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Attorneys for Plaintiffs

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

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ALLIANCE FOR THE WILD ROCKIES, )  
NATIVE ECOSYSTEMS COUNCIL, ) CV-14-  
ROCKY MOUNTAIN WILD, AND )  
SIERRA CLUB, INC., ) COMPLAINT FOR  
 ) DECLARATORY AND  
Plaintiffs ) INJUNCTIVE RELIEF

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v. )  
 )  
 MICHAEL BEAN; SALLY JEWELL; and )  
 U.S. FISH AND WILDLIFE SERVICE, )  
 )  
 Defendants. )  
 )

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**NATURE OF ACTION**

1. This is a citizens’ suit under the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), and an action under the Administrative Procedures Act (APA), 5 U.S.C. § 702 *et. seq.*, challenging Defendants’ September 12, 2014 revised designation of critical habitat for the Canada lynx as being legally and biologically inadequate, underinclusive and incomplete.

2. As set forth fully below, this challenge is based on the failures of the U.S. Fish and Wildlife Service (FWS) to: 1) designate all occupied *and* unoccupied areas that are essential to the conservation of the species as required by the ESA, 16 U.S.C. § 1532(5)(A); and 2) otherwise base the critical habitat designation on the best scientific data available as required by the ESA, 16 U.S.C. § 1533(b)(1)(B).

3. As a result of its action, FWS’s critical habitat designation omitted large areas of lands that are critically important to the conservation and recovery of the lynx. Areas that the FWS wrongfully excluded from the critical habitat designation include, but are not limited to, areas adjacent to

the current designation in Montana which share the same primary constituent elements as the designated areas, and areas which provide essential connectivity and habitat corridors between areas in Montana and between the Northern and Southern Rockies. Those areas, primarily in the State of Montana, include habitat in the Lolo, Bitterroot, Flathead, Helena, Lewis & Clark, Beaverhead-Deerlodge, Gallatin, Targhee, Clearwater, and Idaho Panhandle National Forests. Areas that the FWS wrongfully excluded also include habitat in the Southern Rockies, particularly habitat in Colorado occupied by lynx.

4. Plaintiffs seek a declaratory judgment that FWS's designation of critical habitat was contrary to the ESA and APA; and injunctive relief that keeps the current critical habitat designation in place while remanding the decision to the agency to correct its omissions of habitat, base its decision on the best available scientific data, and to add areas to the critical habitat designation accordingly.

#### **JURISDICTION AND VENUE**

5. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-02 (declaratory judgment), 28 U.S.C. § 2202 (further relief), the ESA citizen suit provision at 16 U.S.C. § 1540(g), and the APA, 5 U.S.C. §§ 701-06.

6. Venue in this case is proper under § 28 U.S.C. §§ 1391(e) and LR 1.2 and LR 3.2. Habitat occupied by Canada lynx and potential future occupied Canada lynx habitat, including areas that FWS designated as critical habitat and areas that should have been designated as critical habitat, are located in this judicial district and in this division. Plaintiffs Alliance for Wild Rockies and Native Ecosystems Council have offices in this judicial district, and Plaintiff Sierra Club has an office in this division. The Fish and Wildlife Service has an office in this district and division. A substantial part of the events or omissions giving rise to the claims occurred in this district and division, and this Court has ruled on designation of lynx critical habitat recently.

#### **PLAINTIFFS**

7. Alliance for the Wild Rockies (AWR) is a nonprofit public interest organization based in Montana dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, including its native plant, fish, and animal life, and its naturally functioning ecosystems. AWR has over 2,000 members, and has been involved in public land management in the area for 26 years. The Alliance for the Wild Rockies has commented on numerous federal government activities that would affect lynx and lynx habitat. Members use and enjoy the National Forests in lynx

habitat for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Members intend to continue to use and enjoy the affected area frequently and on an ongoing basis in the future.

8. Native Ecosystems Council (NEC) is a nonprofit public interest organization based in Three Forks, Montana, with an interest in protecting native ecosystems on public lands in the Northern Rockies. NEC has been active in public lands management for 22 years. Members use and enjoy the lynx habitat in National Forests for hiking, fishing, hunting, camping, birding, riding, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. NEC's executive director Dr. Sara Johnson is a former wildlife biologist for the Forest Service. Members intend to continue to use and enjoy the affected areas frequently and on an ongoing basis in the future.

9. The Sierra Club was founded in 1892, and is the nation's oldest grass-roots environmental organization. Headquartered in San Francisco, California, it has more than 700,000 members nationwide, including thousands of members in Montana. The Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and

enlist humanity to protect and restore the quality of the natural and human environments. The Sierra Club is dedicated to the protection and preservation of the natural and human environment, including wildlife and threatened and endangered species such as the Canada lynx. The Sierra Club has members who use the National Forests and other public lands included in the Canada lynx critical habitat listing, as well as areas wrongfully omitted from the listing, for recreation, wildlife observation, study and photography, and aesthetic, scientific and business purposes. Sierra Club members' use of the areas includes observing, looking for and otherwise enjoying the wildlife, including the Canada lynx. The loss of the Canada lynx would diminish their enjoyment of these areas.

10. Rocky Mountain Wild (RMW) is a nonprofit public interest conservation organization dedicated to the conservation and recovery of native species and ecosystems across the Greater Southern Rockies. It maintains an office in Denver, Colorado. RMW uses the best available science to forward its mission through participation in policy formation, administrative processes, legal action, public outreach and education. RMW uses all of these tools to prevent the extinction of imperiled species like Canada lynx. RMW has over 400 members and supporters, many of whom reside in states with lynx habitat. The organization and its members and

supporters have a long history of interest and involvement in Canada lynx conservation. For example, Colorado Parks and Wildlife (then Colorado Division of Wildlife) invited RMW staff to assist with releases of reintroduced lynx, where RMW staff observed and photographed lynx. RMW staff also collaborated with Colorado Parks and Wildlife (then Colorado Division of Wildlife) to start and coordinate a volunteer lynx tracking program, which continues to provide valuable information to the reintroduction effort. RMW is currently involved in efforts to build a wildlife overpass in known lynx habitat aimed at improving habitat connectivity and reducing highway mortality for Canada lynx and other species in the area. RMW's staff, members and supporters have visited lynx habitat across Colorado and Montana on numerous occasions, for the purpose of observing lynx or signs of lynx presence and other imperiled species. When RMW members, supporters and staff visit lynx habitat, they also partake in recreational activities, such as hiking, camping, and nature photography. RMW members, supporters and staff plan to return to lynx habitat and to continue these activities frequently and on an ongoing basis in the future. The loss of lynx recovery potential in Montana, Idaho, and the Southern Rockies will harm RMW's staff, members and supporters spiritually, aesthetically, emotionally and professionally.

11. In addition, Plaintiffs and their members have actively participated in the critical habitat designation process, including the filing of public comments. Plaintiffs' members stand to be injured, and will continue to be adversely affected and irreparably injured, by Defendants' failure to comply with the law as described herein. Plaintiffs have no adequate remedy at law.

### **DEFENDANTS**

12. Defendant Michael Bean is the Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of Interior. He signed the critical habitat designation at issue in this lawsuit. He is sued in his official capacity.

13. Defendant Sally Jewell is the Secretary of the Interior and in that capacity is responsible for the Canada lynx critical habitat designation. She is sued in her official capacity.

14. Defendant U.S. Fish and Wildlife Service is an agency within the federal Department of Interior, which is responsible for administering the provisions of the ESA, in particular the Canada lynx listing and critical habitat designation under the ESA.

### **STATUTORY FRAMEWORK**

15. The ESA, passed by Congress in 1973, establishes a scheme for the protection of endangered and threatened species and their habitats. Under the

ESA, the Secretary of the Interior (the “Secretary”) must identify endangered species, designate their “critical habitats,” and develop and implement recovery plans. 16 U.S.C. §§ 1533, 1536, 1538, 1539.

16. 16 U.S.C. § 1533 – “Section 4” – of the ESA governs the listing of species and the designation of their critical habitats. Pursuant to this section, the Secretary must first “determine whether any species is an endangered ... or threatened species.” 16 U.S.C. § 1533(a)(1). The Secretary of the Interior has charged the Fish and Wildlife Service with carrying out the ESA’s listing duties, including designating critical habitats for species listed as endangered or threatened. 50 C.F.R. § 402.01(b) (2001).

17. For endangered or threatened species, the Secretary is required to designate any habitat of the species which is considered to be critical habitat. 16 U.S.C. § 1533(a)(3)(A)(i). This includes occupied *and* unoccupied areas that are essential to the conservation of the species. 16 U.S.C. § 1532(5)(A)(i), (ii).

18. The Secretary must “concurrently ... designate any habitat of such species which is then considered to be [a] critical habitat,” unless the Secretary determines that such a designation is not “prudent.” 16 U.S.C. § 1533(a)(3).

19. Rather than “concurrently” designating the critical habitat when it lists the species as endangered or threatened, the Secretary may instead publish notice extending the period for designation by an additional year. 16 U.S.C. §§ 1533(b)(6)(A)(ii), 1533(b)(6)(C)(ii). The statute clearly requires a designation of critical habitat within the one-year additional period after the species is listed, unless the Secretary deems that critical habitat of such species is not then determinable, in which case the Secretary may extend the one-year period specified by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat. 16 U.S.C. § 1533(b)(6)(C)(ii)

20. In addition, the ESA requires the Service to designate the critical habitat “on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2).

21. Section 7 of the ESA requires federal agencies to consult with FWS to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of endangered species “or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical.” 16 U.S.C. §

1536(a)(2). In many cases this level of protection is similar to that already provided to species by the “jeopardy standard.” However, areas that are currently unoccupied by the species, but are needed for its recovery, are protected by the prohibition against adverse modification of critical habitat. As is the case for the lynx, in areas where the species is not currently present there may be some project modifications that would not have occurred without the critical habitat designation.

22. The ESA provides for citizens’ suits for the Secretary’s violations of non-discretionary duties. 16 U.S.C. § 1540(g)(1)(C). On September 15, 2014 Plaintiffs mailed to Defendant Jewell the required 60-day Notice of Intent to Sue letter, pursuant to 16 U.S.C. § 1540(g)(2)(A). Defendant Jewell received the notice and 60 days have expired since Plaintiffs here provided the notice.

## **STATEMENT OF FACTS**

### **Description of the Canada lynx and its Habitat**

23. The Canada lynx (“lynx”) is a medium-sized wild cat comparable to the bobcat in size. The lynx is distinguishable from similar-sized cats by its long legs and large paws, which both make it well-adapted to hunting in deep snow, and its tufts of dark hair on the ears.

24. The Canada lynx is highly dependent on snow-covered areas due to its highly specialized predator-prey relationship with the snowshoe hare – a species evolved to survive in areas that receive deep snow. Studies show that snowfall is the strongest indicator of lynx occurrence on a regional scale.

The lynx depend on areas with abundant snowshoe hare populations and lots of deep, fluffy snow where they have a competitive advantage over coyotes, bobcats and other predators. Fluctuations in the snowshoe hare population due to availability of suitable snow-covered habitat cause similar fluctuations in the lynx population.

25. The Canada lynx historically roamed throughout the boreal forests of North America, including Alaska, Canada and throughout much of the contiguous United States. The lynx historically occupied four distinct regions within the contiguous United States, including the Northeast, Great Lakes states, northern Rocky and Cascade Mountains, and southern Rocky Mountains. The current range of the lynx extends from Alaska and Canada into the contiguous United States, where it is associated with the coniferous and mixed coniferous/deciduous forests of the southern boreal forest.

26. Throughout the 1900s, lynx populations declined in the United States due to trapping for fur, loss of habitat from forest logging and associated road building, and large-scale development. Only approximately 1,000 lynx

remain in the contiguous United States, which is considered to be the southern portion of its range. Most of the remaining lynx in the lower 48 states live in forested and high elevation snow-capped areas in Montana, Washington, Idaho and Colorado.

**Fish and Wildlife’s Critical Habitat Designation for the Canada lynx**

27. In 1982, the Fish and Wildlife Service (“FWS”) first identified the lynx as a potential candidate for listing under the Endangered Species Act (“ESA”), but took no action for many years thereafter. Beginning in August of 1991, FWS was involved in several years of litigation with conservation groups over its refusal to list the lynx. In 1998, the lynx was proposed for listing as a “threatened” species under the ESA. 63 Fed. Reg. 36993 (July 8, 1998).

28. In 2000, the FWS staff in the Montana Field Office completed its Lynx Final Rule, which listed the contiguous United States Distinct Population Segment (“DPS”) of the lynx as “threatened.” 65 Fed. Reg. 16052 (March 24, 2000). However, rather than proposing a designation of critical habitat concurrently with the listing or within one year as required by the ESA, 16 U.S.C. § 1533(b)(6)(C), the FWS announced that “[d]eferral of the critical habitat designation for Canada lynx allows us to concentrate our limited resources on higher priority critical habitat,” and that “[w]e will

develop a proposal to designate critical habitat for the Canada lynx as soon as feasible, considering our workplace priorities.” Id. at 16052.

29. Several environmental organizations subsequently initiated an action in Federal District Court challenging the listing of the lynx as threatened rather than endangered and claiming that FWS acted arbitrarily and capriciously under the ESA and the APA when it failed to designate critical habitat for the lynx. Defenders of Wildlife v. Norton, No. 00-2996 (D.D.C. filed Dec. 14, 2000). On December 26, 2002, District Judge Gladys Kessler issued an order setting aside parts of the Final Rule but leaving the listing intact, remanded to the FWS for further consideration of the lynx’s status under the ESA, and ordered the Service to “undertake prompt rulemaking” in order to designate critical habitat for lynx. Defenders of Wildlife v. Norton, 239 F.Supp.2d 9, 26 (D.D.C. Dec. 26, 2002)(order granting plaintiffs’ motion for summary judgment).

30. In response to the court order, the FWS Montana Field Office prepared a clarification of findings. 68 Fed. Reg. 40076 (July 3, 2003). The clarification addressed several of the court’s concerns as well as many public comments. One public comment suggested that climate change posed a threat to lynx populations and cited a detailed study that predicted lynx habitat would be diminished and could be completely eliminated as a result

of decreasing snow depths. Nonetheless, the FWS concluded that “the potential for long-term reductions in snow depth because of climate change is speculative at this time and is not a threat to lynx within the foreseeable future.” *Id.* at 40083.

31. In 2006, the FWS finally designated critical habitat for the lynx, but limited it to 1,841 square miles in Minnesota, Montana, and Washington. 71 Fed. Reg. 66007 (Nov. 9, 2006).

32. In March of 2007, the Department of the Interior (“DOI”) Inspector General Earl Devaney released a report of an internal investigation into the conduct of Deputy Secretary of Interior for Fish, Wildlife and Parks Julie MacDonald. The report found that MacDonald had manipulated and undermined scientific findings in favor of land developers and had been heavily involved with editing, commenting on, and reshaping the Endangered Species Program's scientific reports from the field. MacDonald resigned in May of 2007.

33. On July 20, 2007, the FWS acknowledged that because MacDonald may have inappropriately influenced the lynx critical habitat designation, the rule “may not be supported by the record, may not be adequately explained, or may not comport with the best available scientific and commercial information.”

34. On January 15, 2008, Judge Kessler ordered the FWS to issue a proposed revised critical habitat designation by February 15, 2008, and a final rule for revised critical habitat by February 15, 2009. Defenders of Wildlife v. Kempthorne, nos. 00-2996, 04-1230 (D.D.C. Jan. 15, 2008)(order setting lynx critical habitat deadlines).

35. In February of 2008, the FWS staff in the Montana and Maine Ecological Services Offices completed the revised proposed critical habitat designation for the Canada Lynx. 73 Fed. Reg. 10860 (Feb, 28, 2008).

36. The FWS announced its revision of the proposed revised critical habitat designation for the Canada lynx on October 21, 2008. 73 Fed. Reg. 62450. Alliance for Wild Rockies, the Sierra Club, Center for Native Ecosystems and numerous other environmental organizations submitted public comments on the proposed critical habitat designation on November 20, 2008.

37. A final rule designating revised critical habitat for the lynx was completed by staff in the Montana Ecological Services Offices in February of 2009. 74 Fed. Reg. 8616 (February 25, 2009) (“2009 Rule”). The 2009 Rule designated approximately 39,000 square miles of critical habitat in Maine, Minnesota, Montana, Wyoming, Idaho, and Washington. The Rule, however, excluded legally and biologically adequate critical habitat for the

lynx in many crucial areas and failed to consider the effects of climate change on lynx habitat.

38. Plaintiffs here challenged the 2009 Rule in this Court. This Court found that the 2009 Rule arbitrarily excluded the Southern Rockies and areas of Montana and Idaho from critical habitat designation and remanded the critical habitat designation to FWS while maintaining the designated critical habitat from the 2009 Rule during the period of remand. Alliance for the Wild Rockies v. Lyder, 728 F.Supp.2d 1126 (D. Mont 2010).

39. Pursuant to a series of agreements with Plaintiffs, FWS eventually released a revised draft critical habitat designation on September 26, 2013. 78 Fed. Reg. 59430 (September 26, 2013). Plaintiffs here submitted comments on the proposed rule.

40. On September 12, 2014, FWS published a revised final rule designating critical habitat for lynx in the lower 48 states. 79 Fed. Reg. 54782 (September 12, 2014) (the “2014 Rule”). Like the 2009 Rule, the 2014 Rule does not designate critical habitat in areas that are essential to the survival and recovery of lynx, including the Southern Rockies and areas in Montana, Idaho, and Washington. Plaintiffs challenge the 2014 Rule in this lawsuit.

41. Like the 2009 Rule, the 2014 Rule limits its scope to currently-occupied lynx habitat and fails to include any portions of unoccupied lynx habitat that are essential to the conservation of the species. The 2014 Rule designates less total area as lynx critical habitat than the 2009 Rule.

### **COUNT ONE**

(Violations of the Endangered Species Act and the Administrative Procedure Act in the failure to base the Critical Habitat designation on the Best Available Science)

42. The allegations of paragraphs 1 - 41 are incorporated by reference.

43. Under the ESA, 16 U.S.C. § 1533(b)(1)(B), the FWS “shall designate critical habitat and make revisions thereto, under section (a)(3) of this section on the basis of the best scientific data available.” Nonetheless, in the Final Rule the FWS failed to base its critical habitat designation on the best scientific data available. Thus, the FWS violated its non-discretionary duty to base its decision on the best scientific data available and/or its designation of critical habitat in the Final Rule was arbitrary and capricious, an abuse of discretion and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A).

44. In addition, the ESA requires that when the Secretary publishes its final regulation on critical habitat it must do so based “on such data as may be available at that time.” 16 U.S.C. § 1533(b)(6)(C)(ii). Thus, the FWS

violated its non-discretionary duty under § 1533(b)(6)(C)(ii) and/or its designation of critical habitat in the Final Rule was arbitrary and capricious, an abuse of discretion and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A).

45. FWS failed to use the best scientific data and methods available, in violation of 16 U.S.C. § 1533(b)(1)(B). It did so as set forth above in this Complaint, and further in regards to:

- a) Its determination of what constitutes a recovered lynx population in the lower 48 and the areas of habitat necessary to support this population, including areas in the Southern Rockies, Washington, Idaho, and Montana;
- b) Its determination of the definition of the Primary Constituent Elements for lynx. PCEs for lynx are boreal forest landscapes supporting a mosaic of differing successional forest stages and containing: (i) presence of snowshoe hares and their preferred habitat conditions; (ii) winter conditions that provide and maintain deep fluffy snow for extended periods of time; (iii) sites for denning that have abundant coarse woody debris; and (iv) matrix habitat (e.g., hardwood forest, dry forest, non-forest, or other habitat types that do not support snowshoe hares). These PCEs are replete with vague and

- undefined terms, allowing them to be applied arbitrarily and inconsistently, and fail, *inter alia*, to include any element to provide for maintenance and recruitment of lynx winter habitat;
- c) Its determination of what habitat is “unoccupied” and “occupied” by lynx. FWS’s determination of “occupied” conflicts with the determination of “occupied” at the time the lynx was listed, and conflicts with the best available science and determinations of “occupied” by sister agencies. FWS’s determination of “unoccupied” fails to account for occurrence records, and is premised upon a lack of formal surveys and data, and is further premised upon the default notion that lynx are absent from their historical range;
  - d) Its determination of what habitat is essential for the conservation of lynx;
  - e) Its determination of the historical populations of lynx;
  - f) Its determinations regarding hare densities in varying regions;
  - g) Its determination of the sustainability of populations of lynx;
  - h) Its failure to conduct appropriate surveys for lynx;
  - i) Its failure to account adequately for threats to the species, including trapping, illegal hunting, and the effects climate change in designation of lynx critical habitat; and

j) Its failure to determine whether there is a need for special management on certain federal lands.

46. The FWS's failure to base its decision on the best available science means that the agency overlooked a serious aspect of the problem and rendered a decision that was contrary to the evidence before the agency. Therefore, the Final Rule was arbitrary and capricious, an abuse of discretion and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A).

## **COUNT TWO**

(Failure to Designate all Necessary Occupied Critical Habitat in violation of the ESA and the Administrative Procedures Act)

47. The allegations of paragraphs 1 - 46 are incorporated by reference.

48. Critical habitat designation must include: "(i) the specific areas within the geographic area occupied by the species, at the time it is listed. . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). However, the FWS did not designate all areas that meet the requirements of 16 U.S.C. § 1532(5)(A)(i).

49. Areas of Montana, Idaho, and the Southern Rockies were excluded as critical habitat despite these areas supporting lynx populations at the time the

lynx was listed as well as containing the physical and biological features essential to the conservation of the species.

50. Even though the Southern Rockies currently sustain breeding populations of lynx, FWS omitted the Southern Rockies from critical habitat designation due to its apparent uncertainty about historical populations of lynx in the Southern Rockies, its apparent uncertainty whether the Southern Rockies can sustain a lynx population over time, and its apparent uncertainty whether the Southern Rockies has connectivity to populations of lynx in northern regions of the lower 48 and Canada. The 2014 Rule states that the Southern Rockies do not “possess the physical and biological features essential to lynx in sufficient quantity and spatial arrangement to sustain lynx populations over time. Therefore, we find that the habitat in Colorado and elsewhere in the Southern Rocky Mountains does not contain the PCE.” 79 Fed. Reg. at 54817. However, lynx are indigenous to the Southern Rockies, and proof of historical presence, proof of long-term sustainability, and proof of connectivity or isolation from other populations are not elements of critical habitat designation or of Primary Constituent Elements, even as PCEs are defined by FWS. Thus FWS applied incorrect legal standards under 16 U.S.C. § 1532(5)(A)(i), and the agency’s conclusions were contrary to the evidence before the agency.

51. FWS omitted areas of Montana and Idaho that sustain present lynx populations from critical habitat designation. FWS failed to utilize the best available science on the existence, quantity, and spatial arrangement of the PCEs in the areas excluded; failed to apply the PCE definition to all areas excluded and in a consistent manner; failed to document and explain how the PCEs were applied to certain areas, what evidence is needed to show PCEs “in sufficient quantity and spatial arrangement” and what this means, and/or how contiguous areas occupied by lynx within the same mountain range are differentiated – one deemed to have PCEs and the other not; imposed more stringent requirements and/or different requirements than required by the ESA or PCE definition; failed to recognize that each PCE does not have to be present or present in “sufficient quantity and spatial arrangement” to qualify an area for critical habitat designation; used unreliable and arbitrary methods and proxies to determine the presence (or absence) of PCEs in the areas excluded; used factors (e.g., proximity to Canada or other populations, viability, need for “self-sustaining” population etc.) not included in the PCE definition or imposed by the ESA; failed to consider and apply the PCEs to meet the ESA’s recovery goals ; used one or two PCE factors as a litmus test for critical habitat designation instead of as relevant factors; excluded areas without applying the PCE definition;

required a “specific quantity and spatial arrangement” of PCEs while admitting these are “not known” and that such quantities and arrangement may differ across the lynx’s range; used artificial political (e.g. state lines), National Forest, and transportation boundaries – instead of the presence of PCEs – to demarcate critical habitat boundaries; failed to recognize that areas not currently containing all the PCEs but with the capability to do so in the future may qualify for critical habitat designation; and did not apply the PCEs equally to each area excluded.

52. There is no rational connection between the evidence in the record and the FWS’s failure to designate the above occupied areas as critical habitat, and the failure to designate is not supported by reliable and sufficient evidence.

53. In sum, the FWS’s actions as described above violated the ESA and/or its decision was arbitrary and capricious, an abuse of discretion and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A).

### **COUNT THREE**

(Failure to Designate all Necessary Unoccupied Critical Habitat in violation of the ESA and the Administrative Procedures Act)

54. The allegations of paragraphs 1 - 53 are incorporated by reference.

55. Critical habitat designation must also include: “(ii) the specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination that such areas are essential to the conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii).

56. In this case, the FWS excluded any area that it deemed unoccupied, including areas in Montana, Idaho, and northeastern Washington, as well as corridors for connectivity between occupied regions. Thus FWS determined that no unoccupied habitat was essential to the conservation of the species. That is inconsistent with § 1532(5)(A)(ii), which expressly provides for including unoccupied habitat.

57. The FWS excluded unoccupied habitat that is essential to the conservation of the species, e.g. for distribution, connectivity and interaction of current and future populations, and for future refuge due to loss of habitat from climate change. This includes areas in Montana, Idaho, Washington and the Southern Rockies.

58. The FWS definition of “unoccupied” habitat was unduly restrictive. This led to the FWS excluding areas and ignoring or overlooking population data as described above.

59. The FWS failed to conduct, use, rely on, or otherwise consult any reliable lynx surveys or data demonstrating the areas deemed “unoccupied”

– including areas that were historically occupied by lynx and where anecdotal observations exist – were in fact unoccupied at the time of listing or remain unoccupied today; (2) failed to utilize the best available and latest science on the location and importance of “unoccupied” travel corridors and linkage zones between sup-populations of lynx within the contiguous United States and lynx in the contiguous United States and Canada to lynx conservation; (3) failed to utilize the best available and latest science on the location and importance of “unoccupied” areas to lynx in response to climate change; (4) never explained and documented why certain “unoccupied” areas are not essential to the conservation of the species; (5) failed to analyze the need for other areas – beyond those areas that are “occupied” and designated as critical habitat – that may need to be set aside and protected for the future expansion and recovery of lynx in the contiguous United States; (6) relied on other factors, such as existing regulatory protections or management plans, unrelated to the ESA obligations, in deciding not to designate “unoccupied” areas as critical habitat; and (7) applied the wrong standard when evaluating unoccupied areas (i.e., refused to designate unoccupied areas because they would “not address the threat for which the DPS was listed” instead of evaluating whether such areas are essential to lynx conservation).

60. In sum, the FWS's actions as described above violated the ESA and/or its decision was arbitrary and capricious, an abuse of discretion and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A).

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs request this Court to find for Plaintiffs and to enter a judgment order:

- a) Declaring that the Fish and Wildlife Service's designation of critical habitat for the Canada lynx was in violation of the Endangered Species Act;
- b) Declaring that the Fish and Wildlife Service's designation of critical habitat for the Canada lynx was arbitrary and capricious, an abuse of discretion and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2)(A);
- c) Entering an injunction that keeps the current critical habitat designation in place, while remanding the decision to the agency to:
  - (i) reconsider and correct its omission of areas of critical habitat, including those identified above, and add them to the critical habitat designation;

- (ii) base its decision on remand on the best available scientific data and the data available at the time of its decision.
- d) Awarding Plaintiffs their costs, expenses and attorneys' fees under ESA and the Equal Access to Justice Act, 28 U.S.C. § 2412, and other applicable law; and
- e) Providing for such other relief as the Court deems just and appropriate.

Respectfully submitted, this 17th day of November 2014.

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