



ADVOCATES for the WEST
3115 NE Sandy Blvd. #223
Portland, OR 97232
www.advocateswest.org | 503.914.6388

August 29, 2017

Via Certified Mail, Return Receipt Requested

Secretary Ryan Zinke
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Greg Sheehan, Acting Director
U.S. Fish and Wildlife Service
1849 C Street NW, Room 3331
Washington, D.C. 20240

Chief Tom Tidwell
U.S. Forest Service
1400 Independence Ave., SW
Washington, D.C. 20250

Supervisor Keith Lannom
Payette National Forest
500 North Mission St.
McCall, ID 83638

Sixty-Day Notice of Intent to Sue Under § 7 of the Endangered Species Act

Dear Secretary Zinke, Chief Tidwell, Acting Director Sheehan, and Supervisor Lannom:

In accordance with the sixty-day notice requirement of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), you are hereby notified that the following organizations intend to bring a civil action against the U.S. Forest Service and the officers and supervisors to whom this letter is directed (collectively, the Forest Service) for violating Section 7 of the ESA, 16 U.S.C. § 1536.

The name and address of the organizations giving Notice of Intent to Sue:

WildEarth Guardians
80 SE Madison St., Suite 210
Portland, OR 97214

Winter Wildlands Alliance
910 Main St., Ste. 235
Boise, ID 83702

The Wilderness Society
1660 Wynkoop Street, Suite 850
Denver, CO 80202

Counsel for the party giving notice:

Laurie Rule, Senior Staff Attorney
Advocates for the West
3115 NE Sandy Blvd. #223
Portland, OR 97232
Tel: (503) 914-6388
lrule@advocateswest.org

As described herein, the Forest Service has violated the ESA by failing to consult under Section 7 with the U.S. Fish and Wildlife Service (FWS) concerning the effects of the over-snow vehicle (OSV) road, trail, and area designations adopted through publication of the Payette's 2017 over-snow vehicle use map (OSVUM) on listed and candidate species, thereby failing to ensure that its actions are not likely to jeopardize the continued existence of listed or candidate species, or result in the destruction or adverse modification of critical habitat. *See* 16 U.S.C. § 1536(a)(2).

We will file suit after the 60-day period has run unless the violations described in this notice are remedied.

Legal Background: Section 7 Consultation

Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of” the ESA. 16 U.S.C. § 1531(c)(1). The purpose of the ESA 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 and threatened species . . .” 16 U.S.C. § 1531(b).

To implement this policy, Section 7(a)(2) of the ESA requires that each federal agency consult with FWS or NMFS to ensure that any action authorized, funded, or carried out by such agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. *See* 16 U.S.C. § 1536(a)(2).

The ESA's consultation requirement applies “to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. Agency actions requiring consultation are broadly defined by regulation to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” and include “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

If listed species may be present in the area of agency action, the action agency must prepare a Biological Assessment (BA) to determine whether the listed species may be affected by the proposed action. *See* 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If the agency determines that its proposed action “may affect” any listed species, the agency must engage in “formal consultation” with FWS or NMFS (collectively, the Services). 50 C.F.R. § 402.14; *see also Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 99, 1018 (9th Cir. 2009) (“any possible

effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement.” (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)).

The threshold for a “may affect” determination is very low, and ensures “actions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are not likely to do so—require at least some consultation under the ESA.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012). Under the Fish and Wildlife Service Consultation handbook, the “may affect” threshold is met if “a proposed action may pose *any* effects on listed species or designated critical habitat.” U.S. Fish and Wildlife Serv. & Nat’l Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* at xvi (1998) (emphasis in original). The regulations implementing the ESA require an examination of both the direct effects of the action as well as the indirect effects of the action, which are defined as “those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur.” 50 C.F.R. § 402.02. Therefore, an agency must consult in every situation except when a proposed action will have “no effect” on a listed species or critical habitat.

If the action agency concludes in a BA that the activity is not likely to adversely affect the listed species or adversely modify its critical habitat, and the Services concur with that conclusion in a Letter of Concurrence, then the consultation is complete. 50 C.F.R. §§ 402.12, 402.14(b). If, however, the action agency determines that the activity is likely to adversely affect the listed species or its critical habitat, then the Services complete a “biological opinion” (BiOp) to determine whether the activity will jeopardize the species or result in destruction or adverse modification of critical habitat. *Id.* § 402.14. If the Services determine that an action will jeopardize the species or adversely modify critical habitat, they may propose reasonable and prudent alternative actions intended to avoid such results. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5).

However, an agency’s Section 7 duties do not end with the issuance of a BiOp. The action agency “cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a FWS biological opinion must not have been arbitrary or capricious.” *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). *See also Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005) (rev’d on other grounds).

Further, once the consultation is complete, the agencies have a duty to ensure that it remains valid. To this end, an agency must re-initiate consultation if certain “triggers” occur. 50 C.F.R. § 402.16. The ESA’s implementing regulations require the Forest Service to re-initiate consultation where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

After consultation is initiated or reinitiated, ESA Section 7(d) prohibits the agency or any permittee from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures . . .” 16 U.S.C. § 1536(d). The 7(d) prohibition “is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09.

Section 7(a)(4) of the ESA requires a Federal action agency to conference with the Services if the proposed action is likely to jeopardize a species proposed for listing or destroy or adversely modify proposed critical habitat. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10(a). *See also* 50 C.F.R. § 402.02 (defining “[c]onference” as “a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the [ESA] regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.”). The agencies must record any results of a conference. *Id.* at § 401.10(e) (“The conclusions reached during a conference and any recommendations shall be documented by the Service and provided to the Federal agency”).

FACTUAL BACKGROUND

Payette National Forest 2017 OSVUM

The Payette National Forest is attempting to comply with subpart C of the Forest Service’s Travel Management Rule by publishing an OSVUM that adopts existing OSV route and area designations. The OSVUM, issued in 2017, authorizes OSV use on designated routes and in all areas not marked as closed to OSVs. By issuing the OSVUM, the Forest Service has determined to reauthorize its existing winter recreation use designations rather than complete a new winter travel plan that complies with the requirements of the Travel Management Rule.

Threatened Canada lynx and northern Idaho ground squirrel, as well as candidate species wolverine, occur on the Payette National Forest. These species are affected by winter recreation use, as described below. Thus, the Forest Service was required to consult over the impacts of the OSV route and area designations adopted in the 2017 OSVUM before issuing that map. To the extent the agency previously consulted over some of these designation decisions when they were originally made in 1988, it must reinitiate consultation because the prior consultation occurred before these three species were listed or proposed for listing.

Canada lynx

In 2000, the FWS listed Canada lynx as threatened with extinction under the ESA in part of its range. 65 Fed. Reg. 16052 (March 24, 2000). It identified the inadequacy of existing regulatory mechanisms, specifically the lack of guidance for conservation of lynx and lynx habitat in Forest Plans and Bureau of Land Management Resource Management Plans as the primary threat to the species. *Id.* at 16052-16086. The FWS published a clarification of findings in 2003, determining that threatened species designation was appropriate for the lynx. 68 Fed. Reg. 40076 (July 3, 2003). The primary factor driving lynx behavior and distribution is the distribution of snowshoe hare, their primary prey.

Lynx in the contiguous United States may exist as several smaller, effectively isolated populations. Metapopulation stability depends on habitat quality and successful dispersal between isolated habitat patches. The likelihood of subpopulation persistence declines with increasing fragmentation and isolation. Maintaining habitats to provide for dispersal movements and interchange among individuals and subpopulations may be the most important provision for maintenance of population viability in the Lynx Conservation Assessment and Strategy (LCAS).¹

Canada lynx may be present on the Payette National Forest.² The Idaho Conservation Data Center has 5 records through 2002 for lynx on the Payette.³ There are 38 lynx analysis units (LAUs) on the forest.⁴ The following map is from the Payette's 2003 Forest Plan, Appendix E, showing lynx habitat linkage zones on the Payette National Forest:

¹ Interagency Lynx Biology Team (ILBT), Canada lynx conservation assessment and strategy (3d ed. 2013), Forest Service Publication R1-13-19. The LCAS continues to fulfill important roles in promoting conservation of the species on federal lands like the Payette National Forest. *Id.* at 4.

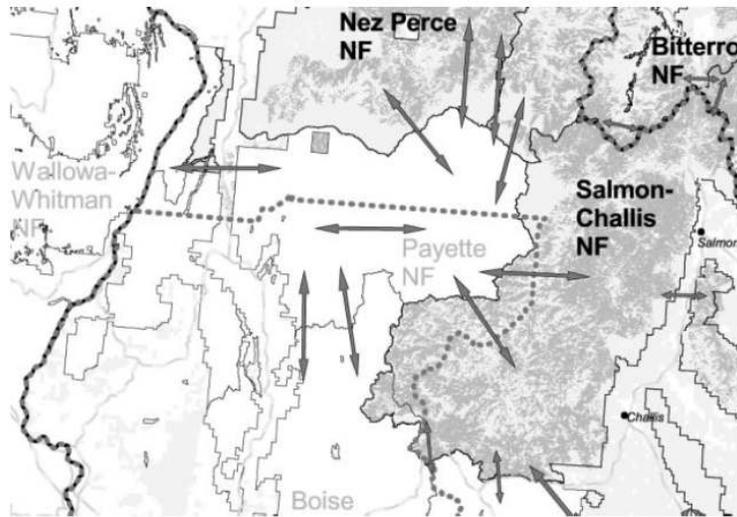
² See Biological Assessment of the Potential Effects of Managing the Payette National Forest on the Canada Lynx (threatened), Main Salmon Southwest Section 7 Watershed Volume 2, Ongoing and New Actions (2008) (hereafter, 2008 Main Salmon BA), page 4. See also Payette National Forest Over-Snow Vehicle Use and Occupied Canada Lynx Habitat Map (Attachment A).

³ 2008 Main Salmon BA at 4.

⁴ *Id.*

LYNX HABITAT LINKAGE ZONES

Figure E-1. Lynx Habitat Linkage Zones for the Payette National Forest
(From Northern Rockies Lynx Amendment Area mapping, as of September 2002)



The arrows on the map represent linkage zones.

Snowmobiles may directly affect Canada lynx during winter months when the species is especially vulnerable by causing physiological responses like increased heart rate and elevated stress level.⁵ The noise from snowmobiles is likely detrimental to lynx, disturbing their ability to hunt and increasing stress. Studies on other large mammals that reside in lynx habitat indicate that snowmobiles elicit an even higher stress response than off road vehicles.⁶ Snowmobiles may disturb den sites during a time when lynx are rearing young.⁷ Snowmobiles may also displace lynx and disrupt otherwise quiet winter habitat by facilitating human access into historically remote winter forest landscapes, increasing lynx interactions with humans, and increasing hunting, trapping, and poaching mortality.⁸ This in turn may result in direct collisions, death, habitat fragmentation, and potential population declines.⁹

Snow compaction from snowmobiles is another threat to lynx. Snow compaction may suffocate or alter the subnivean movements of small mammals on which lynx prey.¹⁰

⁵ W.L. Gaines *et al.*, Assessing the cumulative effects of linear recreation routes on wildlife habitats on the Okanogan and Wenatchee National Forests (2003), Gen. Tech. Rep. PNW-GTR-586, available at <http://www.fs.fed.us/pnw/pubs/gtr586.pdf> (last accessed August 22, 2017), pages 5-6.

⁶ S. Creel *et al.*, Snowmobile Activity and Glucocorticoid Stress Responses in Wolves and Elk, 16 Conservation Biology 809, 812 (2002).

⁷ J.J. Claar *et al.*, Carnivores, *in* Effects of recreation on Rocky Mountain wildlife: a review for Montana (G. Joslin and H. Youmans, cords., 1999).

⁸ Gaines (2003) at 11. See also 2008 Main Salmon BA at 7.

⁹ Gaines (2003) at 11-12.

¹⁰ W.D. Schmid, Snowmobile activity, subnivean microclimate and winter mortality of small mammals, 53 Bulletin of the Ecological Society of America, 37 (1972).

Compacted snow trails may also allow coyotes to move into lynx habitat that coyotes previously used only seasonally. Lynx are well adapted to travel and hunt in the deep, powdery snow where snowshoe hares reside and benefit from a natural spatial segregation from other carnivores.¹¹ One study in Montana found limited use of snowmobile trails by coyotes.¹² But studies in Utah and Wyoming found extensive use of compacted snowmobile trails by coyotes, resulting in potential competition with and displacement of lynx.¹³ The differing results are likely due to different snow characteristics, predator communities, and snowmobile use at the various sites.¹⁴ Under the LCAS, the Forest Service assesses the potential for snowmobile trails to provide routes for competitors such as coyotes, bobcats and cougars based on the density of groomed or commonly used snowmobile routes in LAUs.¹⁵

The Forest Service has not consulted over the effects of the 2017 OSVUM on Canada lynx. OSV use designations in 1988 occurred before lynx was listed as threatened. Consultation over the 2003 Payette Forest Plan revision did not cover travel planning. Between 2007 and 2009, the Forest Service consulted with the Services over its proposed summer and winter travel plan decisions, but that consultation was never implemented with regard to the winter travel plan.¹⁶ In 2013, the Forest Service consulted over effects of grooming OSV routes, but this consultation assumed the OSV trail system was set and so did not consider how the amount of OSV use or location of routes or areas open to cross-country travel affect Canada lynx or its habitat. And the Forest Service did not consult before publishing the 2017 OSVUM. Thus, the OSV use designations adopted in the 2017 OSVUM were never assessed for their effects on Canada lynx.

Northern Idaho ground squirrel

In 2000 the FWS listed the northern Idaho ground squirrel as threatened under the ESA. 65 Fed. Reg. 17779 (April 5, 2000). The species is one of the most imperiled terrestrial animals in Idaho and the only mammal endemic to the State. Long-term habitat fragmentation, distance between colonies, and population declines have resulted in small, isolated ground squirrel populations prone to extinction. Since 1980, seven populations have been extirpated, including the Mill Creek population (extirpated in 1997) located on Payette National Forest lands. In 1985, the total population was estimated to be 5,000 squirrels in 18 known population sites. By 2002, that estimate had dropped to 450 to 500 squirrels in 29 population sites. In 2006, Idaho Department of Fish and Game estimated the overall adult and yearling

¹¹ K.D. Bunnell *et al.*, Potential impacts of coyotes and snowmobiles on lynx conservation in the intermountain west, 34 *Wildlife Society Bulletin* 828 (2006).

¹² J.A. Kolbe *et al.*, The effect of snowmobile trails on coyote movements within lynx home ranges, 71 *Journal of Wildlife Management* 1409 (2007).

¹³ Bunnell (2006); E. Gese *et al.*, The Influence of Snowmobile Trails on Coyote Movements During Winter in High-Elevation Landscapes, 8 *Plos One* 1 (2013).

¹⁴ J.L.B. Dowd *et al.*, Winter Space Use of Coyotes in High-Elevation Environments: Behavioral Adaptations to Deep-Snow Landscapes, 32 *Journal of Ethology* 29 (2014).

¹⁵ See LCAS (3d ed. 2013).

¹⁶ See Feb. 10, 2011 Appeal Decision from Jerome E. Perez to Mark Menlove (File Code 1570, #11-04-00-0018 A215) (reversing the Forest Supervisor's decision to implement the Over-Snow Travel Management Plan ROD).

population at 1,395. Because of the low population levels and isolated habitat, population viability is a concern for the species.

The primary cause for the squirrel's decline is meadow invasion by conifers and shrubs due to fire suppression and past logging activities. Following the loss of suitable meadow habitat, dispersal corridors have been reduced or eliminated. Continued isolation of the remaining populations and degradation of habitat at occupied sites are the primary threats. Remaining populations are likely to become extirpated if suitable habitat is not maintained, expanded, and improved at occupied sites. Additional threats include changes in land use such as golf course development and agricultural land conversion, public access and in particular off-road vehicle use and shooting, road construction, overgrazing by sheep and cattle, and dispersed and developed campground expansion.

The distribution of the northern Idaho ground squirrel is fragmented into what are now very small, isolated populations in Adams and Valley Counties in west-central Idaho.¹⁷ All currently occupied sites are on the west side of the Payette National Forest¹⁸ and adjacent non-Federal lands, except for a single site in Valley County. The main concentration of northern Idaho ground squirrel occurs in a large meadow complex on private lands near the community of Bear in the Brownlee Watershed. Within the Forest Service portion of the Brownlee Watershed, approximately 46,789 acres are considered potential northern Idaho ground squirrel habitat.¹⁹

Snowmobiles may harm squirrels through noise disturbance and winter habitat fragmentation.²⁰ Grooming OSV routes and OSV use may harm squirrels emerging from hibernation in mid March and early April.²¹ Snowmobiles may increase the vulnerability of northern Idaho ground squirrels in the winter by eliciting physiological responses such as increased heart rate and elevated stress level, eliciting behavioral responses including displacement and avoidance, and increasing hunting and mortality.²²

The Payette's actions are critically important to the species and its habitat because the Payette Forest is the primary Federal action agency with potential to affect its survival. Management of the species must focus on restoring habitat and minimizing adverse effects

¹⁷ See Payette National Forest Over-Snow Vehicle Use and Northern Idaho Ground Squirrel Habitat Map (Attachment B).

¹⁸ The ground squirrel occurs on the Council and New Meadow Ranger Districts. See Snowmobile Outfitter and Guide Tours Final Environmental Assessment, Payette National Forest (2015) (hereafter, 2015 Outfitter EA), page 70.

¹⁹ See Biological Assessment of the Potential Effects of Managing the Payette National Forest on the Northern Idaho Ground Squirrel (threatened) and Canada Lynx (threatened), Brownlee Section 7 Watershed Volume 2, Ongoing and New Actions (2008) (hereafter, 2008 Brownlee BA), page 11.

²⁰ 2015 Outfitter EA at 14, 48.

²¹ See U.S. Forest Service, Payette National Forest, Decision Notice /Finding of No Significant Impact Over-Snow Trail Grooming (2013), pages 5, 12 (imposing seasonal restrictions on snowmobile trail grooming and OSV use after March 15 to protect squirrels emerging from hibernation).

²² A. Switalski, Snowmobile Best Management Practices for Forest Service Travel Planning: A Comprehensive Literature Review and Recommendations for Management – *Wildlife*, 12 *Journal of Conservation Planning* 13 (2016).

on its quality and abundance. Ground squirrels could be positively affected by actions that would reduce those threats by closing roads and otherwise limiting public access.

The Forest Service has not consulted over the effects of the 2017 OSVUM on northern Idaho ground squirrel. OSV use designations in 1988 occurred before the northern Idaho ground squirrel was listed as threatened. Consultation over the 2003 Payette Forest Plan revision did not cover travel planning. Between 2007 and 2009, the Forest Service consulted with the Services over its proposed summer and winter travel plan decisions, but that consultation was never implemented with regard to the winter travel plan.²³ In 2013, the Forest Service consulted over effects of grooming OSV routes, but this consultation assumed the OSV trail system was set and so did not consider how the amount of OSV use or location of routes or areas open to cross-country travel affect northern Idaho ground squirrel or its habitat. And the Forest Service did not consult before publishing the 2017 OSVUM. Thus, the OSV use designations adopted in the 2017 OSVUM were never assessed for their effects on northern Idaho ground squirrel.

Wolverine

In 2013 the FWS proposed to list the distinct population segment of the North American wolverine as threatened under the ESA. 78 Fed. Reg. 7864 (Feb. 4, 2013). After a district court vacated the FWS's 2014 withdrawal of its proposal, in 2016 the FWS reopened the public comment period on its proposal to list the distinct population segment of wolverine occurring in the contiguous United States as threatened under the ESA. 81 Fed. Reg. 71670 (Oct. 18, 2016). Factors affecting the wolverine's continued existence include projected decrease and fragmentation of wolverine habitat and range due to climate change, trapping, lack of regulatory mechanisms to address the threats to wolverine habitat from climate change, and loss of genetic diversity due to small population size.

Modeling by the Idaho Department of Fish and Game shows over 83 percent of the Payette National Forest is predicted to be wolverine habitat.²⁴ An ongoing study in Idaho, Montana, and Wyoming to assess the impact of winter recreation on wolverine collected data on wolverine presence in the Salmon Mountains of the Payette National Forest over six winter seasons.²⁵ During the initial years of the study in 2010 and 2011, monitoring identified four reproductively active females and four resident males.²⁶ Subsequent monitoring through 2015 indicates most of the resident animals are no longer present with the exception of one

²³ See Feb. 10, 2011 Appeal Decision from Jerome E. Perez to Mark Menlove (File Code 1570, #11-04-00-0018 A215) (reversing the Forest Supervisor's decision to implement the Over-Snow Travel Management Plan ROD).

²⁴ Idaho Department of Fish and Game, Management Plan for the Conservation of Wolverines in Idaho 2014-2019 (July 2014), page 14. See also Payette National Forest Over-Snow Vehicle Use and Wolverine Habitat Map (Attachment C), based on data from R.M. Inman, Wolverine Ecology and Conservation in the Western United States, Doctoral Thesis No. 2013:4, Faculty of Natural Resources and Agricultural Sciences (2013).

²⁵ K. Heinmeyer and J. Squires, Wolverine – Winter Recreation Research Project: Investigating the Interactions Between Wolverines and Winter Recreation 2015 Progress Report (Dec. 30, 2015).

²⁶ *Id.* at 4.

female.²⁷ The 2015 interim report notes an incremental loss of resident animals without identifying new animals filling the vacant home ranges identified when the project was initiated in 2010.²⁸

The following Figure 2 is from the 2015 interim report shows home ranges of wolverine in the winter of 2014 in the Salmon Mountains:

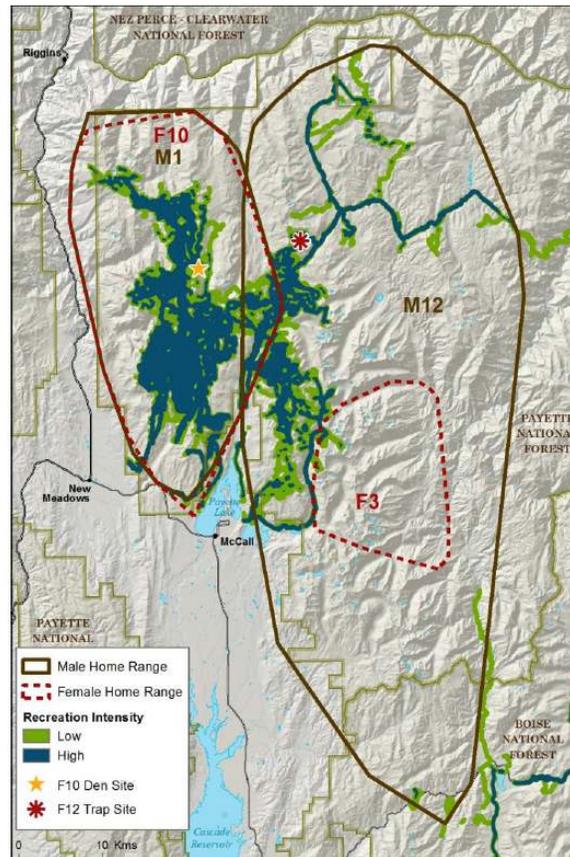


Figure 2. Home ranges of wolverines monitored in the winter of 2014 in the Salmon Mountains near McCall, Idaho. One female F12 was collared on 2014 (location shown), but was never relocated and was likely a transient; another female, F10, denned in late February and her approximate den site is shown. In 2015, M1, F10 and F3 were not detected and are likely no longer present and M12 was identified at baited camera stations in both his 2014 area and the area occupied by M1 in prior years.

Snowmobile use commonly overlaps with wolverine denning habitat.²⁹ Dispersed recreational activities like motorized winter recreation have the potential to negatively impact wolverine by disrupting natal denning areas.³⁰ Wolverines have one of the lowest successful

²⁷ *Id.*

²⁸ *Id.* at 5.

²⁹ Switalski (2016) at 15. *See also* Attachment C.

³⁰ *See, e.g.,* R.M. Inman *et al.*, Wolverine reproductive chronology, *In: Wildlife Conservation Society, Greater Yellowstone Wolverine Program, Cumulative Report* (2007a); J. Krebs *et al.*, Multiscale habitat use by wolverines in British Columbia, Canada, 71 *Journal of Wildlife Management* 2180 (2007); E.C. Lofroth and J. Krebs, The Abundance and Distribution of Wolverines in British Columbia, Canada, 71 *Journal of Wildlife Management* 2159 (2007); L.F. Ruggiero *et al.*, Wolverine conservation and management, 71 *Journal of Wildlife Management* 2145 (2007).

reproductive rates known to mammals, and this is hypothesized as linked to winter energy constraints. Female wolverines select and enter dens and give birth in February to mid-March³¹ and the overlap of winter recreation with this energetically taxing period is highly concerning. Any disturbance during this important winter period can negatively affect productivity and other vital rates.³²

Researchers have reported that female wolverines may be sensitive to human disturbance in the vicinity of natal and maternal dens, and disturbance from foot and snowmobile traffic has been purported to cause maternal females to abandon or move dens.³³ One study found that females tended to avoid areas with heli-skiing and backcountry skiing areas.³⁴ High-cirque snowmobile use, especially crosscountry use and “high marking,” may present a substantial threat to wolverines and their habitat. Preliminary findings from the ongoing study suggest wolverine exposed to higher levels of winter recreation in their home range may avoid recreated areas and move at higher rates in higher intensity recreation areas. In particular, denning female wolverines showed higher movement rate increases in response to higher intensity recreation areas, which causes higher expenditure of energy and reduced ability to hunt for food.³⁵

These behavioral changes can negatively affect individuals’ physiological stress levels and reproductive capacity in several ways, as evidenced in numerous studies on different species.³⁶ It may reduce the amount of time and thus ability of female wolverines to hunt or to utilize food caches. This would result in significant additive energetic effects, reducing foraging success for adult females already stressed by the demands of bearing and raising a litter.³⁷ In addition, this could reduce kit survival rates by increasing the potential for predation and exposure to cold temperatures. These results indicate that winter recreation may impact wolverines in as yet unknown ways.

As snowmobiling and backcountry skiing continue to grow in popularity and as snowpack continues to decline due to climate change, there is increasing concern that wolverine denning habitat may become limiting. Recent warming has already led to substantial

³¹ A.J. Magoun and J.P. Copeland, Characteristics of wolverine reproductive den sites, 62 *Journal of Wildlife Management* 1313 (1998).

³² R. May *et al.*, Impact of infrastructure on habitat selection of wolverines *Gulo gulo*, 12 *Wildlife Biology* 285 (2006); Krebs (2007).

³³ S. Myrberget, The breeding den of the wolverine, 21 *Fauna* 108 (1968); Magoun and Copeland (1998); R.M. Inman *et al.*, Wolverine reproductive rates and maternal habitat in Greater Yellowstone, *In: Wildlife Conservation Society, Greater Yellowstone Wolverine Program, Cumulative Report* (2007b).

³⁴ Krebs (2007).

³⁵ K. Heinmeyer and J. Squires, Wolverine – Winter Recreation Research Project: Investigating the Interactions Between Wolverines and Winter Recreation 2014 Progress Report (Oct. 27, 2014). The 2015 Progress Report did not include an executive summary of preliminary results like in previous reports.

³⁶ S.J. Creel *et al.*, Snowmobile activity and glucocorticoid stress responses in wolves and elk, 16 *Conservation Biology* 809 (2002).

³⁷ K. Heinmeyer and J. Squires, Wolverine – Winter Recreation Research Project: Investigating the interactions between wolverines and winter recreation use 2013 Progress Report (2013).

reductions in spring snow cover in the mountains of western North America.³⁸ Numerous recent and sophisticated studies support the conclusion that climate changes caused by global climate change are likely to negatively affect wolverine habitat.³⁹ Protection of denning habitat may be critical for the persistence of the species in the Rockies.

An additional concern related to snowmobile use is that motorized access leads to increased trapping pressure (direct or indirect capture) for some furbearers that prefer more mesic habitat conditions generally found at higher elevations or in riparian habitats, such as marten, fisher, lynx, and wolverine. Trapping season for these species is limited to the winter months, and most trappers prefer the relatively easy access to suitable habitat provided by snowmobiles. Wolverine populations in small, isolated mountain ranges can be very susceptible to trapping pressure.⁴⁰ Trapping pressure for these species is dramatically reduced if there is less snowmobile access.

The Forest Service has failed to conference with the FWS over the effects of the 2017 OSVUM. The OSV use designations in 1988 occurred before the FWS proposed wolverine for listing as threatened, and the Forest Service did not consult before publishing the 2017 OSVUM. Thus, the OSV use designations adopted in the 2017 OSVUM were never assessed for their effects on wolverine.

ESA VIOLATIONS

1. The Forest Service has violated the ESA by failing to consult, or reinstate consultation, under Section 7 regarding the impacts on Canada lynx and northern Idaho ground squirrel, and failing to conference under Section 7 regarding the impacts on wolverine associated with the adoption of existing OSV use designations through publication of the Payette National Forest's 2017 OSVUM. Section 7(a)(2) of the ESA requires that each federal agency consult with the Services to ensure that any action authorized, funded, or carried out by such agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. *See* 16 U.S.C. § 1536(a)(2). Section 7(a)(4) of the ESA requires a Federal action agency to conference with the Services if the proposed action is likely to jeopardize a species proposed for listing or destroy or adversely modify proposed

³⁸ P. Mote *et al.*, Declining mountain snowpack in western North America, 86 *Bulletin of the American Meteorological Society* 1 (2005); G.T. Pederson *et al.*, A century of climate and ecosystem change in Western Montana: what do temperature trends portend? 96 *Climatic Change* (2010).

³⁹ P. Gonzales *et al.*, Wolverines and Climate Change, Unpublished report (2008); J.F. Brodie and E. Post, Nonlinear responses of wolverine populations to declining winter snowpack, 52 *Population Ecology* 279 (2010); J.P. Copeland *et al.*, The bioclimatic envelope of the wolverine (*Gulo gulo*): do climate constraints limit its geographic distribution? 88 *Canadian Journal of Zoology* 233 (2010); K.S. McKelvey *et al.*, Climate change predicted to shift wolverine distributions, connectivity, and dispersal corridors. 21 *Ecological Applications* 2882 (2011); S. Peacock, Projected 21st century climate change for wolverine habitats within the contiguous United States. *Environmental Research Letters* (2011); K.M. Johnston *et al.*, Projected range shifting by montane mammals under climate change: implications for Cascadia's National Parks, 3 *Ecosphere* 11 (2012).

⁴⁰ J.R. Squires *et al.*, Sources and patterns of wolverine mortality in western Montana, 71 *Journal of Wildlife Management* 2213 (2007).

critical habitat. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10(a). The agencies' failure to consult, or reinitiate consultation, and failure to conference on the Payette National Forest's 2017 OSVUM designations after the Services listed Canada lynx and northern Idaho ground squirrel as threatened, or after the Services proposed wolverine as a candidate species, is a significant violation of the ESA.

2. The Forest Service is in violation of Section 7(d) of the ESA by adopting and implementing the 2017 OSVUM designations before adequate and lawful consultation is complete. Such actions constitute an "irreversible and irretrievable commitment of resources" and warrant an injunction. See 16 U.S.C. §1536(d).

WildEarth Guardians, Winter Wildlands Alliance, and The Wilderness Society will initiate litigation over the Forest Service's ESA violations unless the Forest Service consults with FWS regarding the effects of the 2017 OSVUM designations, and prevents any irreversible or irretrievable commitment of resources from occurring until consultation is completed.

For the above stated reasons, the Forest Service has violated and remains in ongoing violation of the ESA. The 60-day notice requirement is intended to provide you an opportunity to correct the actions that are in violation of the ESA.

Sincerely,

Lauren Rule, Senior Staff Attorney
Advocates for the West

cc: Jeff Sessions, U.S. Attorney General

