

## OFFICE OF SPECIES CONSERVATION

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January 29, 2024

Attn: FWS-R6-ES-2023-0216  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Re: State of Idaho Comments on the Interim 4(d) Rule, issued concurrently with the Rule listing North American wolverine (*Gulo gulo luscus*) in the contiguous United States (**FWS-R6-ES-2023-0216**)

To whom it may concern:

The Idaho Governor's Office of Species Conservation (OSC) is coordinating State executive agency review and compiling state agency comments regarding wolverine for submission to USFWS. The Idaho Department of Lands, the Idaho Department of Fish and Game and the Idaho Department of Parks and Recreation provided input to OSC for inclusion in these collated State of Idaho comments. OSC is dedicated to planning, coordinating, and implementing the State's actions to preserve, protect, and restore species listed as candidate, threatened, or endangered under ESA, while considering Idaho's economic vitality and values (Idaho Code § 67-818).

State, tribal, and federal agencies, as well as private organizations and individuals, have been united in our desire to conserve and protect wolverines in Idaho, including continuing to monitor wolverines across their range. However, Idaho disagrees with imposing unnecessary ESA administrative burdens and restrictions for a non-species: a small number of wolverines that have successfully re-colonized range in four western states south of Canada--range from which they were extirpated nearly a century ago. The listing rule (November 30, 2023) is not only unlawful, it exemplifies poor conservation policy and fails to apply the best available science. Through a separate letter dated January 26, 2024, Idaho agencies have informed USFWS of an intent to sue if USFWS does not promptly withdraw the unlawful final listing rule. Idaho incorporates the January 26, 2024, 60-day notice by reference.

Although USFWS did not seek comments on the final ESA listing of wolverines, it did ask for public comments on the interim 4(d) rule issued concurrently with the final listing rule. Accordingly, State of Idaho agencies have reviewed the interim 4(d) rule and provide comments, with details attached to this cover letter per USFWS's comment categories.

Should the USFWS choose not to withdraw the listing rule, we request sensible revisions to the 4(d) rule that will be in place while we resolve any ensuing litigation over the lower 48-listing. The State of Idaho has been an active partner in wolverine conservation over the years, and we have found it is important to ground strategies in the best available science. When conservation depends on the actions of people and public support, we have found it is especially important to avoid imposing unnecessary ESA restrictions and administrative burdens on activities, whether they are on the vast public lands in Idaho, state endowment lands, or on private property.

Notably, the Rule concluded that *current* stressors for wolverines in the contiguous United States do not provide a basis for ESA listing. Should USFWS keep the Rule in place despite Idaho's 60-day notice,

USFWS should provide robust exceptions in 50 CFR 17.40(u) for activities that USFWS has found to have limited if any impact on the listed wolverines, and whose potential effect is infrequent and unpredictable occur across a broad geographic area.

If you have any questions regarding these comments, please contact OSC's Program Manager and Policy Advisor Joshua Uriarte at 208-332-1556 or at [joshua.uriarte@osc.idaho.gov](mailto:joshua.uriarte@osc.idaho.gov)

Sincerely,



/s/ Mike Edmondson

MIKE EDMONDSON  
Administrator

The State of Idaho has reviewed the interim 4(d) rule and provides the following comments and recommendations per the USFWS's following four comment categories (Federal Register Page 83770, Vol. 88, No. 229, Rules and Regulations):

**1. Whether the 4(d) rule as a whole is necessary and advisable to provide for the conservation of the contiguous U.S. DPS of the North American wolverine.**

- In a separate letter sent to Secretary Haaland and USFWS Director Williams, dated January 26, 2024, Idaho has described the arbitrary and unwarranted listing of wolverine in the contiguous United States, which does not qualify as a species under the ESA. Idaho incorporates that letter by reference. Because the listing itself is arbitrary and unlawful, there should not be a need for a 4(d) rule. However, so long as the unlawful ESA listing is in effect, it is necessary and advisable to have regulatory allowances for the take of ESA-listed wolverine to avoid further discouraging conservation support for the wolverines that have recolonized some of their extirpated historic range in the contiguous United States. Wolverines in Idaho occupy much of their former estimated historic range.

Wolverines are renowned for their capacity for wide-ranging and unpredictable movements. The ESA should not result in land lockdowns or administrative gridlock everywhere a wolverine has wandered or might wander in the future. For example, wolverines in Idaho have sporadically occurred where their presence is unexpected and where habitat does not support their prolonged presence. One well-known Idaho example included a wolverine near the Boise airport that was even documented at a nearby gas station. Others have appeared in lava fields where they do not remain. There should be protections for otherwise lawful activity related to potential take of these wolverines, through a combination of 4d regulations and enforcement policy direction.

USFWS has stated that the purpose of 4d regulations is to tailor protections to those needed to prevent further decline and facilitate recovery. Section 4d regulations should maintain, and hopefully expand, conservation support for ESA-listed species by allowing exceptions to general § 9 take prohibitions that can occur during otherwise lawful activities, but at levels that do not significantly impact viability or persistence.

When there are no exceptions to §9, or the administrative permitting burden is unreasonable, potential ESA liability discourages active measures for conservation. This is particularly true in situations analogous to expansion of wolverines, where conservation success involves reoccupying vacant habitat. It is also true where active measures are needed to improve habitat and connectivity through unsuitable habitat.

Based on best available science, Idaho concludes that none of the five threat factors (ESA §4(a)(1)(A)-(E)) warrant ESA listing of wolverine south of Canada. Idaho notes that the threats USFWS *did* identify were related to uncertain climate change *in the future* (not currently) and speculation about the effects of activities in Canada despite Canada's regulations and conservation measures.

**2. Information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule.**

Based on best available science, Idaho concludes that none of the five threat factors (ESA §4(a)(1)(A)-(E)) warrant ESA listing of wolverine south of Canada. Idaho notes that the threats USFWS *did* identify were related to uncertain climate change *in the future* (not currently) and speculative impacts from activities in Canada. USFWS regulations should not penalize take incidental to otherwise lawful activities when it has not identified them as threats to wolverines; such activities should certainly be excepted from ESA liability under §9 (take prohibitions). USFWS' analysis in the Rule supports more robust exceptions from ESA §9 prohibitions than the

interim 4d regulations provide; the Rule’s analysis does not support inclusion of ESA §9 prohibitions in the 4(d) Rule.

**3. Whether we should consider any additional exceptions from the prohibitions, such as take as a result of other categories of activities beyond those described, and, if so, under what conditions and with what conservation measures, if any.**

- Consistent with the information provided in response to #1 and #2 above, ESA protections should not extend to wolverines in the lower-48 at all. A corollary is that exceptions from ESA take liability should be robust.
  - **Scientific or research activities** – Since the rule referred to 50 CFR 17.21 (c)(2) – (c)(4) but did not refer to 50 CFR 17.21 (c)(5), USFWS should clarify that activities authorized under a section 6(c) cooperative agreement are included in exceptions from §9 prohibitions (see 50 CFR 17.21(c)(5)).

The exceptions in 50 CFR § 17.40(u)(2)(v) should also be expanded in at least three ways:

1. State wildlife agencies should be included in addition to federal and tribal agencies. Given the active role Idaho and other western states have taken in the study of wolverine, we assume this omission in the interim rule is unintentional. Take authorization should include mortality, although it is expected to be low occurrence; there can be appropriate limits for mortality and injurious take identified as a matter of §7 compliance.
  2. The category of individuals should be expanded to federal, state, and tribal “authorities” similar to other take regulations. Agencies rely on individuals other than biologists to access remote habitats and appropriately perform capture activities. The take exception should apply more broadly to the exercise of federal/state/tribal wildlife management authorities. An exception applicable to only scientific or research activities for wolverines is unduly narrow. Wildlife agencies routinely conduct conservation activities targeting fish and wildlife species and populations that might occur in wolverine habitat or in proximity to wolverines, but for purposes not related to conserving wolverine (e.g., mountain goat aerial surveys, camera/hair snare surveys, etc.). These conservation activities could incidentally affect wolverines that might qualify as “take” under ESA (e.g., non-lethal disturbance).
- **Forest Practices** - The interim 50 CFR 17.40 exception for forest practices is overly narrow in relation to the rationale stated in the rule. It is also unduly narrow relative to the lack of negative effects of any forest vegetation management on wolverine.

50 CFR 17.40(u)(2)(vi)(A) should be revised to be focused on potential results relative to the *effect* of otherwise lawful forest vegetation management relative to wolverines and not embroiled in the purpose of the management activity. The USFWS concluded: “this generalist species appears to be affected little by changes to the vegetative characteristics of its habitat...wolverine breeding habitat in the contiguous United States occurs at high elevations in rugged terrain that is not conducive to intensive forms of silviculture and timber harvest.”

The USFWS also concluded: “this interim 4(d) rule will facilitate the continuation of forest vegetation management activities because these activities pose no or minimal threats to the North American wolverine...and result in only de minimis forms of take...” The Rule also found that forest vegetation management can also contribute to wolverine conservation “into the future by maintaining overall forest health in and adjacent to wolverine habitat.” Vegetation management for wildfire mitigation and other industry-standard silviculture practices typically share best management practices.

Because USFWS has not identified a threat to wolverine from forest vegetation management, the exception in 50 CFR 17.40(u)(2)(vi)(A) should expand to include incidental take for all forest vegetation management meeting the standards for state and federal requirements for forest practices/silviculture practices (e.g., timber harvest) as a general matter.

- **Trapping and Hunting** – The USFWS did not identify a threat to wolverine due to state-regulated hunting or trapping in the United States. The 50 CFR 17.40(u)(2)(vi)(B) exception for trapping in compliance with state or tribal regulations should expand to include trapping for wildlife control purposes by employees or agents of federal, state or tribal agencies. The reference to “best practices” should be deleted because it is difficult to apply given its variability based on field conditions (e.g., a best practice for snow conditions may not be a best practice when snow is absent).

In addition, the exception in 50 CFR 17.40(u)(2)(vi)(B) should be expanded to include incidental take in the form of potential non-lethal disturbance during otherwise lawful hunting activities, which occur to some extent throughout occupied wolverine habitat in the West. Such incidental take from hunting activities is expected to be *de minimis* (less than trapping). The exception to the prohibition of incidental take during lawful trapping/hunting should also be robust yet flexible to cover time-to-time future updating of trapping/hunting regulations and practices by state wildlife authorities. Wolverines are closed to harvest in Idaho, Montana, Washington, and Wyoming. The shooting of wolverines, whether shooting with knowledge of the species or due to misidentification for an animal for which a hunting seasons is open, is subject to enforcement under state law for violating season closures.

- **Livestock Grazing** - Because the USFWS identified no threats to wolverine from livestock grazing, the USFWS should include an exception in 50 CFR 17.40 (u)(2) for incidental take related to authorization/administration of livestock grazing, including on federal lands. The USFWS states that conflicts rarely occur between wolverines and livestock and identified no adverse effects to wolverine populations or wolverine habitat from livestock grazing. Specifying a 4(d)-exception relative to livestock grazing avoid unnecessary administrative burden regarding potential *de minimis* impact from
- **Winter Recreation** – In the listing rule, USFWS referred to winter recreation impacts to wolverines based on Heinemeyer et al. (2019). The Heinemeyer study did not detect survival or reproduction consequences caused by winter recreation. Significant adverse effects to wolverine survival or reproduction would be needed to justify that winter recreation causes wolverine population-level declines warranting ESA protection. The speculation about winter recreation becoming concentrated due to climate change has not been documented and not projected to occur under the USFWS’s climate analysis for more than 25 years. Furthermore, USFWS identified that winter recreation in the lower 48 (1) is not adversely affecting the current viability of wolverines, (2) is actively managed on public lands with well-established federal regulatory mechanisms (e.g., National Environmental Policy Act), and (3) would not affect population viability until after mid-century at the earliest.

50 CFR 17.40(u) should include an exception that includes winter recreation activities, including motorized and non-motorized. For federal lands, the exception could include a reference to compliance with any travel management plan in effect.

- **Wildlife-vehicle Collisions** – The listing rule speculated that transportation systems impeded wolverine dispersal and movements, specifically naming highways in Canada (Highway 3 and the Trans-Canada Highway). The USFWS appropriately did not

identify mortality from wolverine-vehicle collisions as a threat to the viability or persistence of wolverines in lower 48. Nevertheless, wildlife-vehicle collisions are likely to occur at a de minimis level in the future causing accidental, infrequent, and likely unavoidable incidental wolverine take. Therefore, 50 CFR 17.40(u)(2) should include an exception for incidental take from wolverine-vehicle collisions.

- **Nuisance** – Should wolverines continue to expand, there might become situations in which wolverine become nuisances as they disperse in and around settled areas. The USFWS identified that wolverines rarely harm livestock. 50 CFR 17.40(u) should include an exception for nuisance wolverines, similar to what it has included in other 4d rules, as suggested as below:
  - *Removal of nuisance wolverines.* A wolverine constituting a demonstrable but non immediate threat to human safety or committing significant depredations to lawfully present livestock or domestic animals may be taken, but only if: it has not been reasonably possible to eliminate such threat or depredation by live-capturing and releasing unharmed in a remote area the wolverine involved.

**4. Additional provisions the USFWS may wish to consider for a revision to the interim 4(d) rule in order to conserve, recover, and manage the DPS.**

- Proactive Conservation – The Rule appropriately concluded that *current* stressors for wolverines in the contiguous United States do not provide a basis for ESA listing, and Idaho has identified why the Rule’s analysis about future conditions is speculative and arbitrary. USFWS should withdraw the listing and associated 4(d) regulations. Wolverine conservation can continue to occur through incentives and proactive and practical actions among governmental and private entities in the western U.S. states and Canada. USFWS and other agencies can contribute resources during the next 25 years to better understand present stressors, as well as addressing speculative future climate effects, to ensure the likelihood of wolverine persistence in the future.