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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CENTER FOR NATIVE ECOSYSTEMS,
a nonprofit corporation; SINAPU, a nonprofit
corporation; ANIMAL PROTECTION OF NEW
MEXICO, a nonprofit corporation; ANIMAL
PROTECTION INSTITUTE, a nonprofit
corporation; FOREST GUARDIANS, a nonprofit
corporation; and CARSON FOREST WATCH,)
a nonprofit organization,)

Plaintiffs,

vs.

WILDLIFE SERVICES, a federal program;
WILLIAM H. CLAY, Deputy Administrator,
Wildlife Services; ANIMAL AND PLANT HEALTH
INSPECTION SERVICE (APHIS), a federal agency;
BOBBY ACORD, Administrator, APHIS; and
the UNITED STATES DEPARTMENT OF
AGRICULTURE, a federal department,)

Defendants.)

Civil Action No. _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs bring this civil action for declaratory and injunctive relief against the above named Defendants (hereinafter Wildlife Services or “WS”) pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540 (g), and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 to 706, for violations of the ESA and National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 to 4370e.

2. This civil action arises out of WS’s authorization, funding, and carrying out of wildlife killing activities in the Southern Rocky Mountains – an area currently occupied by threatened Canada lynx (hereinafter “lynx”).

3. The use of the term “Southern Rocky Mountains” or “Southern Rockies” in this complaint refers specifically to a relatively small geographic area that stretches from western and southwestern Colorado into north-central New Mexico. This area, which is known to be occupied by lynx, encompasses the San Juan and Sangre de Cristo Mountain ranges.

4. To date, WS has, and continues, to use harmful, lethal, and indiscriminate wildlife killing methods (i.e., aerial gunning, leghold and body-crushing traps, snares, and poisons like M-44s and Compound 1080 collars) to destroy native wildlife like bobcats, bears, mountain lions, coyotes, badgers, and foxes as a means of protecting livestock interests in the Southern Rockies.

5. WS conducts these lethal and indiscriminate wildlife killing activities (referred to by WS as “predator damage management” or “PDM” activities) in

the Southern Rockies out of its Colorado and New Mexico State Offices.

6. In conducting these wildlife killing activities in the Southern Rockies, WS has failed, and continues to fail, to complete formal consultation with the U.S. Fish and Wildlife Service (“FWS”) to insure that its actions are not jeopardizing the continued existence of lynx in the Southern Rockies. Such formal consultation is explicitly required by section 7 of the ESA, 16 U.S.C. § 1536. WS has also failed to assess the direct, indirect, and cumulative environmental impacts of its wildlife killing activities in the Southern Rockies on lynx as required by NEPA.

7. WS’s failure to comply with section 7 of the ESA and NEPA creates an increased risk of actual, threatened, and imminent harm to the lynx and its survival in the Southern Rockies.

8. As such, the Plaintiffs – a coalition of organizations dedicated to protecting and restoring lynx to the Southern Rockies – are therefore compelled to bring this civil action.

9. WS’s failure to comply with the requirements of section 7 of the ESA and NEPA clearly represents “agency action unlawfully withheld or unreasonably delayed” and is “arbitrary and capricious, an abuse of discretion, and not in accordance with law.” 5 U.S.C. §§ 706 (1) and (2)(A).

JURISDICTION AND VENUE

10. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 (Federal Question).

11. The Court has the authority to review the agency inaction and/or action of the Defendants complained of herein, and grant the relief requested, for Plaintiffs’ ESA

claims pursuant to the ESA's citizen suit provision, 16 U.S.C. § 1540 (g). All requirements for judicial review required by the ESA, 16 U.S.C. § 1540 (g), including the requirement of providing sixty days notice of intent to sue prior to filing a civil action, have been satisfied.

12. The Court has the authority to review the agency inaction and/or action of the Defendants complained of herein, and grant the relief requested, for Plaintiffs' NEPA claims pursuant to the APA, 5 U.S.C. §§ 701-706.

13. The relief sought is authorized by 28 U.S.C. § 2201 (Declaratory Judgment), 28 U.S.C. § 2202 (Injunctive Relief), 16 U.S.C. § 1540 (ESA), and 5 U.S.C. § 706 (APA).

14. Venue is properly before this Court pursuant to 28 U.S.C. § 1391(e).

15. There is a present and actual controversy between the parties.

PARTIES

16. Plaintiff, CENTER FOR NATIVE ECOSYSTEMS ("CNE"), is a non-profit advocacy organization dedicated to conserving and recovering naturally functioning ecosystems in the greater Southern Rocky Mountains and plains. It maintains offices in Paonia and Boulder, Colorado. CNE has approximately 200 members in Colorado and other states including New Mexico. Many of CNE's members and staff live in and around the Southern Rockies where lynx have been released, will be released, and currently reside. CNE and its members and staff value the ways that humans benefit from protecting native biological

diversity, including protecting clean water and fresh air, healthy human communities, sources of medicines and foods, and recreational opportunities. CNE and its members and staff believe that all species and their natural communities have the right to exist and thrive. CNE uses the best available science to forward its mission through participation in policy formation, administrative processes, legal action, public outreach and organizing, and education. CNE has a specific, concrete interest in protecting and restoring the Canada lynx and its habitat to the Southern Rockies and is leading a campaign with other conservation groups to that end. The conservation and recovery of lynx in the Southern Rockies is a major program effort for CNE. CNE repeatedly reports on the status of Colorado's lynx release program to its members and the press. CNE repeatedly distributes news releases to the media and garners news coverage on Southern Rocky Mountain lynx issues. CNE prepared and submitted a comment letter, signed by eight other conservation groups, on the Forest Service's scoping notice regarding the preparation of forest plan amendments for Canada lynx throughout Colorado and southern Wyoming. CNE has actively tracked the Forest Service's lynx habitat mapping process in the Southern Rockies over the past several years, frequently communicating with various Forest Service biologists and other staff and reviewing Forest Service data and maps. CNE frequently raises concerns about the potential impacts of proposed land management actions on lynx and lynx habitat, and frequently assists other conservation organizations in doing the same. For example, CNE joined groups in submitting comments on the proposed Millswitch Timber Sale

in which we discussed at some length potential impacts to lynx and lynx habitat. Similarly, we joined several other groups in submitting an October 25, 2002 comment letter on the proposed Missionary Ridge Timber Salvage project, again raising concerns about potential impacts of the proposed project on lynx and lynx habitat. CNE also prepared a guide on the status, conservation needs, and management implications regarding lynx in the Southern Rocky Mountains, and distributed this guide to other conservation groups throughout the region. CNE's members and staff have, and will continue, to regularly and repeatedly use the "core lynx recovery area" in southwestern Colorado – including areas throughout the San Juan Mountains and Sangre de Cristo Mountains in north-central New Mexico – where lynx are currently residing and traveling for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. CNE's members and staff derive scientific, recreational, conservation, and aesthetic benefits from the lynx's existence in the wild and return to the Southern Rockies. For CNE's members and staff, working to restore lynx to the Southern Rockies and observing lynx in the wild, as well as being aware of the presence of lynx and the health of lynx habitat are key components to their enjoyment of their visits to these areas. In furtherance of this interest, CNE staff and members visited National Forest lands near Creede, Colorado on April 23, 2003 to witness the release of several lynx into the wild. CNE members and staff will continue fight for the restoration of lynx to the Southern Rockies and will continue to visit lynx habitat in the Southern Rockies in the hopes of seeing lynx once again. WS's failure to comply with section 7 of

the ESA and NEPA in conducting wildlife killing activities in the Southern Rockies' San Juan and Sangre de Cristo Mountains, as alleged in this complaint, has, and continues to harm CNE's concrete interests. WS's failure to comply with the ESA and NEPA results in uninformed decisions and creates an increased risk of actual, threatened, and imminent harm to the lynx and CNE's members' interest in protecting and restoring the lynx to the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA significantly increases the risk of an unnecessary and avoidable mortality of lynx in an already vulnerable Southern Rocky Mountain lynx population. Just one unnecessary and avoidable mortality of a lynx in the Southern Rockies significantly reduces the likelihood that the current lynx recovery program will succeed. WS's uninformed decisions thus create an increased risk of harm to the lynx and CNE's real and concrete interest in restoring and protecting lynx in the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA has adversely affected and continues to adversely affect the interests of CNE and its staff and members. CNE brings this action on behalf of itself and its adversely affected members and staff.

17. Plaintiff SINAPU, named after the Ute word for wolves, is dedicated to the restoration and protection of native wildlife like lynx and their habitat in the Southern Rockies and connected high plains and deserts. Many of Sinapu's 1,000 members and staff live in and around the Southern Rockies' San Juan and

Sangre de Cristo Mountains where lynx have been released, will be released, and currently reside. Sinapu's members and staff have, and will continue, to regularly and repeatedly use the "core lynx recovery area" in southwestern Colorado – including areas throughout the San Juan Mountains and Sangre de Cristo Mountains in north-central New Mexico – where lynx are currently residing for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. Sinapu's members and staff derive scientific, recreational, conservation, and aesthetic benefits from the lynx's existence in the wild and return to the Southern Rockies. For Sinapu's members and staff, working to restore lynx to the Southern Rockies and observing lynx in the wild, as well as being aware of the presence of lynx and the health of lynx habitat are key components to their enjoyment of their visits to these areas. Sinapu and its members and staff believe that all species and their natural communities have the right to exist and thrive. Sinapu's members and staff use the best available science to forward its mission through participation in policy formation, administrative processes, legal action, public outreach and organizing, and education. Sinapu and its members and staff have a specific, concrete interest in protecting and restoring the Canada lynx and its habitat to the Southern Rockies and are leading a campaign with other conservation groups to that end. Sinapu and its members are concerned about the threat to lynx in the Southern Rockies from WS's funding and implementation of indiscriminate wildlife killing activities. Wildlife Services uses many indiscriminate lethal controls such as leghold traps, foot and neck snares, and M-44 (sodium cyanide) devices. Many

of these traps and poisons have accidentally killed threatened and endangered species as well as thousands of birds and unintended mammals. Sinapu is concerned that these M-44 devices and other indiscriminate lethal controls used by WS could further inhibit the recovery of lynx as they disperse from Colorado's core lynx areas into other parts of the state and into New Mexico and other surrounding states. In furtherance of our concrete interest in protecting and restoring the lynx to the Southern Rockies, we (Sinapu) intervened in a lawsuit brought by the Farm Bureau, which had filed suit against the Colorado Division of Wildlife in an attempt to derail lynx reintroduction efforts and prevent the release of additional lynx in 2003. The Colorado Division of Wildlife and Sinapu prevailed in the suit and lynx were released in the winter of 2002-2003 in the Colorado Rockies. On April 23, 2003, a number of Sinapu's staff and members witnessed the release of seven lynx into the wild in the San Juan National Forest of Colorado. Sinapu also worked with the Pitkin County Commission to pass a resolution stating that they want lynx in their county. The County Commission sent their letter to the Colorado Wildlife Commission. Sinapu's staff and members have also testified at the Colorado Wildlife Commission's hearings in support of augmenting the lynx reintroduction program and supplied two letters in support of the augmentation to the Colorado Department of Wildlife. Additionally, on October 24, 2002, a few of Sinapu's staff and members met with Colorado Division of Wildlife staff to discuss lynx conservation issues in the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA in conducting wildlife killing activities in the Southern Rockies' San Juan and Sangre de Cristo Mountains, as alleged in this complaint,

has, and continues to harm Sinapu's concrete interests. WS's failure to comply with the ESA and NEPA results in uninformed decisions and creates an increased risk of actual, threatened, and imminent harm to the lynx and to Sinapu's members' interest in protecting and restoring the lynx to the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA significantly increases the risk of an unnecessary and avoidable mortality of lynx in an already vulnerable Southern Rocky Mountain lynx population. Just one unnecessary and avoidable mortality of a lynx in the Southern Rockies significantly reduces the likelihood that the current lynx recovery program will succeed. WS's uninformed decisions thus create a real risk of harm to the lynx and Sinapu's real and concrete interest in restoring and protecting lynx in the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA has adversely affected and continues to adversely affect the interests of Sinapu and its staff and members. Sinapu brings this action on behalf of itself and its adversely affected members and staff.

18. Plaintiff ANIMAL PROTECTION OF NEW MEXICO ("APNM") is a non-profit membership organization, organized under the laws of the State of New Mexico, that advocates for the rights of animals. APNM is dedicated to educating the public on animal welfare issues in the State of New Mexico and works diligently to protect and restore native species and their habitat in the State. Many of APNM's 1,800 members and staff live in and around the Southern Rockies' San Juan and Sangre de Cristo Mountains where lynx have been released, will be released, and currently reside. APNM's members and staff have, and will continue, to regularly and

repeatedly use the “core lynx recovery area” in southwestern Colorado – including areas throughout the San Juan Mountains and Sangre de Cristo Mountains in north-central New Mexico – where lynx are currently residing for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. APNM’s members and staff derive scientific, recreational, conservation, and aesthetic benefits from the lynx’s existence in the wild and return to the Southern Rockies. For APNM’s members and staff, working to restore lynx to the Southern Rockies and observing lynx in the wild, as well as being aware of the presence of lynx and the health of lynx habitat are key components to their enjoyment of their visits to these areas. APNM and its members and staff believe that all species and their natural communities have the right to exist and thrive. APNM’s members and staff use the best available science to forward their mission through participation in policy formation, administrative processes, legal action, public outreach and organizing, and education. APNM and its members and staff have a specific, concrete interest in protecting and restoring the Canada lynx and its habitat to the Southern Rockies and are leading a campaign with other conservation groups to that end. WS’s failure to comply with section 7 of the ESA and NEPA in conducting wildlife killing activities in the Southern Rockies’ San Juan and Sangre de Cristo Mountains, as alleged in this complaint, has, and continues to harm APNM’s concrete interests. WS’s failure to comply with the ESA and NEPA results in uninformed decisions and creates an increased risk of actual, threatened, and imminent harm to the lynx and APNM’s members’ interest in protecting and

restoring the lynx to the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA significantly increases the risk of an unnecessary and avoidable mortality of lynx in an already vulnerable Southern Rocky Mountain lynx population. Just one unnecessary and avoidable mortality of a lynx in the Southern Rockies significantly reduces the likelihood that the current lynx recovery program will succeed. WS's uninformed decisions thus create an increased risk of harm to the lynx and APNM's real and concrete interest in restoring and protecting lynx in the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA has adversely affected and continues to adversely affect the interests of APNM and its staff and members. APNM brings this action on behalf of itself and its adversely affected members and staff.

19. Plaintiff ANIMAL PROTECTION INSTITUTE ("API") is a national nonprofit advocacy organization headquartered in Sacramento, California. API is dedicated to educating and encouraging the public to treat animals humanely. To accomplish its objectives, API engages in litigation, legislative activity, research, and public education. API also comments regularly on federal and state proposals that affect wildlife and companion animals. Among its many programs, API advocates for non-lethal methods to manage conflicts with wildlife, with particular emphasis on protecting threatened and endangered species like Canada lynx. Many of API's approximately 85,000 members, supporters, and staff use and live in and around the Southern Rockies' San Juan and Sangre de Cristo Mountains where lynx have been released, will be released, and currently reside. API's members and staff have,

and will continue, to regularly and repeatedly use the “core lynx recovery area” in southwestern Colorado – including areas throughout the San Juan Mountains and Sangre de Cristo Mountains in north-central New Mexico – where lynx are currently residing for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. API’s members and staff derive scientific, recreational, conservation, and aesthetic benefits from the lynx’s existence in the wild and return to the Southern Rockies. For API’s members and staff, working to restore lynx to the Southern Rockies and observing lynx in the wild, as well as being aware of the presence of lynx and the health of lynx habitat are key components to their enjoyment of their visits to these areas. API and its members and staff believe that all species and their natural communities have the right to exist and thrive. API’s members and staff use the best available science to forward their mission through participation in policy formation, administrative processes, legal action, public outreach and organizing, and education. API and its members and staff have a specific, concrete interest in protecting and restoring the Canada lynx and its habitat to the Southern Rockies and is leading a campaign with other conservation groups to that end. WS’s failure to comply with section 7 of the ESA and NEPA in conducting predator control activities in the Southern Rockies’ San Juan and Sangre de Cristo Mountains, as alleged in this complaint, has, and continues to harm API’s concrete interests. WS’s failure to comply with the ESA and NEPA results in uninformed decisions and creates an increased risk of actual, threatened, and imminent harm to the lynx and API’s members interest in protecting and

restoring the lynx to the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA significantly increases the risk of an unnecessary and avoidable mortality of lynx in an already vulnerable Southern Rocky Mountain lynx population. Just one unnecessary and avoidable mortality of a lynx in the Southern Rockies significantly reduces the likelihood that the current lynx recovery program will succeed. WS's uninformed decisions thus create an increased risk of harm to the lynx and API's real and concrete interest in restoring and protecting lynx in the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA has adversely affected and continues to adversely affect the interests of API and its staff and members. API brings this action on behalf of itself and its adversely affected members and staff.

20. Plaintiff FOREST GUARDIANS is a non-profit corporation with approximately 3,000 members throughout the United States, including New Mexico and Colorado. Forest Guardians' mission is to protect and restore the natural biological diversity of forests in America's Southwest, including the Southern Rockies' San Juan and Sangre de Cristo Mountains. Members of Forest Guardians live in and around the San Juan and Sangre de Cristo Mountains and engage in outdoor recreation, wildlife viewing, and other activities in the San Juan and Sangre de Cristo Mountains and intend to continue to do so. The health of the San Juan and Sangre de Cristo Mountains, including its native species like lynx, is an important part of the members' aesthetic and recreational enjoyment of the forest. Many of Forest Guardians 3,000 members

and staff live in and around the Southern Rockies' San Juan and Sangre de Cristo Mountains where lynx have been released, will be released, and currently reside. Forest Guardian's members and staff have, and will continue, to regularly and repeatedly use the "core lynx recovery area" in southwestern Colorado – including areas throughout the San Juan Mountains and Sangre de Cristo Mountains in north-central New Mexico – where lynx are currently residing and traveling for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. Forest Guardians' members and staff derive scientific, recreational, conservation, and aesthetic benefits from the lynx's existence in the wild and return to the Southern Rockies. For Forest Guardians' members and staff, working to restore lynx to the Southern Rockies and observing lynx in the wild, as well as being aware of the presence of lynx and the health of lynx habitat are key components to their enjoyment of their visits to these areas. Forest Guardians and its members and staff believe that all species and their natural communities have the right to exist and thrive. Forest Guardians' members and staff use the best available science to forward their mission through participation in policy formation, administrative processes, legal action, public outreach and organizing, and education. Forest Guardians and its members and staff have a specific, concrete interest in protecting and restoring the Canada lynx and its habitat to the Southern Rockies and is leading a campaign with other conservation groups to that end. WS's failure to comply with section 7 of the ESA and NEPA in conducting wildlife killing activities in the Southern Rockies' San Juan and Sangre de Cristo Mountains, as alleged in this

complaint, has, and continues to harm Forest Guardians' concrete interests. WS's failure to comply with the ESA and NEPA results in uninformed decisions and creates an increased risk of actual, threatened, and imminent harm to the lynx and Forest Guardians' members' interest in protecting and restoring the lynx to the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA significantly increases the risk of an unnecessary and avoidable mortality of lynx in an already vulnerable Southern Rocky Mountain lynx population. Just one unnecessary and avoidable mortality of a lynx in the Southern Rockies significantly reduces the likelihood that the current lynx recovery program will succeed. WS's uninformed decisions thus create an increased risk of harm to the lynx and Forest Guardians' real and concrete interest in restoring and protecting lynx in the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA has adversely affected and continues to adversely affect the interests of Forest Guardians and its staff and members. Forest Guardians brings this action on behalf of itself and its adversely affected members and staff.

21. Plaintiff CARSON FOREST WATCH is a volunteer citizen group dedicated to protecting and restoring the native ecosystems and wildlife communities of New Mexico with particular emphasis on north-central New Mexico's Carson National Forest. Carson Forest Watch has a long history of involvement and concern regarding WS's wildlife killing activities in New Mexico. Carson Forest Watch has reviewed numerous NEPA documents and decisions by WS's and has long monitored wildlife killing activities on public lands throughout New Mexico. Many of Carson Forest Watch's

members and staff live in and around the Southern Rockies' San Juan and Sangre de Cristo Mountains where lynx have been released, will be released, and currently reside. Carson Forest Watch's members and staff have, and will continue, to regularly and repeatedly use the "core lynx recovery area" in southwestern Colorado – including areas throughout the San Juan Mountains and Sangre de Cristo Mountains in north-central New Mexico where lynx are currently residing for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. Carson Forest Watch's members and staff derive scientific, recreational, conservation, and aesthetic benefits from the lynx's existence in the wild and return to the Southern Rockies. For Carson Forest Watch's members and staff, working to restore lynx to the Southern Rockies and observing lynx in the wild, as well as being aware of the presence of lynx and the health of lynx habitat are key components to their enjoyment of their visits to these areas. Carson Forest Watch and its members and staff believe that all species and their natural communities have the right to exist and thrive. Carson Forest Watch's members and staff use the best available science to forward their mission through participation in policy formation, administrative processes, legal action, public outreach and organizing, and education. Carson Forest Watch and its members and staff have a specific, concrete interest in protecting and restoring the Canada lynx and its habitat to the Southern Rockies and are leading a campaign with other conservation groups to that end. WS's failure to comply with section 7 of the ESA and NEPA in conducting wildlife killing activities in the Southern Rockies'

San Juan and Sangre de Cristo Mountains, as alleged in this complaint, has, and continues to harm Carson Forest Watch's concrete interests. WS's failure to comply with the ESA and NEPA results in uninformed decisions and creates an increased risk of actual, threatened, and imminent harm to the lynx and Carson Forest Watch's members interest in protecting and restoring the lynx to the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA significantly increases the risk of an unnecessary and avoidable mortality of lynx in an already vulnerable Southern Rocky Mountain lynx population. Just one unnecessary and avoidable mortality of a lynx in the Southern Rockies significantly reduces the likelihood that the current lynx recovery program will succeed. WS's uninformed decisions thus create an increased risk of harm to the lynx and Carson Forest Watch's real and concrete interest in restoring and protecting lynx in the Southern Rockies. WS's failure to comply with section 7 of the ESA and NEPA has adversely affected and continues to adversely affect the interests of Carson Forest Watch and its staff and members. Carson Forest Watch brings this action on behalf of itself and its adversely affected members and staff.

22. Defendant WILDLIFE SERVICES ("WS") is program within the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), that is responsible for applying and implementing the federal laws and regulations challenged in this complaint.

23. Defendant WILLIAM CLAY is sued in his official capacity as Deputy Administrator of Wildlife Services. Mr. Clay is the federal official with ultimate

responsibility for all WS officials' inactions or actions challenged in this complaint.

24. Defendant ANIMAL AND PLANT HEALTH INSPECTION SERVICE ("APHIS") is an agency within the USDA that oversees the Wildlife Services' program and is responsible for applying and implementing the federal laws and regulations challenged in this complaint.

25. Defendant BOBBY ACORD is sued in his official capacity as the APHIS Administrator. Mr. Clay is the federal official with ultimate responsibility for all APHIS and WS officials' inactions or actions challenged in this complaint.

26. Defendant UNITED STATES DEPARTMENT OF AGRICULTURE ("USDA") is a department of the United States Government with supervisory and managerial responsibility over APHIS and WS and is responsible for applying and implementing the federal laws and regulations challenged in this complaint.

FACTUAL BACKGROUND

The Canada Lynx

27. On March 24, 2000, the U.S. Fish and Wildlife Service ("FWS") determined the contiguous United States population of lynx to be "threatened" under the ESA.

28. The lynx is a medium-sized cat with long legs, large, well furred paws, long tufts on the ears, and a short, black-tipped tail.

29. It is difficult to distinguish a lynx (*Lynx canadensis*) from its North American relative, the bobcat (*Lynx rufus*). The two species are both about the same size, have ear

tufts and facial ruffs, and have short tails. The differences include only: (1) the size of the feet (lynx have very large feet that look out of proportion to the rest of their body); (2) the amount of black on the tail (the tip of the tail on a lynx is completely black whereas a bobcat's tail has a black spot on the top and is white underneath); and (3) discrete differences in coloring (the pelage of a lynx generally consists of uniform coloring whereas bobcats will typically have some distinct spots or striping).

30. Lynx are highly specialized predators whose primary prey is the snowshoe hare. Snowshoe hares comprise 35-97% of the lynx's diet throughout its range. Other prey species include red squirrel, grouse, rabbits, flying squirrel, ground squirrel, porcupine, beaver, mice, voles, shrews, fish, and small ungulates. Canada Lynx Conservation Assessment and Strategy (LCAS), Interagency Lynx Biology Team, (January 2000) at 5.

31. Southern populations of lynx likely prey on a wider diversity of species than northern populations because of lower average hare densities and differences in small mammal communities. In areas characterized by patchy distribution of lynx habitat, lynx may prey on other species that occur in adjacent habitats, potentially including white-tailed jackrabbit, black-tailed jackrabbit, sage grouse, and Columbian sharp-tailed grouse. LCAS at 5.

32. In the contiguous United States, lynx historically occurred in five separate geographic areas: (1) Northeast; (2) Great Lakes (north-central Minnesota, northern Wisconsin, and the Upper Peninsula and northern portions of Michigan); (3) the Cascade Mountains (western Washington and western Oregon); (4) Northern Rocky Mountains (Idaho, Montana, eastern Washington,

eastern Oregon, northeastern Utah, and western Wyoming); and (5) Southern Rocky Mountains (south-central Wyoming, Colorado, and north-central New Mexico). LCAS at 38.

The Lynx's Southern Rocky Mountain Geographic Area

33. The Southern Rocky Mountain Geographic Area includes the mountainous regions of south-central Wyoming, Colorado, and north-central New Mexico. LCAS at 50.

34. As mentioned earlier, the use of the term “Southern Rocky Mountains” or “Southern Rockies” in this complaint refers specifically to a relatively small area that stretches from western and southwestern Colorado into north-central New Mexico. This area includes the San Juan and Sangre de Cristo Mountain ranges.

35. The Southern Rockies are isolated from the rest of the Rocky Mountain chain by vast sagebrush and desert shrub communities in the Wyoming Basin and the Red Desert in southern and central Wyoming, and arid Green and Colorado River plateaus in western Colorado and eastern Utah. LCAS at 50.

36. Primary “lynx habitat in the Southern Rockies is likely found within the subalpine and upper montane forest zones, typically between 2,450-3,650 meters (8,000 to 12,000 feet) in elevation.” LCAS at 52.

37. At the “upper elevations of the subalpine, forests are typically dominated by subalpine fir and Engelmann spruce. As the subalpine transitions to the upper montane, spruce-fir forests begin to give way to a predominance of lodgepole pine, aspen, or mixed stands of pine, aspen, and spruce.” LCAS at 52.

38. The “lower montane zone is dominated by ponderosa pine and Douglas fir, with pine typically dominating the lower, drier, more exposed sites, and Douglas fir occurring on moister and more sheltered sites. Although this forest zone is likely below primary lynx habitat, lower montane forests likely are important as connective habitat where they may facilitate lynx dispersal and movements between blocks of primary habitat, and may provide some foraging opportunities during those movements.” LCAS at 52.

39. The Southern Rockies’ subalpine and upper montane forest zones, interspersed with lower montane zones – all of which provide outstanding lynx habitat – exists throughout the San Juan and Sangre de Cristo Mountain ranges. These ranges stretch from southwestern Colorado into north-central New Mexico. LCAS at 51.

The Return of Lynx to the Southern Rockies

40. To establish and restore a viable population of lynx to the Southern Rockies, the Colorado Division of Wildlife (“CDOW”) began releasing lynx into a “core recovery area” in southwestern Colorado’s San Juan Mountains in 1999.

41. The “core lynx recovery area” is specifically defined as the area of the San Juan and Rio Grande National Forests and associated lands above 9,000 feet extending

from Del Norte west to Dolores and north to include the Uncompahgre and Gunnison National Forests in the Gunnison basin (as far north as Taylor Park east to the Collegiate Range).

42. CDOW picked southwestern Colorado's San Juan Mountains as the "core recovery area" (i.e., the place to release lynx) because of its outstanding lynx habitat.

43. The San Juan Mountains include relatively large populations of snowshoe hare (the lynx's primary prey), low road densities, and large forested areas of public land.

44. CDOW's recovery efforts began with the release of 96 lynx into the San Juan Mountains between 1999 and 2000. Forty-one lynx were reintroduced in the winter and spring of 1999 and an additional 55 lynx were released in April and May of 2000.

45. CDOW released an additional 33 lynx (17 females and 16 males) into southwestern Colorado's San Juan Mountains in April 2003. The lynx were released with dual VHF/satellite radio collars that allow CDOW to monitor their movement and mortality.

46. CDOW plans to release 100 more lynx over the next two years (50 each year), and up to 15 lynx in 2006-2008.

47. In the spring of 2003, CDOW discovered the first birth of a lynx in the wild.

48. CDOW documented 9 pairs of lynx during the 2003 breeding season and later discovered 6 dens and a total of 16 lynx kittens that were born in the wild. All births occurred in southwestern Colorado's San Juan Mountains which extend into north-central New Mexico.

49. The lynx dens were scattered throughout the San Juan Mountains in Engelmann spruce/subalpine fir forests and in areas of extensive downfall.

50. Of the 129 lynx released by the CDOW, there are 46 known mortalities. Of these 46 mortalities, 25 are from the 1999 releases, 20 are from the 2000 releases, and 1 is from the 2003 releases. The causes of death include: starvation (9), hit by vehicles (6), shot (6), probable predation (1), plague (3), and unknown human-caused deaths (21).

51. CDOW is currently tracking 61 of the 83 lynx that are still possibly alive.

52. There are currently 22 “missing” lynx. By missing, the CDOW means that they have not heard a signal from the lynx for at least one year, likely because their collar batteries have died or the lynx is outside the core research area.

53. The majority of lynx released by the CDOW remain in the San Juan Mountains, from north-central New Mexico north to Gunnison, west as far as Taylor Mesa and east to Monarch Pass.

54. The San Juan Mountains are a high elevation range that extends from southwestern Colorado – the core recovery area – to north-central New Mexico. Lynx released into the core recovery area have, and continue to migrate south along the San Juan Mountains into northern New Mexico.

55. CDOW has and continues to track a number of lynx movements into New Mexico.

56. Aerial telemetry locations of lynx released in 1999 reveal that a number of lynx migrated into New Mexico’s Taos, Rio Arriba, and San Juan Counties. The same is true with respect to the 2000 releases, where lynx were tracked as far south as the Los Alamos area, in the Jemez Mountains. Many of the 22 missing lynx from the San Juan Mountains may also be inhabiting north-central New Mexico.

57. CDOW identified a number of travel corridors used repeatedly by more than one lynx, possibly suggesting route selection based on olfactory cues. For southerly movements into New Mexico, this corridor is down the east side of Wolf Creek Pass to the southeast to the Conejos River Valley.

58. Over the last three years, at least 4 lynx have been killed in New Mexico. Two were shot near Chama, New Mexico by livestock owners, one was hit by a car, and the cause of one death remains unknown (a cut radio collar was found in a dump near Taos, New Mexico).

59. The CDOW recognized that lynx mortalities occurred throughout the recovery area. However, CDOW determined that “mortalities occurred in New Mexico in higher proportion to all lynx locations in that area than elsewhere.”

Wildlife Services' Program to Kill Predators in the Southern Rockies

60. WS is a federal program within the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA).

61. WS is authorized to spend federal money to kill native wildlife like bobcats, bears, mountain lions, coyotes, and foxes as a means of protecting livestock and agricultural interests. The killing of native wildlife to protect livestock interests is known as WS's “Predator Damage Management” or PDM program.

62. In fiscal year 2002, WS reported that its PDM activities killed over 1.5 million animals in the United States, including 607 badgers, 382 black bears, 30,266 beavers, 2,220 red-winged blackbirds, 2,451 bobcats, 86,360 coyotes,

6,796 mourning doves, 2,079 gray foxes, 2,906 red foxes, 361 mountain lions, 516 river otters, 721 turtles, 194 gray wolves, and 1 Canada lynx.

63. In fiscal year 2002, WS reported that its PDM activities *accidentally* killed 5,849 animals including 194 badgers, 7 black bears, 63 bobcats, 91 white-tailed deer, 139 dogs, 176 gray foxes, 33 kit foxes, 204 red foxes, 4 mountain lions, 476 river otters, over 100 rabbits and hares, and 2 gray wolves.

64. WS has, and continues, to conduct its wildlife killing activities or PDM in the Southern Rockies.

65. WS has, and continues, to conduct programs to kill wildlife in southwestern Colorado's San Juan Mountains – the core lynx recovery area – and north-central New Mexico's San Juan and Sangre de Cristo Mountains – all areas that are currently occupied by lynx.

66. WS's wildlife killing activity is divided into two regions: the Western Region and the Eastern Region.

67. Within the Western Region, WS is divided by State boundaries with each State having a "WS State Office."

68. Both the State of Colorado and the State of New Mexico have a WS State Office.

69. The Colorado and New Mexico State Offices are divided into Districts or "analysis areas."

Western Colorado.

70. WS divides its Colorado State Office into two analysis areas: Western Colorado and Eastern Colorado.

71. WS's Western Colorado analysis area includes the Southern Rockies' San Juan Mountains in southwestern Colorado, an area currently occupied by lynx.

72. WS's Western Colorado analysis area encompasses approximately 31.5 million acres of land in western Colorado. Environmental Assessment (EA), Predator Damage Management (PDM) in Western Colorado, Wildlife Services (hereinafter "Western Colorado EA") (October 1997) at 1-2.

73. WS's Colorado State Office conducts activities to kill wildlife, known as "PDM" activities, in its Western Colorado analysis area which encompasses, but is not limited to, the following counties in southwestern Colorado: Montezuma, Gunnison, Ouray, Saguache, Alamosa, Rio Grande, Mineral, San Juan, Hinsdale, Dolores, La Plata, Archuleta, Conejos, and Costilla.

74. WS's Colorado State Office has agreements to kill wildlife on an estimated 6.7 million acres, or about 21% of the Western Colorado analysis area. This 6.7 million acre figure includes an agreement to kill predators on National Forest and Bureau of Land Management (BLM) lands in western Colorado.

75. WS's Colorado State Office has, and currently, funds and conducts activities to kill wildlife pursuant to its PDM program on public and private lands in the Western Colorado analysis area pursuant to the Western Colorado EA which was prepared in 1997.

76. WS's Colorado State Office has, and currently, funds and conducts programs to kill wildlife on public and private lands in the Southern Rocky

Mountains' San Juan Mountains in southwestern Colorado, an area currently occupied by lynx.

77. WS's Colorado State Office has, and currently, funds and conducts activities to kill wildlife on public lands and private lands within CDOW's core lynx recovery area.

78. During fiscal year 2000, approximately \$1.2 million (\$746,000 from WS's own funding and \$470,000 from cooperative funding) was spent on killing wildlife in Colorado.

79. WS's Colorado State Office killed approximately 3,351 coyotes (2,400 from aerial gunning), 2 cougars (1 by snare), 2 bobcats (2 by leghold traps), and 37 black bears (4 by snares) in Colorado during fiscal year 2000.

Northern New Mexico.

80. In New Mexico there are three WS Districts: the Albuquerque District (northern New Mexico), Roswell District (southeastern New Mexico), and the Las Cruces District (southwestern New Mexico).

81. The Albuquerque (northern New Mexico) District includes the Southern Rockies and, in particular, the San Juan and Sangre de Cristo Mountains, an area currently occupied by lynx.

82. WS's Albuquerque District encompasses nearly 36.2 million acres in northern New Mexico. Environmental Assessment (EA), Predator Damage Management (PDM) in the Albuquerque ADC District in Northern New Mexico (hereinafter "Northern New Mexico EA") (1997).

83. WS's New Mexico State Office kills wildlife pursuant to its PDM program in its Albuquerque District which includes the following counties: San Juan, Rio Arriba, Taos, and Colfax.

84. WS has agreements to conduct its wildlife killing or PDM activities on about 10.1 million acres in the Albuquerque District.

85. WS's New Mexico State Office has, and currently, conducts programs to kill wildlife on public and private lands in northern New Mexico pursuant to the Northern New Mexico EA and subsequent Decision Notices/FONSIs.

86. WS's New Mexico State Office has, and currently, conducts programs to kill wildlife on public and private lands in areas occupied by lynx.

87. In fiscal year 2000, a total of \$2.2 million was spent on programs to kill wildlife in New Mexico (\$1.2 million from WS's own funding and \$1 million from cooperative funding from the State, County, or private landowner).

88. WS's New Mexico State Office's wildlife killing or "PDM" activities killed 6,132 coyotes (1,200 by aerial gunning, 2,200 by M-44s), 20 cougars (5 by leghold trap, 13 by snares), 245 bobcats (207 by leghold trap, 2 by aerial gunning, 21 by snares), and 5 black bears (4 by aerial gunning) in New Mexico during fiscal year 2000.

Methods Employed by WS to Kill Predators in the Southern Rockies

89. To kill, capture, and harass wildlife like bobcats, cougars, bears, and coyotes as part of its PDM activities in the Southern Rockies, WS's Colorado State Office and New Mexico State Office employ a variety of methods, both lethal and nonlethal.

90. Nonlethal methods used in the Southern Rockies include fencing, use of guard dogs or herders, and various frightening devices (i.e., propane exploders, siren-strobe light devices, and spotlights).

91. Lethal methods used in the Southern Rockies include, but are not limited to aerial gunning, use of trapping devices (i.e., leghold traps, body-crushing traps, and snares) and poisons like M-44s and 1080 collars.

Aerial Gunning

92. WS's Colorado State Office's and New Mexico State Office's PDM activities employ aerial gunning to kill and harass wildlife in the Southern Rockies.

93. Aerial gunning is one of the most controversial and expensive methods of killing wildlife.

94. WS spends approximately \$250 an hour to hire helicopters and fixed wing aircraft to gun down wildlife like coyotes and bobcats from the air.

95. Aerial gunning causes stress, anxiety and pain not only to the target animals but also to other wildlife in the area. Wounded coyotes often suffer prolonged and painful deaths from exposure, starvation, or bleeding. Other impacts of aerial gunning include the starvation of orphaned and dependent young.

96. Gunshot wounds are the most likely causes of pain to coyotes and other animals targeted by aerial gunning. These wounds can range from superficial to seriously disabling. A seriously disabling wound may lead to an animal's death from secondary causes such as infection or a disability that inhibits the animal from successfully foraging for food, evading natural predators, or performing other functions necessary to its survival.

97. Although WS has never analyzed wounding rates in its aerial gunning program, wounding and crippling rates are likely to be relatively high, given the difficulty in placing an accurate and deadly shot from a moving plane or helicopter.

98. An animal shot in the heart-lung area, or in a critical portion of the central nervous system such as the brain or spinal cord, generally dies in less than 22.3 seconds. An animal shot in a less vital area may take hours or even days to die, depending upon the location.

100. Shots to non-vital areas may result in an animal being left wounded and/or crippled, but not dead. Because of the difficulty of placing a deadly shot from a moving aircraft, coyotes are often shot numerous times in aerial gunning programs.

101. Aerial gunning also results in the harassment of animals not targeted for killing. Aircraft noise and disturbance disrupts feeding behavior and reproductive success. Slow-flying, noisy aircraft keep animals from foraging and disrupt breeding and parenting.

102. In fiscal year 2000, Wildlife Services' aerial gunning operations killed 6 badgers, 3 bears, 291 bobcats, 32,000 coyotes, 37 gray foxes, and 173 red foxes nationwide.

Trapping and Snaring

103. WS's Colorado State Office's and New Mexico State Office's PDM activities employ the use traps and snares to kill and harass wildlife in the Southern Rockies.

104. WS uses three kinds of traps and snares: leghold traps, body-crushing traps, and snares.

105. Leghold traps are designed to capture and hold an animal by a limb. The trap's two spring-powered metal jaws slam shut when an animal steps on the trigger.

106. Both the American Veterinary Medical Association and the American Hospital Association have declared the steel-jaw leghold trap to be an inhumane capturing device.

107. Animals caught by the heavy steel jaws of a leghold strap suffer excruciating pain on impact. The trap can tear the flesh, cut tendons and ligaments, and break bones. It is not uncommon for trapped animals to chew or twist off their own limbs caught in the trap while trying to escape (29% of raccoons in one study did this).

108. Body-crushing or "Conibear" traps are also used by Wildlife Services.

109. Body-crushing traps are made of two metal rectangular jaws hinged at the side with a spring affixed to one or both sides. When an animal walks or swims through the center of the rectangles and brushes up against the trigger, the trap's jaws close with a scissor-like action on the animal's body. This type of trap is designed to snap shut on the spinal column at the base of the skull for a "quick kill." Often times the trap misses this vital spot, or does not close with enough force to kill the animal instantly or even to render the animal unconscious. The trap's jaws frequently clamp down on the chest or pelvis, crushing bones, blood vessels, and nerves, causing excruciating pain and a prolonged death.

110. WS also uses snares as part of its PDM activities to kill wildlife in the Southern Rockies.

111. Snares are considered the most primitive, indiscriminate, and inhumane devices legally used in the United States.

112. A snare is a wire noose attached at one end to a stake or anchor. Snares catch an animal either by the neck, midsection of the body, or foot. Snares work by tightening around the animal as it struggles. As with leghold traps, animals caught in leg snares often injure themselves further as they struggle. Neck and body snares strangle their victims or crush their vital organs, leading to an agonizing and often prolonged death.

113. Snares are particularly cruel to animals like coyotes, foxes, wolves, bobcats, and lynx, because the significant musculature around these animals' tracheas and common carotid arteries slows death.

114. Use of leghold traps, body-crushing traps, and snares results in the capture and death of thousands of nontarget species each year, including protected species like lynx.

115. Lynx, in particular, are "known to be very vulnerable to trapping." LCAS at 85.

116. Trappers "relate that lynx are relatively easy to capture; they appear to have little fear of human scent, they respond to baits and lures, and can be attracted using visual attractants." FWS Science Report at 280.

117. Although lynx trapping seasons are now closed in the contiguous U.S., it is well documented that "lynx may be trapped incidentally or illegally." FWS Science Report at 453.

118. The Forest Service's Rocky Mountain Research Station in Montana recently documented the accidental killing of lynx from trapping activities in the Seeley-Swan Mountains. According to the Forest Service, "accidental trapping and illegal shooting

accounted for 25%” of all lynx mortalities in the study area. Three trapping deaths were reported in the winter of 2001 alone.

119. In January 2001 a lynx was killed in a Conibear (i.e, body-crushing) trap intended for wolverine in Montana’s Seeley-Swan Mountains. The trap was placed in a leaning tree that held a large meat bait. Also in January 2001 a female lynx died from “trap-related injuries.” The female lynx’s body was recovered in a natural position over a small pool of blood under her body. Her hind leg had a large patch of exposed skin where the fur was rubbed. Biologists followed old snowshoe tracks found within ten meters of the carcass to a sprung trap with lynx hair in the closed trap jaw. The third trapping incident involved a younger lynx that was caught in a “long-spring trap” and had apparently starved with the trap on its foot.

120. Each year traps in the U.S. injure or kill millions of nontarget animals – domestic dogs and cats, rabbits, birds, raptors, livestock, and even listed species such as lynx and wolves. According to a former professional trapper, at least two nontarget animals are trapped for each target animal.

121. The U.S. FWS’s Lynx Biology Team stated that “trapping for other large furbearers in areas occupied by lynx may pose a risk. Lynx appear to be extremely susceptible to trapping, and where trapping is permitted it can be (and has been) a significant source of mortality.”

122. Incidental mortality, in areas where lynx densities are low, as in the Southern Rockies region, is particularly disruptive. Evidence indicates that when lynx densities are low “incidental or illegal killing can *significantly* affect lynx population dynamics under some circumstances.”

123. In Idaho, the Bureau of Land Management (“BLM”) and U.S. Forest Service conducted interviews with over seventy-five individuals who “spend a great deal of time outdoors and are familiar with potential Canada lynx habitat and local fauna in general.” The purpose of the interviews was to gain as much information on lynx in Idaho as possible.

124. The BLM’s and U.S. Forest Service’s interviews revealed that: (1) trapping incidents were fairly common with lynx; and (2) lynx were commonly trapped accidentally – in situations where the individual was trapping for bobcat or coyote.

125. The BLM and Forest Service concluded that “[m]any Canada lynx have been trapped incidentally while targeting bobcat and coyotes. . . . Incidental trapping [of lynx] remains a problem when Canada lynx populations are so critically low.”

126. The BLM and U.S. Forest Service included incidental trapping as one of the factors for the decline of the species in Idaho. According to one well-known lynx hunter in Idaho, “complete protection from all types of direct and indirect trapping” would be needed in order to protect and restore the species.

127. Complete protection from trapping is the approach taken by the State of Washington. Recognizing the need to protect species like lynx from otherwise legal trapping activities, voters in the State of Washington passed an initiative prohibiting the use of most traps in the State (i.e., leghold, Conibear, and snares). Washington State Recovery Plan for Lynx at 32.

128. The passing of the initiative eliminated the Washington Department of Fish and Wildlife’s (“WDFW”) concern “about incidental trapping mortality.” The WDFW

recognized, however, that if “trapping with leghold traps and snares resumes in the future, regulations may need to be evaluated and revised to address risk to lynx.”

129. The FWS recognizes that “[l]egal trapping activities for bobcat, coyote, wolverine and other furbearers create a potential for incidental capture of lynx.” 65 Fed. Reg. 16078. The “threat to resident lynx from legal trapping for other species may be limited in many areas because bobcat or coyote trapping generally occurs outside of areas where lynx would be found, although we know that incidental capture occurs.”

130. In Maine, FWS called on the State’s wildlife agency, the Department of Inland Fisheries and Wildlife (IFW), to ban the use of snares in lynx habitat. The FWS’s letter points out that the IFW has documented a number of incidental lynx captures over the last ten years. One lynx was accidentally trapped in 1992, one was snared in 1993 and one was killed by a houndsman in 1996. Seven other lynx were reported caught in leghold traps since 1994.

131. An unofficial tally of nontarget species captured by coyote trappers last winter in Maine includes bobcats (4), red fox (17), deer (8), snowshoe hares (2), and fishers (2). Referring to the risk of being snared, the FWS pointed out that “the difference in shoulder height between coyotes (21 inches) and lynx (19 inches) is negligible” and that lynx “likely will continue to be captured in traps or snares in the future.”

132. Concern over the incidental trapping of lynx from otherwise legal trapping activities (e.g., trapping for bobcat, coyote, fox) prompted the FWS to propose a special 4 (d) rule under the ESA.

133. FWS's special 4 (d) rule, originally proposed back in March 2000 when the lynx was listed, would allow for the "incidental take of lynx resulting from otherwise lawful trapping or hunting of wildlife other than lynx." The rule would require individual states and tribes to adopt programs to minimize the likelihood of incidental take by trappers.

Poisons

134. WS's Colorado State Office's and New Mexico State Office's PDM activities include the use poisons to kill and harass wildlife in the Southern Rockies.

135. WS uses poisons or "toxicants" like M-44s and 1080 collars to kill wildlife in the Southern Rockies.

136. M-44s and 1080 collars kill a number of "nontarget" species including bobcats, bears, foxes, and cougars.

137. M-44s are devices made up of a metal stake, an ejector, and a capsule containing a poisonous sodium cyanide mixture. When an animal bites and pulls the device, which is baited with scent, the poison is ejected into the animal's mouth. Death occurs immediately thereafter.

138. In fiscal year 2001, Wildlife Services killed 17,068 mammals with M-44s. As with traps, M-44s also kill hundreds of nontarget species each year including bears, badgers, kit and swift foxes, bobcats, ringtail cats, javelinas, beavers, hawks, and pets.

139. Compound 1080 collars, like M-44s, are highly toxic. Back in 1972, President Richard Nixon banned the use of Compound 1080, or sodium fluoroacetate. In the mid-1980s, President Ronald Regan and Secretary of the Interior, James Watt,

brought this toxicant back for limited use in so-called livestock protection collars (LPCs). These collars strap rubber bladder reservoirs of poison onto the necks of sheep or goats. When the collar is punctured, all contents are evacuated. Some of the compound enters the predator's mouth, some falls around the mouth, some seeps into wool or hair near the collared sheep or goat, and some eventually falls to the ground.

140. Recent research on 1080 collars indicates that numerous nontarget species are killed by the device each year. These types of kills typically occur when 1080 collars are lost or punctured (one study reported that 107 collars were either lost or inadvertently punctured by vegetation or barbed wire whereas only 57 were actually punctured by coyotes) or when nontarget species scavenge on livestock carcasses wearing the collar.

141. WS claims that while nontarget species have been known to scavenge from a sheep or goat carcass wearing the collar, "none were known to be poisoned by Compound 1080." This conclusion fails to take into account that nontarget animals may die away from the carcass (Compound 1080 may take between 30 minutes to many hours to kill its victim).

142. WS's use of aerial gunning, trapping, snaring and toxicants like M-44s and 1080 collars as part of its PDM activities results in the harassment and unintentional killing of thousands of nontarget animals each year.

143. The amount of nontarget kills prompted the Lynx Biology Team to include WS's predator killing activities – specifically the trapping, shooting, and poisoning of wildlife – as one of the "factors affecting lynx mortality." LCAS at 28.

144. WS's records reveal that the probability of killing a nontarget species is high and the numbers of nontarget kills significant.

145. WS's data suggests that, on average, approximately 7,000 nontarget animals are either captured or killed each year.

146. In fiscal year 1989, WS either captured or killed 10,059 nontarget animals (included within this number are 582 badgers, 26 black bears, 293 bobcats, 214 deer, 651 dogs, 1,426 gray foxes, 187 kit foxes, 371 red foxes, 701 javelina, 5 cougars, 4 pronghorn antelope, 1,500 rabbits, and 1 wolf). In 1990, 8,988 nontarget animals were either captured or killed by Wildlife Services (this includes 556 badger, 20 black bears, 251 bobcats, 687 dogs, 5 fishers, 1,389 gray foxes, 686 javelina, 2 lynx, 8 pronghorn antelope, 1 gray wolf, and even 1 bald eagle). In 1991, 9,942 nontarget animals were either captured or killed by Wildlife Services (this includes 17 black bears, 224 bobcats, 653 dogs, 2 fishers, 1,137 gray foxes, 5 cougars, 8 pronghorn antelope, and 330 rabbits).

147. WS's data from fiscal year 2001 includes 6,973 nontarget animals. These are just "reported" numbers.

148. On March 15, 1990, WS (formerly Animal Damage Control ("ADC")) requested formal programmatic consultation with the FWS on its PDM activities pursuant to section 7 of the ESA.

149. "May affect" determinations were made for 21 species.

150. The FWS concurred with Wildlife Services' determination, identifying 21 species that will be "adversely affected by some aspect of the ADC Program" in a July 1992 Biological Opinion.

151. FWS identified 7 mammals on this list: black-footed ferret, grizzly bear, gray wolf, San Juaquin kit fox, ocelot, jaguarundi, and Utah prairie dog. The risks to these protected mammals stems from the nonselective nature of

Wildlife Services' wildlife killing activities – in particular, the use of traps, snares and toxicants.

152. Back in 1990, WS did not consult on lynx because, at the time, lynx was not listed as threatened under the ESA.

153. On May 12, 2000 – over three years ago – WS prepared a programmatic Biological Assessment to initiate formal consultation with the U.S. Fish and Wildlife Service on how its wildlife killing or PDM activities impact lynx in the entire Western United States. During this time, WS continued to implement its wildlife killing activities in the Southern Rockies – an area occupied by lynx.

154. On August 18, 2000 – over three years ago – FWS prepared a Draft programmatic Biological Opinion on WS's programmatic Biological Assessment for WS's "review and comment."

155. On September 20, 2000, WS wrote to the FWS and stated that it was reviewing the Draft programmatic Biological Opinion and requested a 60 day extension to respond. The FWS granted the extension. During this time, WS continued to implement its wildlife killing activities in the Southern Rockies – an area occupied by lynx.

156. On November 14, 2000, WS requested a 90 day extension to respond to the Draft programmatic Biological Opinion. FWS granted the extension. During this time, WS continued to implement its wildlife killing activities in the Southern Rockies – an area occupied by lynx.

157. On March 21, 2001, WS asked for an additional 90 days – until June 30, 2001, to respond to the Draft programmatic Biological Opinion. FWS

granted the extension. During this time, WS continued to implement its wildlife killing activities in the Southern Rockies – an area occupied by lynx.

158. On July 24, 2001, WS asked for an additional, indefinite period of time upon which to respond to the Draft programmatic Biological Opinion. FWS granted the extension. During this time, WS continued to implement its wildlife killing activities in the Southern Rockies – an area occupied by lynx.

159. Rather than wait for completion of WS's programmatic consultation, and recognizing that there are site-specific adverse affects to lynx from wildlife killing or "PDM" activities in the State of Idaho, the WS's Idaho State Office initiated its own section 7 consultation with the FWS on December 18, 2001.

160. On February 22, 2002, WS's Idaho State Office met with the U.S. Fish and Wildlife Service to discuss impacts to lynx from wildlife killing activities in Idaho.

161. On February 25, 2002, WS's Idaho State Office sent FWS an Analysis of Potential Impacts to Canada Lynx in Idaho and an accompanying Environmental Assessment (EA) entitled "Predator Damage Management in Southern Idaho (February 2002)."

162. On March 20, 2002, WS's Idaho State Office sent a request to the FWS to initiate its own formal consultation under section 7 of the ESA on the effects of wildlife killing or "PDM" activities on lynx in 34 southern Idaho counties.

163. On March 23, 2002, FWS sent a letter of concurrence and Final Biological Opinion for Idaho Wildlife Service's wildlife killing or "PDM" activities in 34 southern Idaho counties.

164. FWS concluded that Idaho WS's wildlife killing or "PDM" activities in Idaho's southernmost 34 counties may affect and is likely to adversely affect the threatened Canada lynx.

165. WS's Idaho State Office is the only WS office in the West to complete consultation on lynx.

166. Completion of the programmatic consultation on lynx in all western states is still pending.

167. WS has yet to initiate or complete consultation on how its wildlife killing or "PDM" activities are impacting lynx in the Southern Rockies.

168. WS has, and continues to implement its wildlife killing or "PDM" activities in the Southern Rockies via its Colorado and New Mexico State Offices, without first initiating or completing consultation on lynx.

COUNT I

169. Plaintiffs repeat and incorporate by reference the foregoing paragraphs.

170. WS has violated, and continues to violate, section 7 (a)(1) of the ESA, 16 U.S.C. § 1536 (a)(1).

171. Pursuant to section 7 (a)(1) of the ESA, all Federal agencies, including WS, "shall, in consultation with and with the assistance of the [U.S. FWS], utilize their authorities in furtherance of [the ESA] . . . by carrying out programs for the conservation of endangered and threatened species." 16 U.S.C. § 1536 (a)(1).

172. The term “conservation” is defined in the ESA as the “use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided by [the ESA] . . . are no longer necessary.” 16 U.S.C. § 1532 (3).

173. In authorizing, funding, and carrying out wildlife killing or “PDM” activities in the Southern Rockies – an area occupied by lynx in WS’s Western Colorado analysis area and Albuquerque (northern New Mexico) District – WS has failed, and continues to fail, to utilize its authority to carry out programs for the conservation of lynx in the Southern Rockies.

174. WS’s failure to utilize its authority to carry out programs for the conservation of lynx in the Southern Rockies constitutes “agency action unlawfully withheld or unreasonably delayed” and is “arbitrary and capricious, an abuse of discretion, and not in accordance with law.” 5 U.S.C. §§ 706 (1), 706 (2)(A).

COUNT II

175. Plaintiffs repeat and incorporate by reference the foregoing paragraphs.

176. WS has violated, and continues to violate, section 7 (a)(2) of the ESA, 16 U.S.C. § 1536 (a)(2).

177. Pursuant to section 7 (a)(2) of the ESA, all Federal agencies, including WS, “shall, in consultation with and with the assistance of the [U.S. FWS], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or

threatened species.” 16 U.S.C. § 1536 (a)(2); 50 C.F.R. § 402.14. In fulfilling the requirements of section 7 (a)(2) “each agency shall use the best scientific and commercial data available.” 16 U.S.C. § 1536 (a)(2); 50 C.F.R. § 402.14 (d).

178. The phrase “jeopardize the continued existence of” means to “engage in action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.2

179. In authorizing, funding, and carrying out wildlife killing or “PDM” activities in the Southern Rockies – an area occupied by lynx in WS’s Western Colorado analysis area and Albuquerque (northern New Mexico) District – WS has failed, and continues to fail, to initiate and/or complete formal consultation with the U.S. FWS to insure that its actions are not likely to jeopardize the continued existence of lynx in the Southern Rockies. 16 U.S.C. § 1536 (a)(2). WS has also failed, and continues to fail, to use the best scientific and commercial data available in insure that its actions are not likely to jeopardize the continued existence of lynx in the Southern Rockies. 16 U.S.C. § 1536 (a)(2).

180. WS’s failure to initiate and/or complete formal consultation on, and use the best scientific and commercial data available for, its wildlife killing or “PDM” activities in the Southern Rockies constitutes “agency action unlawfully withheld or unreasonably delayed” and is “arbitrary and capricious, an abuse of discretion, and not in accordance with law.” 5 U.S.C. §§ 706 (1), 706 (2)(A).

COUNT III

181. Plaintiffs repeat and incorporate by reference the foregoing paragraphs.

182. WS has violated, and continues to violate, section 7 (d) of the ESA, 16 U.S.C. § 1536 (d).

183. Section 7 (d) of the ESA states that, “[a]fter initiation of consultation required under subsection (a)(2) of this section, the Federal agency . . . shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536 (d).

184. In authorizing, funding, and carrying out wildlife killing or “PDM” activities in the Southern Rockies – an area occupied by lynx in WS’s Western Colorado analysis area and Albuquerque (northern New Mexico) District – WS has failed, and continues to fail, to avoid making any irreversible or irretrievable commitment of resources.

185. WS’s failure to avoid making any irreversible or irretrievable commitment of resources constitutes “agency action unlawfully withheld or unreasonably delayed” and is “arbitrary and capricious, an abuse of discretion, and not in accordance with law.” 5 U.S.C. §§ 706 (1), 706 (2)(A).

COUNT IV

186. Plaintiffs repeat and incorporate by reference the foregoing paragraphs.

187. WS has violated, and continues to violate, the regulations implementing section 7 of the ESA, 50 C.F.R. § 402.

188. The implementing regulations state that “[r]einitiation of formal consultation is required and shall be requested by the Federal agency or by the Service . . . [i]f the amount or extent of the taking specified in the incidental take statement is exceeded . . . [i]f 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 . . . [i]f 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 . . . [i]f a new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. § 402.16.

189. In authorizing, funding, and carrying out wildlife killing or “PDM” activities in the Southern Rockies – an area occupied by lynx in WS’s Western Colorado analysis area and Albuquerque (northern New Mexico) District – WS has failed, and continues to fail, to reinitiate formal consultation on lynx.

190. WS’s failure to reinitiate formal consultation constitutes “agency action unlawfully withheld or unreasonably delayed” and is “arbitrary and capricious, an abuse of discretion, and not in accordance with law.” 5 U.S.C. §§ 706 (1), 706 (2)(A).

COUNT V

191. Plaintiffs repeat and incorporate by reference the foregoing paragraphs.

192. WS has violated, and continues to violate, NEPA by failing to assess the direct, indirect, and cumulative impacts of, and reasonable range of alternatives to, its wildlife killing or “PDM” activities on lynx in the Southern Rockies – an area occupied by lynx in WS’s Western Colorado analysis area and Albuquerque (northern New Mexico) District.

193. NEPA requires that all Federal agencies, including WS, assess the direct, indirect, and cumulative environmental impacts of its actions and a reasonable range of alternatives to the action, before the actions occur and before the agency commits resources to the project. 40 C.F.R. §§ 1500 to 1508. WS must ensure that an impacts and alternatives analysis is available to public officials and citizens before decisions are made and before actions are taken. 40 C.F.R. § 1500.1 (b).

194. In authorizing, funding, and carrying out wildlife killing or “PDM” activities in the Southern Rockies WS has failed, and continues to fail, to assess the direct, indirect, and cumulative impacts of, and a reasonable range of alternatives to, its predator killing activities on lynx in the Southern Rockies as required by NEPA.

195. WS’s failure to assess the direct, indirect, and cumulative impacts of, and a reasonable range of alternatives to, its wildlife killing or “PDM” activities on lynx in the Southern Rockies constitutes “agency action unlawfully withheld or

unreasonably delayed” and is “arbitrary and capricious, an abuse of discretion, and not in accordance with law.” 5 U.S.C. §§ 706 (1), 706 (2)(A).

COUNT VI

196. Plaintiffs repeat and incorporate by reference the foregoing paragraphs.

197. WS has violated, and continues to violate, NEPA by failing to prepare a supplemental Environmental Assessment (EA) or supplemental Environmental Impact Statement (EIS) for its wildlife killing or “PDM” activities in the Southern Rockies.

198. Pursuant to NEPA, all Federal agencies, including WS, must prepare supplements to earlier EAs or EISs if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.

199. The recent return, release, movements, mortality, and breeding of lynx in the Southern Rockies constitutes “significant new circumstances or information” that warrants the need for a supplemental EA or EIS.

200. WS’s failure to prepare a supplemental EA or EIS for its authorization, funding, and carrying out of wildlife killing or “PDM” activities in the Southern Rockies – an area occupied by lynx in WS’s Western Colorado analysis area and Albuquerque (northern New Mexico) District – constitutes “agency action unlawfully withheld or unreasonably delayed” and is “arbitrary

and capricious, an abuse of discretion, and not in accordance with law.” 5 U.S.C. §§ 706 (1), 706 (2)(A).

PRAYER FOR RELIEF

201. Plaintiffs repeat and incorporate by reference the allegations of all foregoing paragraphs.

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

A. Issue a declaratory judgment that WS’s inactions and actions, as alleged above, have violated, and continue to violate, the ESA and NEPA;

B. Issue declaratory judgment that the WS’s violation of the ESA and NEPA constitutes agency action unlawfully withheld or unreasonably delayed, or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, under the APA;

C. Issue a mandatory injunction requiring WS to initiate and complete formal consultation pursuant to section 7 of the ESA on the impacts of its PDM activities on lynx in the Southern Rockies;

D. Issue a mandatory injunction requiring WS to assess the direct, indirect, and cumulative impacts of, and a reasonable range of alternative to, its PDM activities on lynx in the Southern Rockies pursuant to NEPA;

E. Issue a mandatory injunction prohibiting WS from funding, authorizing, and/or carrying out any PDM activities in the Southern Rockies – specifically southwestern Colorado’s Montezuma, Gunnison, Ouray, Saguache, Alamosa, Rio Grande,

Mineral, San Juan, Hinsdale, Dolores, La Plata, Archuleta, Conejos, and Costilla Counties and north-central New Mexico's San Juan, Rio Arriba, Taos, and Colfax Counties until all violations of law complained of herein are remedied;

F. Issue such injunctive relief as Plaintiffs may subsequently request or that this Court may deem appropriate;

G. Retain continuing jurisdiction of this matter until Defendants fully remedy the violations of law complained of herein;

H. Grant the Plaintiffs their costs and expenses of litigation, including reasonable attorneys' fees for claims brought under the ESA pursuant to 16 U.S.C. § 1540 (g);

I. Grant the Plaintiffs their costs and expenses of litigation, including reasonable attorneys' fees for claims brought under NEPA pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C § 2412;

J. Grant such other relief as this Court deems just and proper.

Respectfully submitted this ____ day of October, 2003.

WESTERN ENVIRONMENTAL LAW CENTER

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