Matthew K. Bishop
Shiloh Hernandez
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 324-8011 (tel.)
(406) 443-6305 (fax)
bishop@westernlaw.org
hernandez@westernlaw.org

Counsel for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

HELENA HUNTERS AND ANGLERS ASSOCIATION, a non-profit organization; FRIENDS OF THE WILD SWAN, a non-profit organization; MONTANA ECOSYSTEM DEFENSE COUNCIL,a non-profit organization; GEORGE WUERTHNER, an individual; NATIVE ECOSYSTEMS COUNCIL, a non-profit organization; ALLIANCE FOR THE WILD ROCKIES, a non-profit organization; SWAN VIEW COALITION, a non-profit organization; WILDEARTH GUARDIANS, a non-profit organization, and FOOTLOOSE MONTANA, a non-profit organization, Plaintiffs, vs. JOE MAURIER, in his official capacity as Director of The Montana Fish, Wildlife and Parks, MONTANA FISH, WILDLIFE AND PARKS, an agency of the State of Montana; BOB REAM, in his official capacity as chairman of the Montana Fish,Wildlife and Parks Commission; and the MONTANA FISH, WILDLIFE AND PARKS COMMISSION, a regulatory entity of the State of Montana, State-Defendants.	Cause No._____ COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs, Helena Hunters and Anglers Association et al., hereby bring this civil action for declaratory and injunctive relief against the above-named State-Defendants, the Montana Department of Fish Wildlife and Parks and Montana Fish Wildlife and Parks Commission (collectively "the Department") for violations of the Montana Administrative Procedure Act ("MAPA"), §§ 2-4-101 to 2-4-711, MCA, and §§ 87-1-101 to 87-1-805, MCA.

2. This civil action arises from the Department's controversial decision to authorize trapping of wolverine (*Gulo gulo*) in Montana. Montana is the only state in the contiguous United States to authorize the trapping of wolverine.

3. On December 14, 2010, the U.S. Fish and Wildlife Service ("Service") determined that wolverine are warranted for listing under the federal Endangered Species Act ("ESA") based on the best available science on the status of, and threats to, the species. 75 Fed. Reg. 78030. Wolverine are now a candidate species awaiting listing under the ESA.

4. Only 100-175 wolverines likely remain in Montana and the effective population (i.e., the number of wolverines able to contribute to the next generation) is dangerously low, <u>less than 35.</u> This already small and vulnerable wolverine population is well below the number needed for genetic viability and facing extinction due to the loss of habitat and increased fragmentation from climate change (wolverine depend on late-spring snow for denning). Montana's decision to authorize wolverine trapping under these circumstances worsens an already bleak situation.

5. According to the Service, Montana's trapping of wolverines, when combined with other existing threats, "may contribute to the likelihood that the

wolverine will become extirpated in the foreseeable future by increasing the speed with which small populations of wolverine are lost from isolated habitats, and also by increasing mortality levels for dispersing wolverines that are required to maintain the genetics and demographics of wolverine populations in the contiguous United States." 75 Fed. Reg. at 78050-51.

6. In response, since the Service's ESA finding on December 14, 2010, members of the public have repeatedly asked at the Department to close the wolverine trapping season in Montana. The Department has steadfastly refused all requests.

7. The Department did not respond or otherwise address the public's concerns or comments about wolverine trapping before authorizing the 2011-2012 trapping season or the 2012-2013 trapping season.

8. On July 31, 2012, a coalition of organizations and one individual (collectively "Plaintiffs") made a request to end the trapping of wolverines by submitting a formal petition for rulemaking to the Department pursuant to MAPA, § 2-4-315, MCA.

9. Plaintiffs' petition requested that the Department promulgate a new administrative rule under § 2-4-315, MCA, ending the trapping of wolverines in Montana until wolverines are no longer a candidate or protected species under the ESA. The best available science on wolverines, including the Service's ESA finding, was included with the petition and provided to the Department.

10. On September 21, 2012, the Department denied Plaintiffs' petition on its face, without considering the arguments made and science provided in support of the petition, on the grounds that "trapping rules" are exempt from rulemaking under MAPA.

11. Wherefore, Plaintiffs – eight conservation organizations and one individual dedicated to the long term survival and recovery of wolverine in Montana – are hereby compelled to bring this civil action for declaratory and injunctive relief.

JURISDICTION AND VENUE

12. This Court has jurisdiction pursuant to Article VII, § 4 (1) of the Montana Constitution.

13. This Court has the authority to review the Department's actions and/or inactions complained of herein, and grant the relief requested, pursuant to the Uniform Declaratory Judgments Act, §§ 27-8-101 to 27-8-313, MCA, §§ 27-19-101 to 27-19-406, MCA (Injunctions), §§ 27-26-101 to 27-26-403, MCA (Writ of Mandate), and MAPA, § 2-4-704, MCA. Plaintiffs are challenging final agency actions and have exhausted all available and necessary administrative remedies.

14. Venue is properly before this Court pursuant to § 25-2-105, MCA.

15. Plaintiffs are aggrieved and harmed by the Department's actions and/or inactions challenged in this complaint.

16. Substantial rights of Plaintiffs have been and continue to be prejudiced by the Department's actions and/or inactions challenged in this complaint.

17. There is a present and actual controversy between the Parties.

PARTIES

18. Plaintiff, HELENA HUNTERS AND ANGLERS ASSOCIATION, is a non-profit organization dedicated to protecting and restoring fish and native wildlife populations and habitat in Montana as a public trust, vital to our general welfare. Helena Hunters and Anglers Association promotes the highest standards of ethical conduct and sportsmanship and promotes outdoor recreational

opportunities for all citizens to share equally. Helena Hunters and Anglers Association is based in Helena, Montana.

19. Plaintiff, FRIENDS OF THE WILD SWAN, is a Montana non-profit organization with its principal place of business in Swan Lake, Lake County, Montana. Friends of the Wild Swan is dedicated to the conservation of natural resources and preserving the biological integrity of Montana's public lands.

20. Plaintiff MONTANA ECOSYSTEM DEFENSE COUNCIL is a Montana non-profit, grassroots organization headquartered in Kalispell, Montana. The Council was established in 1990 to protect and restore biological diversity, water quality and ecosystem integrity in the Northern Rockies region.

21. Plaintiff GEORGE WUERTHNER is an ecologist, writer (36 publications), and photographer who has viewed wolverines and wolverine tracks in the wild. Mr. Wuerthner currently splits his time between Bend, Oregon and Helena, Montana.

22. Plaintiff NATIVE ECOSYSTEMS COUNCIL ("NEC") is a non-profit advocacy organization based in Three Forks, Montana dedicated to protecting and restoring native ecosystems in the Northern Rockies. In furtherance this mission, NEC's members and staff have been active in wildlife management in the Northern Rockies region for more than 16 years.

23. Plaintiff THE ALLIANCE FOR THE WILD ROCKIES ("the Alliance") is a non-profit conservation and education organization with approximately 2,000 members. The mission of the Alliance is to protect and restore the ecological and biological integrity of the Northern Rockies. The Alliance is based in Helena, Montana.

24. Plaintiff SWAN VIEW COALITION is a Montana non-profit

conservation and education organization dedicated to conserving the biological integrity of Montana's natural ecosystems and ensuring projects and programs on public lands truly sustain wildlife habitat and protect water quality. The Swan View Coalition is based in Kalispell, Montana.

25. Plaintiff WILD EARTH GUARDIANS is non-profit organization dedicated to protecting and restoring the West's wild places, rivers, and wildlife. WildEarth Guardians has over 4,500 members, some of whom reside in Montana. WildEarth Guardians is based in Santa Fe, New Mexico.

26. Plaintiff FOOTLOOSE MONTANA is a non-profit organization dedicated to promoting trap free public lands for people, pets, and wildlife. Footloose Montana is based in Missoula, Montana.

27. All Plaintiffs are dedicated to protecting and preserving the natural function and biological integrity of Montana's natural resources and native wildlife populations, including wolverine.

28. Plaintiffs' members and staff live near and/or routinely recreate in the wolverine's current and historic range in Montana. They enjoy observing and studying wolverine in the wild, including signs of the wolverine's presence, throughout Montana. The opportunity to possibly view wolverine or signs of wolverine in the wild—by itself—is of significant interest and value to Plaintiffs' members and staff and increases their use and enjoyment of Montana's wild places.

29. Plaintiffs derive aesthetic, recreational, scientific, inspirational, educational, and other benefits from these activities and in working to protect and restore wolverine in Montana. Plaintiffs also have an interest in knowing that wolverine are still present in Montana, that Montana's native predator-prey system

remains fully intact, and that "some real teeth remain" in Montana's scenery. The continued presence of wolverine and other native carnivores is, in part, what makes Montana so unique and special in the contiguous United States and why Plaintiffs choose to live and/or recreate in Montana.

30. Plaintiffs' interests have been, are being, and unless the requested relief is granted, will continue to be adversely and irreparably harmed by the Department's actions and/or inactions challenged in this complaint. If this Court issues the relief requested the harm to Plaintiffs' interests will be alleviated.

31. Defendant JOE MAURIER is named in his official capacity as Director of Montana Fish Wildlife and Parks. As Director, Mr. Maurier is the State official with responsibility for all Department officials' actions and/or inactions challenged in this complaint.

32. Defendant MONTANA DEPARTMENT OF FISH WILDLIFE AND PARKS is an agency within the State of Montana that is responsible for applying and implementing the State laws and regulations challenged in this complaint.

33. Defendant BOB REAM is named in his official capacity as chairman of the Montana Fish Wildlife and Parks Commission.

34. Defendant MONTANA FISH WILDLIFE AND PARKS COMMISSION, is a five member commission within Montana Fish Wildlife and Parks responsible for applying and implementing the State laws and regulations challenged in this complaint.

BACKGROUND

Wolverine (*Gulo gulo*)

35. Wolverines are the largest member of the *Mustelidae* (weasel) family.

36. Wolverines resemble a small bear, but with a bushy tail and a broad, rounded head, short rounded ears, and small eyes and a body custom-built for

high-elevation, mountain living.

37. A wolverine's large, crampon-clawed feet (each with five toes with curved, semi-retractile claws used for digging and climbing) are enormous relative to its body which allow the animal to spread its weight like snowshoes. This gives wolverines an advantage over most competitors and prey during cold months.

38. Wolverines operate at a higher metabolic rate than other animals their size. To hold in heat, wolverines wear a double coat which includes a dense inner layer of air-trapping wool beneath a cover of stout guard hairs which add extra insulation. These stout guard hairs, which drape from the wolverine, are textured to resist absorbing moisture and excel at shedding frost (this makes a wolverine's pelt desirable and valuable - the average price for a wolverine pelt in 2011 was $253.11.)

39. A wolverine's weapons include well developed claws, sharp front teeth, long fangs, and cheek teeth designed for cutting.

40. The wolverine's bite force is extremely strong. When a wolverine comes upon an elk or moose carcass that larger predators have worked over, it can crunch up the skeleton left behind, shattering massive bones that not even a grizzly could crack.

41. Wolverine have robust skulls that protect relatively large brains. A wolverine's eyes are positioned in the front of the head rather than on the sides which is a common trait for hunters that rely on accurate depth perception.

42. Reproductive rates for wolverines are among the lowest known for mammals. Approximately 40% of all female wolverines are capable of giving birth at two years old (the average age of reproduction, however, is three years).

43. Female wolverines become pregnant most years and produce a litter of

approximately 3.4 kits on average. It is common, however, for females to forgo reproducing every year, possibly saving resources to increase reproductive success in subsequent years. Female wolverines are also known to reabsorb or spontaneously abort litters prior to giving birth.

44. Breeding generally occurs from late spring to early fall. Female wolverines undergo delayed implantation until the following winter to spring, when active gestation lasts from 30 to 40 days. Wolverine litters are born from mid-February through March.

45. Female wolverines use natal (birthing) dens that are excavated in deep snow.

46. Deep snow that persists into the late spring (May) is essential for wolverine reproduction. No records exist for wolverines denning anywhere but in snow, despite wide availability of snow-free denning opportunities within the species' geographic range.

47. Stable snow pack greater than five feet deep appears to be a requirement for natal denning because it provides security for offspring and buffers cold winter temperatures. These natal dens consist of tunnels that contain well-used runways and bed sites and may naturally incorporate shrubs, rocks, and downed logs as part of their structure.

48. The snow tunnel and complex structures associated with dens is likely required to protect young from interspecific and intraspecific predation. A layer of deep snow may also add crucial insulation from cold temperatures and wind prevalent in denning habitat.

49. Female wolverines have been known to abandon reproductive dens when temperatures warm and snow conditions become wet indicating that the

condition of the snow is also important to successful reproduction and that the onset of spring snowmelt forces female wolverines to move kits into alternate denning sites with better snow conditions if they are available.

50. In Montana, natal dens typically occur above 7,874 feet and are located on north aspects in avalanche debris, typically in alpine habitats near treeline.

51. Once the litter is born, wolverines will continue to use the natal den through late April and early May (occupancy of such dens varies from 9 to 65 days).

52. As wolverines grow, females move the kits to multiple secondary "maternal" dens. Researchers think the timing of natal den abandonment may be tied to the accumulation of water in the dens due to snowmelt, the maturation of offspring, disturbance, and/or geographic location.

53. After using natal and maternal dens, wolverines may also use rendezvous sites through early July. These sites are characterized by natural (unexcavated) cavities formed by large boulders, downed logs (avalanche debris), and snow.

54. In Montana, wolverines occur primarily in the high-elevation alpine portions of the State. Wolverines do not appear to specialize on specific vegetation or geological habitat aspects, but instead select areas that are cold and receive enough winter precipitation to reliably maintain deep persistent snow late into the warm season.

55. The majority (95%) of wolverine habitat currently occupied by the species in the contiguous lower 48 states is federally owned and managed mostly by the United States Forest Service.

56. Wolverines opportunistically feed on a variety of food sources.

Wolverines scavenge carcasses, prey upon small animals, birds, and ungulates, and eat fruit, berries and insects (in Glacier National Park wolverines compete with grizzly bears for prey and carcasses. Sometimes 30 pound wolverines succeed in driving off grizzlies, and sometimes they die trying).

57. Wolverines cache food in snow banks and in boulder fields with icy water running underneath. Supplies in such caches may keep not just for one month but from one year to the next. Wolverines also have an excellent sense of smell that enables them to find food beneath deep snow.

58. During all seasons and regions, caching food in cold, structured microsites inhibits competition with insects, bacteria, and other scavengers. Caching is likely a critical behavioral adaptation because total food resources are relatively limited within the wolverine's niche.

59. Wolverines require secure, core areas of habitat that are large and linked to other sub-populations. Wolverines require a lot of space; the availability and distribution of food is likely the primary factor in determining wolverine movements and home range size.

60. Female wolverines forage close to den sites in early summer, progressively ranging further from dens as kits become more independent.

61. Wolverines travel long distances over rough terrain and deep snow, and adult males generally cover greater distances than females. Wolverines' territories in Montana range from 193 to 588 square miles for males and 55 to 148 square miles for females.

62. Wolverines often move long distances in short periods of time when dispersing from natal ranges, into habitats unsuitable for long-term survival. Such movements make it difficult to estimate total population size and distinguish

between occurrence records that represent established populations and those that represent short-term occupancy or exploratory movements.

63. Studies suggest that wolverine occur at naturally low densities, approximately 1 per 65 to 337 sq. km.

64. In the contiguous United States, wolverines exist as a metapopulation. By definition, a metapopulation is a network of semi-isolated populations, each occupying a suitable patch of habitat in a landscape of otherwise unsuitable habitat.

65. Metapopulations require some level of regular or intermittent migration and gene flow among subpopulations, in which individual populations support one another by providing genetic and demographic enrichment through mutual exchange of individuals. Individual subpopulations may go extinct or lose genetic viability, but are then rescued by immigration from other subpopulations, thus ensuring the persistence of the metapopulation as a whole.

The Service's December 14, 2010, determination that protective ESA status is "warranted" for wolverines

66. On December 14, 2010, the Service determined that the addition of wolverines to the ESA's list of threatened and endangered wildlife was warranted. 75 Fed. Reg.78030.

67. The Service found that, on the basis of the best scientific and commercial data available, "[listing wolverine in the contiguous United States] as threatened or endangered is warranted." 75 Fed. Reg. at 78054. The Service explained, however, that adopting a rule to list wolverines is precluded by higher priority listing actions.

68. Wolverines are a candidate species awaiting federal, ESA protection.

69. The Service's determination that wolverines are "warranted" for listing was made in accordance with Section 4 of the ESA, 16 U.S.C. § 1533, and the ESA's implementing regulations, 50 C.F.R. § 424.

Threats to wolverines

70. The Service determined an already small population size with low genetic diversity, loss and modification of habitat from climate change, the authorization of wolverine trapping in Montana, and the inadequacy of existing regulatory mechanisms pose a threat to wolverines.

Small population size and low genetic diversity

71. Biologists draw a distinction between a species' total or absolute population size and the "effective" size of a population, which is the number of individuals that actually contribute offspring to the next generation. To determine the effective population size, biologists take the overall count, subtract nonbreeding animals (immature, infertile, or prevented from mating by dominant individuals), then subtract the adult females that skipped breeding that year because they were nursing young or replenishing their energy reserves. Then subtract the mothers whose offspring of that year failed to survive to breeding age.

72. Effective population size is important because it determines rates of loss of genetic variation and the rate of inbreeding.

73. No systematic or accurate population census of wolverines in the lower 48 or Montana exists so the current population level and trends remain unknown.

74. Based on the Service's current knowledge of occupied wolverine habitat and wolverine densities, the Agency estimates that the total wolverine population in the entire lower 48 states to be 250-300 individuals, with the bulk of the population in the Northern Rockies.

75. The Service estimates that approximately 175 wolverines occupy Montana.

76. Other wolverine researchers say a more realistic estimate of the number of wolverines in Montana is 100 to 150 individuals.

77. The estimated effective population of wolverine in Montana, Idaho, and Wyoming is 35 individuals.

78. The Service notes that the effective population size of wolverines in the contiguous United States is exceptionally low and below what is thought to be adequate for short-term maintenance of genetic diversity and population viability.

79. Concern over low effective population size was highlighted in a recent study which determined that without immigration from other populations at least 400 breeding pairs of wolverines would be necessary to sustain the long-term genetic viability of the contiguous U.S. population.

Loss and modification of habitat from climate change

80. The best available science reveals climate change will (1) decrease the amount of available wolverine habitat; and (2) increase fragmentation between areas of suitable wolverine habitat in Montana. This will result in a smaller and more isolated population of wolverines in Montana.

81. The wolverines' reliance on late spring snow for denning and consistent snowpack and cold sites for food storage, as well as recent evidence revealing the species rarely occurs where the average maximum daily temperature in August exceeds 70 degrees, makes the species extremely sensitive to climate change.

82. Climate change models predict that warming temperatures and changes in precipitation will result in reduced snowpack and permanent loss of essential wolverine habitat in the contiguous United States.

83. By 2045, the best available science estimates that 23 percent of current wolverine habitat in the contiguous United States will be lost due to climate warming. That loss expands to 63 percent of wolverine habitat by the time interval between 2070 and 2099.

84. The Service found that changes in climate are likely to result in permanent loss of a significant portion of essential wolverine habitat within the foreseeable future. Given the spatial needs of wolverines and the limited availability of suitable habitat, this projected loss in wolverine habitat will likely result in a loss of wolverine numbers that is greater than the overall loss of habitat area.

85. As habitat patches become smaller and more isolated, they are likely to lose the ability to support wolverines.

86. Loss of wolverine habitat also increases habitat fragmentation as islands of wolverine habitat become smaller and intervening areas between wolverine habitat become larger.

87. This habitat alteration will result in the loss of genetic diversity due to inbreeding within a few generations. Further isolation of wolverines on small habitat islands with reduced connectivity to other populations would also increase the likelihood of subpopulations being lost due to demographic stochasticity, impairing the functionality of the wolverine metapopulation in the contiguous United States. This is particularly true in Montana, where the wolverine population is already very small and already highly fragmented.

88. According to the Service, climate change will have direct and indirect effects to wolverine populations in the contiguous United States including reducing the number of wolverines that can be supported by the available habitat

and reducing the ability of wolverines to travel between patches of suitable habitat. This reduction in connectivity is likely to affect metapopulation dynamics making it more difficult for subpopulations to recolonize areas where wolverines have been extirpated and to bolster the genetics or demographics of adjacent subpopulations.

Mortality from trapping

89. In Montana, wolverines are trapped and killed for their fur which is valued for its durability and capacity to resist frost accumulation.

90. Over the last hundred years, trapping has been the primary cause of wolverine mortality.

91. Trapping is believed to have played a role in the historic decline of wolverines in North America in the late 1800s and early 1900s.

92. Trapping is the driving force behind local extirpations of wolverine populations.

93. Trapping accounts for a high proportion of wolverine mortality, affecting even populations that are locally protected.

94. Wolverines are vulnerable to trapping due to their habit of ranging widely in search of carrion, which would bring them into frequent contact with poison baits and traps.

95. Because of their scavenging nature, wolverines come readily to man-made baits and are thus vulnerable to skilled trappers. Females with newborn young are limited in their ranging and foraging capacities and, as such, are especially vulnerable to baited traps.

96. The best available science reveals that human caused mortality of wolverine from trapping can harm local populations of wolverine in a number of

ways.

97. According to the Service, human caused mortality is likely additive to natural mortality due to the low reproductive rate and relatively long life expectancy of wolverines.

98. Trapped wolverine populations likely live at densities that are lower than carrying capacity, and may need to be reinforced by recruits from untrapped populations to maintain population viability and persistence.

99. In Montana, wolverines are susceptible to trapping due to reduced levels of gene flow, low reproductive rates and need for large areas of undisturbed habitat.

100. According to Forest Service biologists, no other type of human activity has the same potential to cause populations to become dangerously small or locally extirpated as trapping.

101. According to Forest Service biologists, decisions concerning wolverine trapping are critical to the persistence of extant populations and to the recolonization of depleted populations, especially those in isolated mountain ranges.

102. The Service found that trapping wolverines could have "significant negative effects" on wolverine populations inhabiting small mountain ranges.

103. In a 1981 study in the South Fork of the Flathead, Hornocker and Hash (1981) captured and marked 24 wolverines during a 5-year period from 1972-1977. During this study, 15 of the 24 wolverines were killed by trappers; only 3 died by natural causes. An additional 6 wolverines were also caught by trappers in the South Fork before the study even began. The large number of wolverines killed in traps during the five-year study led the researchers to

conclude that "of the biotic factors in the wolverine's environment, predation by humans appears to be the most likely factor to have affected the number of wolverines."

104. Between 2001-2007, Inman et al. (2007) monitored 26 wolverines (16 females and 10 males) in the Greater Yellowstone Area of Montana, Idaho, and Wyoming. During the project, the researchers documented 11 wolverine mortalities. Five mortalities resulted from natural causes (2 predation, 2 avalanche, and 1 unknown) and 6 were human-caused, including 5 trapped and 1 roadkill. In the end, trapping "accounted for the majority of human-related mortality of wolverines" in the six year study.

105. In another Montana study, the United States Forest Service's Rocky Mountain Research Station instrumented and followed 36 wolverines in two study areas in western Montana (Pioneer Mountains and Glacier National Park) and one study area on the Idaho-Montana border (Clearwater). From 2002-2005, the researchers documented 14 wolverine mortalities (10 males and 4 females) and reported losing contact with 5 additional male wolverines (they were unable to determine if the lost males were the result of dispersal, radio failure, or undocumented mortality). Nine of the documented 14 wolverine mortalities (6 males and 3 females) or 64% of the total wolverine mortalities were attributable to trapping. According to the researchers, harvest from trapping was the primary factor that affected wolverine survival.

106. The documented wolverine mortalities from trapping in the Pioneer Mountains—a small island range in southwestern Montana with a high density of forest roads and snowmobile access—were particularly harmful to the local population. Of the 14 wolverines instrumented and followed in the Pioneer

Mountains study area during the three year period, 6 were killed in traps, including 4 adult males and 2 pregnant adult females.

107. The trapping of two pregnant females mortalities had a disproportionately large effect on wolverine demography in the Pioneers. The researchers report that while they were able to capture 2 subadults in the Pioneers during the first year of live trapping (2002), they failed to capture any subadults in the 3 subsequent years, suggesting that the harvesting of reproductive adults may have suppressed reproduction in the area. Trapping was the "dominant factor" affecting wolverine survival across the study areas.

108. In a June, 2006, report prepared for the Montana Department of Transportation (MDOT) on the association between transportation corridors and wolverine movement, researchers noted that high mortality rates, especially of reproductive females, appeared to be the major issue facing wolverine populations. Of the three individual wolverines captured in the Beaverhead Mountains for the study (a family group consisting of the a mother (F12), father (M10), and one offspring (M11)), two individuals—the mother and father—were killed by trappers in 2005 and the sole offspring died of natural causes. Subsequent to this event, no other wolverine tracks were detected in the entire portion of the Beaverhead Mountains ranging from Hamby Lake to Lost Trail Ski Area during 2005.

109. According to the Service, "[Trapping may] contribute to the likelihood that the wolverine will become extirpated in the foreseeable future by increasing the speed at which small populations of wolverine are lost from isolated habitats, and also by increasing mortality levels for dispersing wolverines that are required to maintain the genetics and demographics of wolverine populations in the

contiguous United States." 75 Fed. Reg. at 78051.

110. An additional source of wolverine mortality in Montana often occurs when wolverine are caught and killed in traps set for other species.

111. The accidental or incidental trapping or killing of wolverines in traps set for other species is well documented throughout the literature.

112. Incidents of incidental wolverine take are likely to increase due to the Department's decision in allow wolf trapping in Montana for the first time during the 2012-2013 wolf trapping season.

113. Over 1,900 individuals have obtained a license to engage in wolf trapping for the 2012-2013 season.

Montana: The only state in the contiguous United States to allow the trapping of wolverines

114. Despite the Service's December 14, 2010, determination that wolverines qualify for federal ESA protection, the Department continues to treat wolverines as "furbearers" that can be trapped for their fur.

115. Montana is the only state in the entire contiguous United States that still allows wolverines to be trapped.

116. Montana's 2011-2012 furbearer regulations authorized the killing of up to five wolverines (maximum of three females) a year.

117. Individuals with a $20 license are authorized to trap wolverine between December 1st and February 15th in three wolverine management units ("WMUs").

118. Trapping means to take or participate in the taking of wolverine by setting or placing any mechanical device, snare, deadfall, pit, or device intended to take wildlife or to remove wildlife from any of these devices. The reference to

"trapping" in this complaint refers to all forms of intentional take of wolverine.

119. The specific quotas by WMU region are as follows:

WMU	One (northern)	Two (central)	Three (southern)
wolverine quota	3	1	1
female subquota	1	-	-

120. No wolverine trapping is allowed in WMU 4, which covers part of the central area of Montana, between the Greater Yellowstone Ecosystem and the Crown of the Continent.

121. Prior to 2004, the Department regulated wolverines through the licensing of trappers, a bag limit of one wolverine per year per trapper, and no statewide limit.

122. The Department adopted new trapping regulations for the 2004-2005 trapping season that divided the State into three units with the goal of spreading the harvest more equitably throughout the State.

123. In 2008, the Department further refined their regulations by reducing the overall statewide harvest to the current level of 5 wolverines and no more than 3 females.

124. The Service reports that legal wolverine trapping in Montana in the recent past removed an average of 10.5 individual wolverine each year. This figure is consistent with the Department's annual "harvest reports" which document the killing of approximately 175 wolverines over the last 15 years, from 1996 to 2011.

125. Based on current population estimates, more wolverine have been trapped and killed in Montana over the last 15 years than likely currently reside in the State.

Public comment on Montana's authorization of wolverine trapping.

126. After the Service's December 14, 2010, determination that wolverine were "warranted" for protective ESA status, various members of the public (including members of Plaintiffs' organizations) submitted written and oral comments asking the Department to close the wolverine trapping season in Montana.

127. In 2011, before authorizing the 2011-2012 trapping season and quotas, the Department received more than 35 written comments from members of the public asking the Department to end the trapping of wolverines in Montana. Additional comments were also provided at the Department's meetings.

128. Members of the public commented that the Department was ignoring the best available science and findings of the Service's December 14, 2010, determination that wolverine are "warranted" for ESA listing, raised concerns about the small numbers and threats to the species, complained that the Department was not listening to the public's concerns, and specifically requested the Department close the wolverine trapping season.

129. On August 18, 2011, the Department finalized the 2011-2012 trapping season and quotas authorizing the killing of up to five wolverines.

130. In authorizing the trapping of wolverines for the 2011-2012 season, the Department did not respond to or otherwise address the public's comments and request to end the trapping of wolverines.

131. It is the Department's policy not to consider and respond to public comment unless changes or modifications are made to the previous year's rules and/or trapping quotas.

132. In 2012, before authorizing the 2012-2013 trapping season and quotas, the Department received five written comments from members of the public

asking the Department to, once again, end the trapping of wolverines in Montana. Additional comments were also provided during the Department's meetings.

133. Members of the public once again commented that the Department was ignoring the best available science and findings of the Service's December 14, 2010, determination that wolverines are "warranted" for ESA listing, raised concerns about the small numbers and threats to the species, and specifically requested the Department close the wolverine trapping season.

134. On August 2, 2012, the Department finalized the 2012-2013 trapping season and quotas authorizing the killing of up to five wolverines.

135. In authorizing the trapping of wolverines for the 2012-2013 season, the Department did not respond to or otherwise address the public's comments and request to end the trapping of wolverines.

Plaintiffs' petition to end the trapping of wolverines in Montana

136. On July 31, 2012, Plaintiffs submitted a formal petition for rulemaking to the Department (the Agency, Commission, and Director) pursuant to MAPA, § 2-4-315, MCA.

137. The petition requested the Department promulgate a new rule ending wolverine trapping in Montana until wolverines are no longer a candidate or protected species under the ESA.

138. A copy of the Service's December 14, 2010, determination that wolverine are warranted for ESA listing, along with 18 other exhibits, including the best available science and various studies on wolverines, was included in Plaintiffs' petition and submitted to the Department for consideration.

139. Plaintiffs' petition also provided five legal reasons to grant the petition and initiate rulemaking to end the trapping of wolverine in Montana until such

time as wolverine are no longer a candidate or protected species under the ESA.

The Department's September 21, 2012, denial of Plaintiffs' petition

140. On September 21, 2012, the Department responded to Plaintiffs' petition with a formal letter explaining that it does not have to consider the merits of the petition because "trapping rules" are per se exempt from rulemaking under MAPA.

141. In denying Plaintiffs' petition, the Department did not review, consider, discuss or consult with Department biologists or the Service on the merits of Plaintiffs' petition, including the best available science on the current status and threats to wolverine in Montana.

142. In denying Plaintiffs' petition, the Department did not address the status or threats to wolverines in Montana or provide any rationale in support of Montana's authorization of wolverine trapping.

143. In denying Plaintiffs' petition, the Department did not request a hearing or solicit public comment from interested persons.

144. In denying Plaintiffs' petition, the Department did not agree to take the matter under advisement, did not request more time to carefully consider the best available science and consult with state and federal biologists, or otherwise address whether trapping a candidate species awaiting federal ESA protection was consistent with the Department's legal obligations.

COUNT I

145. Plaintiffs incorporate by reference all preceding paragraphs.

146. The Department (and Commission) is an agency that falls under the purview of MAPA. § 2-3-102 (1), MCA; § 2-4-102 (2)(a), MCA.

147. Pursuant to MAPA, an interested person may petition an agency requesting the "promulgation, amendment, or repeal of a rule." § 2-4-315, MCA.

148. Within 60 days after submission of a petition, the agency "either shall deny the petition in writing or shall initiate rulemaking proceedings in accordance with [MAPA]." § 2-4-315, MCA. "A decision to deny a petition or to initiate rulemaking proceedings must be in writing and based on record evidence. The written decision must include the reasons for the decision. Record evidence must include any evidence submitted by the petitioner on behalf of the petition and by the agency and interested persons in response to the petition. An agency may, but is not required to, conduct a hearing or oral presentation on the petition in order to develop a record and record evidence and to allow the petitioner and interested persons to present their views." § 2-4-315, MCA.

149. On July 31, 2012, Plaintiffs submitted a formal petition for rulemaking to the Department in accordance with § 2-4-315, MCA and § 1.3.308, ARM.

150. The Department received the petition on August 1, 2012.

151. Plaintiffs' petition requested the Department promulgate a new administrative rule to end the trapping of wolverine in Montana until such time as wolverine are no longer a candidate or protected species under the federal ESA.

152. On September 21, 2012, the Department denied Plaintiffs' petition on its face, without reviewing or considering the arguments made in support of the petition.

153. The Department determined that Plaintiffs' petition was a request to adopt a "seasonal rule adopted annually or biennially" relating to trapping which is exempt from MAPA pursuant to § 2-4-102 (11)(b)(iv), MCA.

154. MAPA defines a "rule" as "each agency regulation, standard, or

statement of general applicability that implements, interprets, or prescribes law or policy . . .” § 2-4-102 (11), MCA.

155. Under MAPA, the Department may promulgate three types of rules: (1) administrative rules; (2) emergency rules; and (3) seasonal rules adopted annually or biennially.

156. Administrative rules are long-term rules that stay in effect until repealed or amended. Part 3 of MAPA delineates the rulemaking process for administrative rules. §§ 2-4-301 to 2-4-315, MCA.

157. Section 2-4-303, MCA governs emergency rules.

158. MAPA also provides for the adoption of seasonal rules adopted annually or biennially by the Department. Seasonal rules do not fall within the strict rulemaking requirements because they are not “rules” under MAPA. § 2-4-102 (11)(d), MCA. To qualify for the exemption from MAPA, the rule must seasonal in nature and be adopted by the Department either annually or biennially.

159. Plaintiffs’ petition requested the Department to adopt a long-term rule to end the trapping of wolverine in Montana until such time as they are no longer a candidate or listed species under the ESA. This is a request for an administrative rule, not a request for a seasonal rule adopted annually or biennnially.

160. The Department’s denial of Plaintiffs’ petition on the grounds that it is a request for seasonal rule exempt from MAPA is arbitrary, capricious, unlawful, and not in accordance with MAPA. § 2-4-704, MCA.

COUNT II

161. Plaintiffs incorporate by reference all preceding paragraphs.

162. Pursuant to § 87-1-201(9)(a)(ii), MCA, the Department has a

mandatory duty to ensure it is managing wolverine—a candidate species for listing under the ESA—in a manner that "assists in the maintenance or recovery" of the species.

163. Pursuant to § 87-1-201(9)(a)(i), MCA, the Department has a mandatory duty to ensure it is managing wolverine "in a manner the prevents the need for listing" under the federal ESA.

164. Pursuant to § 87-1-301(1)(a), MCA, the Department has a mandatory duty to ensure it sets "policies for the protection, preservation, management, and propagation" of wolverine.

165. Pursuant to § 87-1-201(9), MCA, the Department has a mandatory duty to develop a wolverine management program and management plan for wolverine.

166. On August 2, 2012, the Department adopted a final, seasonal rule for the 2012-2013 trapping season and annual quotas for 2012 authorizing the trapping of wolverines in Montana. No changes to the 2011 wolverine trapping regulations or annual quotas were made.

167. In authorizing the trapping of wolverines for the 2012-2013 furbearer season (as well as the 2011-2012 season), the Department did not consider, reference, discuss, apply, or take any steps to ensure compliance with its legal obligations under §§ 87-1-201 to 87-1-301, MCA.

168. The Department's authorization of wolverine trapping without first ensuring compliance with §§ 87-1-201 to 87-1-301, MCA is arbitrary, capricious, and not in accordance with law. § 2-4-704, MCA.

PRAYER FOR RELIEF

169. Plaintiffs incorporate by reference all preceding paragraphs.

170. WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

A. Issue a declaratory judgment that the Department's September 21, 2012, denial of Plaintiffs' petition is arbitrary, capricious, and not in accordance with law as alleged above;

B. Issue a declaratory judgment that the Department's August 2, 2012, decision authorizing the trapping of wolverines in Montana is arbitrary, capricious, and not in accordance with law as alleged above;

C. Set aside the Department's August 2, 2012, decision authorizing wolverine trapping and September 21, 2012, decision denying Plaintiffs' petition.

D. Remand this matter back to the Department and mandate that the Department: (1) consider and respond to Plaintiffs' request for rulemaking, including the best available science on the status of and threats to wolverine in Montana, before issuing a final decision to either deny or grant Plaintiffs' request for rulemaking in accordance with § 2-4-315, MCA; (2) consider and respond to Plaintiffs' request to declare the wolverine trapping season closed pursuant to § 87-1-304 (4) MCA, due to the threat of undue depletion; and (3) consider and explain how trapping wolverines is consistent with the Department's legal obligations under §§ 87-1-201 to 87-1-301, MCA, before authorizing wolverine trapping for the 2012-2013 season;

E. Suspend and/or enjoin the 2012-2013 wolverine trapping season in Montana until the Department complies with the law as alleged above;

F. Suspend and/or enjoin the Department from conducting and/or

authorizing the trapping of wolverines in Montana until the Department complies with the law as alleged above;

G. Issue such declaratory, injunctive, or other relief as Plaintiffs may subsequently request;

H. Retain continuing jurisdiction of this matter until the Department fully remedies the violations of law complained of herein;

I. Grant Plaintiffs their costs and expenses of litigation, including reasonable attorneys' fees; and

K. Grant such other relief that this Court deems necessary, just, and proper.

Respectfully submitted this 11th day of October, 2012.

WESTERN ENVIRONMENTAL LAW CENTER

Matthew K. Bishop
103 Reeder's Alley
Helena, MT 59601
(406) 324-8011 (tel.)
(406) 443-6305 (fax)
bishop@westernlaw.org

WESTERN ENVIRONMENTAL LAW CENTER

Shiloh Hernandez
103 Reeder's Alley
Helena, MT 59601
(406) 204-4861 (tel.)
(406) 443-6305 (fax)
hernandez@westernlaw.org

Counsel for Plaintiffs