. Disturbance from foot and snowmobile traffic associated with historical wolverine control activities, and field research activities, have been purported to cause maternal females to abandon natal dens and relocate kits to maternal dens. However, this behavior appears to be rare, even under intense disturbance associated with capture of family groups at the den site, and other causes of den abandonment may have acted in these cases.

Preliminary results from an ongoing study on the potential impacts of winter recreation on wolverines in central Idaho indicate that wolverines are present and reproducing in this area in spite of heavy recreational use, including a developed ski area; dispersed winter and summer recreation; and dispersed snowmobile use. ... Evidence for effects to wolverines from den abandonment due to human disturbance is lacking. The best scientific information available does not substantiate dispersed recreational activities as a threat to wolverine. (Citations omitted).

After extensive consideration, FWS decided in August 2014 to withdraw its proposal to list the wolverine, declaring that “we no longer conclude that impacts from climate change pose a risk of extinction to the wolverine.”⁵ FWS reiterated its previous conclusion that winter recreation, including skiing and snowmobiling, was not harming the species. It also addressed specific comments on this topic:

(64) Comment: Several commenters suggested that changes in technology make access to wolverine habitat easier for snowmobilers. Others pointed out that Inman et al. (2013) says snowmobile use may affect wolverines.

Our Response: We agree that changes in technology increase access to wolverine habitat [but not to their denning sites] by snowmobilers and that winter recreation may affect wolverines. Significant effects to wolverines from winter recreation remain to be demonstrated scientifically. We do not agree that the available scientific information supports the conclusion that winter recreation is a threat to the DPS, for reasons discussed [more extensively in the above excerpt].

We believe FWS made the proper conclusion that listing was not warranted and that winter recreation does not need to be curtailed for the wolverine’s benefit. The withdrawal of the listing was challenged in court, however, and in April 2016, a U.S. District Court in Montana

⁵ Endangered and Threatened Wildlife and Plants: Threatened Status, Nonessential Experimental Population of the North American Wolverine, etc.; Withdrawal, 79 Fed. Reg. 47522 (Aug 13, 2014).

vacated the FWS decision, for two reasons.⁶ First, the Court said that FWS failed to properly consider the impacts of climate change on wolverine denning. Second, the Court called for greater analysis of the threat posed to the wolverine by its small population size and lack of genetic diversity.

The Court did not order FWS to list the wolverine. In extraneous commentary, the Court stated that its view that “the time is now” to take action to protect “this snow-dependent species standing squarely in the path of global climate change,” but the Court did not override FWS’s normal duty on remand to make all listing decisions based on the best available scientific and commercial data, as required by ESA § 4. Notably, the Court did not address any purported impacts from skiing or snowmobiling, and thus did not set aside FWS prior findings (reviewed above) that winter recreation is not a threat to wolverines.

3. If the Wolverine is Listed for Climate Reasons, Winter Recreation Should be Protected, Under ESA § 7 as Well as ESA § 9.

It is clear that if the wolverine population is truly at risk, which is highly questionable, that risk is being caused by climate change and not winter recreation. Accordingly, if FWS finds it necessary to list the wolverine (but see Part 4 of our comments below), we urge FWS to take steps to protect the positive recreational and economic value provided by activities like skiing and snowmobiling, which FWS has already found is not a threat to wolverines. We propose three specific actions.

First, should FWS list the Lower 48 wolverines under the ESA, then ESA § 7(a)⁷ will require that federal land managers at the U.S. Forest Service, Bureau of Land Management, and elsewhere in the Federal Government ensure that various actions they undertake (including deciding whether to allow or prohibit motorized or non-motorized recreation) will not jeopardize the continued existence of the species or destroy or adversely modify any critical habitat FWS might designate. Consistent with FWS’s prior findings in the 2013 proposed rule and the 2014 withdrawal of the proposed rule, and the results coming from the study noted above, we urge FWS to restate that motorized and non-motorized winter recreation is not a threat to wolverines, and therefore does not jeopardize the continued existence of the species or destroy or adversely modify their critical habitat.

Such a specific finding will assist federal land managers in complying with ESA § 7. It will avoid the risk of unnecessarily closing areas to winter recreation activities that do not negatively impact wolverines, and should also reduce the number of unnecessary requests for inter-agency consultation that FWS receives under § 7 from other federal agencies charged with managing public lands. The U.S. Forest Service is currently in the midst of a major round of unit-by-unit administrative proceedings to evaluate appropriate routes and areas for snowmobile and other winter travel.

⁶ *Defenders of Wildlife v. Jewell*, CV-14-246-M-DLC, ECF 108 (D. MT. April 4, 2016).

⁷ Codified at 16 U.S.C. § 1536(a).

Second, we urge FWS to avoid unnecessarily broad designations of wolverine critical habitat. The Idaho study noted above should be helpful to FWS as it shows that wolverine are relatively insensitive to reasonable amounts of noise and human activity. This in turn puts limits on the quantity of habitat that is truly “critical.” Areas distant from dens cannot be “critical.”

Third, should listing occur, it would be at the “threatened” rather than the “endangered” level, given the absence of any current extinction or extirpation risk, and therefore the FWS has the flexibility to decide the extent to which to impose a “take” prohibition. ESA §9(a)(1)(B)⁸ makes it illegal to “take” a member of an “endangered” species, but affords FWS discretion whether to extend this prohibition to members of “threatened” species ESA §9(a)(1)(G). For this reason, and in light of its original findings that winter recreation was not a threat, FWS’s 2013 proposed listing rule (later withdrawn) did not prohibit unintentional (incidental) “take” occurring during lawful winter recreation activities:

Incidental take of wolverines will not be a violation of section 9 of the Act, if it occurs from any other otherwise legal activities involving wolverines and their habitat that are conducted in accordance with applicable State, Federal, tribal, and local laws and regulations. Such activities occurring in wolverine habitat include: (i) Dispersed recreation such as snowmobiling, skiing, backpacking, and hunting for other species...” 78 Fed. Reg. at 7890.

This approach complies with FWS’s policy of acting to “minimize social and economic impacts” of species listings and should be used again if there is a listing.⁹ However, we are unaware of any incidental take of wolverines occurring during winter recreation. Accordingly, the ESA § 7 issue discussed above is far more important. Misapplication of § 7 by federal land managers could easily result in unnecessary closures of snowmobile routes and cross country ski routes that can safely be traveled with zero probability of jeopardizing the survival of the species.

4. FWS Should Carefully Examine Whether ESA Listing is Appropriate, Including Examining Both New Population Data and Whether the Lower 48 Wolverines are a Significant Portion of the Wolverine Taxon as Needed to be Eligible for Listing as a DPS

Before even reaching questions regarding the details of any ESA listing, FWS must decide whether to list the North American Wolverine in the first place.

In that analysis, the emphasis should be on two issues: (a) what is the population of the wolverine in the Lower 48 states, and (b) is the population of the wolverine in the Lower 48 states significant to the biological wolverine taxon as a whole, given the large wolverine

⁸ Codified at 16 U.S.C. § 1538(a).

⁹ Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act, 59 Fed. Reg. 34275 (July 1, 1994).

population in Canada, as necessary for the Lower 48 wolverines to qualify as a DPS eligible for listing under the FWS 1996 DPS Policy?

FWS stated in its 2014 decision not to list that the Lower 48 wolverine population “is thought to be around 250-300, and consists of small, semi-isolated subpopulations that likely interact as a metapopulation with some connection to the larger population in Canada.” 79 Fed. Reg. 47524 (Aug. 13, 2014). FWS also found evidence to suggest the wolverine population was expanding. It is likely that the forthcoming Idaho study will provide further information on the total American population size of this reclusive animal.

In addition to the issue of whether wolverine population levels in the Lower 48 states may be higher than originally thought, there is the issue of whether they qualify as a DPS despite the relative abundance of wolverines in Canada. FWS found in its 2013 listing proposal that the wolverine “population in western Canada is estimated to include approximately 15,089 to 18,967 individuals.” 78 Fed. Reg. at 7869. Wolverines may be present in other parts of Canada as well. According to the 1996 policy, a DPS must be both “discrete” and “significant.”¹⁰ In its 2013 proposal, FWS suggested that the population was discrete “based on the differences in control of exploitation and conservation status across the international boundary.” The significance analysis was minimal, as the FWS relied on its 2010 12-month finding.¹¹ That analysis in turn relied heavily on a finding that the loss of the wolverine in the contiguous United States would purportedly represent a significant gap in the range of the taxon. FWS found that the Lower 48 Wolverine was expanding and recolonizing portions of its historic range. Accordingly, FWS at the time thought that the loss of the Lower 48 wolverine would create a 15 degree latitude gap between the southernmost known wolverines and the populations in Alaska and Canada. FWS also argued that the Lower 48 Wolverine would provide security for the taxon if the populations in Canada and Alaska deteriorated.

FWS should reexamine these findings in light of the Idaho study. It seems contradictory to conclude that the wolverine population in the contiguous United States is simultaneously (a) expanding, making it more significant to the taxon as a whole, and (b) shrinking due to global warming, making it “threatened.” The sounder conclusion is that wolverines in the Lower 48 are indeed “a relic of the last ice age” (as the Court found), living at the southern fringe of wolverine range, and therefore naturally rare, not significant to the taxon as a whole, and so ineligible for listing as a DPS. Clearly the abundance of the wolverine in Canada precludes any thought of a taxon-wide listing. In deciding whether to list the Lower 48 wolverines as a DPS, FWS must also be mindful of the admonition of Congress, noted in the 1996 DPS policy, that a DPS listing should be used “sparingly.”

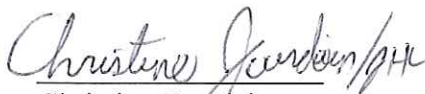
¹⁰ Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996).

¹¹ Endangered and Threatened Wildlife and Plants: 12-month Finding on a Petition to List the North American Wolverine, 75 Fed Reg 78030 (Dec. 14, 2010).

Conclusion

We urge FWS to continue to avoid listing the wolverine unless and until hard data justifies such an act. Regardless of the decision, we urge you to protect winter recreation.

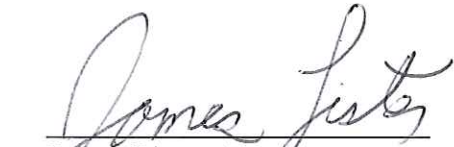
Sincerely,



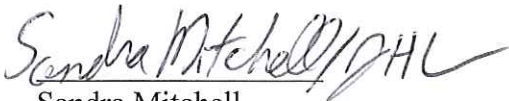
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