

Eric E. Huber  
Sierra Club  
1650 38<sup>th</sup> St. Ste. 102W  
Boulder, CO 80301  
(303) 449-5595

Timothy M. Bechtold  
Bechtold Law Firm, PLLC  
PO Box 7051  
Missoula, Montana 59807  
Tel: (406) 721-1435

Rebecca K. Smith  
PUBLIC INTEREST DEFENSE CENTER, P.C.  
P.O. Box 7584  
Missoula, MT 59807  
Tel: (406) 531-8133

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

ALLIANCE FOR THE WILD ROCKIES,	)	
NATIVE ECOSYSTEMS COUNCIL,	)	CV-09-73-M-DWM
CENTER FOR NATIVE ECOSYSTEMS,	)	
AND SIERRA CLUB, INC.,	)	
	)	COMPLAINT FOR
Plaintiffs	)	DECLARATORY AND
	)	INJUNCTIVE RELIEF
v.	)	
JANE LYDER, Assistant Deputy Secretary	)	
of the Department of Interior; KENNETH	)	
SALAZAR, Secretary of the Department of	)	
Interior; and U.S. FISH AND WILDLIFE	)	
SERVICE,	)	
	)	
Defendants.	)	

## 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' February 25, 2009 revised designation of critical habitat for the Canada lynx (*Lynx Canadensis*) 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) consider the evidence of record on the impacts of climate change on the Canada lynx and to base the critical habitat designation on such evidence; 2) 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 3) 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 a re-introduced population of lynx, and habitat in northeastern Washington that is essential for the conservation of the Canada 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 consider the impacts of climate change on the habitat of the Canada lynx and 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 1.11(a). 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.

### **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 individual members and more than 600 member businesses and organizations, and has been involved in public land management in the area for 18 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 15 years. Members use and enjoy the lynx habitat in National Forests for hiking, fishing, hunting, camping, 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. Center for Native Ecosystems (CNE) is a nonprofit public interest conservation organization dedicated to the conservation and recovery of native species and ecosystems across the Greater Southern Rockies and Plains. It maintains an office in Denver, Colorado. CNE uses the best available science to forward its mission through participation in policy formation, administrative processes, legal action, public outreach and education. CNE uses all of these tools to prevent the extinction of imperiled species like Canada lynx. Center for Native Ecosystems has 300 members,

many of whom reside in Colorado and Montana. The organization and its members have a long history of interest and involvement in Canada lynx conservation. For example, Colorado Division of Wildlife invited CNE staff to assist with releases of reintroduced lynx, where CNE staff observed and photographed lynx. CNE also collaborated with Colorado Division of Wildlife to start and coordinate a volunteer lynx tracking program, which continues to provide valuable information to the reintroduction effort. CNE's staff and members 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 members and staff visit lynx habitat, they also partake in recreational activities, such as hiking, camping, and nature photography. CNE members and staff plan to return to lynx habitat in Montana and the Southern Rockies and to continue these activities frequently and on an ongoing basis in the future. The loss of lynx recovery potential in Montana and the Southern Rockies will harm CNE's staff and members 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 Jane Lyder is the Assistant Deputy Secretary of the Department of Interior. She signed the final critical habitat designation for the Canada lynx on February 12, 2009. She is sued in her official capacity.

13. Defendant Kenneth Salazar is the Secretary of the Interior and in that capacity is responsible for the Canada lynx critical habitat designation. He is sued in his 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 - or “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 March 12, 2009 Plaintiffs mailed to Defendant Salazar the required 60-day Notice of Intent to Sue letter, pursuant to 16 U.S.C. § 1540(g)(2)(A). Defendant Salazar received said notice and 60 days have expired since said notice.

## **STATEMENT OF FACTS**

### **A. 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 and loss of habitat from forest clearcutting 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.

/

/

**B. 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. The final rule designating revised critical habitat for the lynx (“Revised Designation” or the “Rule”), which is the subject of this lawsuit, was completed by staff in the Montana Ecological Services Offices in February of 2009. 74 Fed. Reg. 8616 (February 25, 2009). The Rule designates 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.

38. Specifically, the Final Designation arbitrarily fails to consider the effects of climate change on lynx habitat. The Rule acknowledges that climate change will affect lynx habitat, cites several studies discussing regional climate changes and potential effects on lynx habitat, but then inexplicably refuses to take them into account. Id. at 8617. Instead, the Rule states that the information will be further considered in the lynx 5-year review process. Id.

39. The Final Designation also 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. Furthermore, the FWS arbitrarily considers the Southern Rockies as unoccupied despite the presence of an entire reintroduced population beginning in 1999 as well as consistent observations of naturally-occurring lynx throughout the last several decades.

40. In addition, instead of properly designating the occupied areas that contain features essential to the conservation of the lynx as required by the ESA, the Rule impermissibly limits critical habitat designation to areas that meet additional criteria: (1) those containing the majority of recent lynx records; (2) those containing evidence of breeding lynx populations; (3) those with self-sustaining lynx populations, and (4) those having direct

connectivity with lynx populations in Canada. 74 Fed. Reg. at 8641. These criteria results in the arbitrary exclusion of areas that are essential to the conservation of the species.

**C. The FWS Failure to Consider Climate Change in the Critical Habitat Designation**

1. Climate Change Generally

41. As used herein, the term “climate change” is “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”

<http://www.ipcc.ch/pdf/glossary/ar4-wg3.pdf>.

42. The publications of the Intergovernmental Panel on Climate Change (IPCC), specifically the IPCC Fourth Assessment Report: Climate Change 2007, are the best available science on global climate change. The IPCC concluded that global climate change is occurring and is caused by human activities, such as the burning of fossil fuels and clearing of forests. Historical records analyzed by the IPCC demonstrated that global surface temperatures have risen (with regional variations) during the past 157 years, most strongly after the 1970s.

43. The warming of global temperatures has increased the probability of precipitation falling as rain rather than snow, especially in near-freezing

situations, such as the beginning and end of the snow season. In many Northern Hemisphere regions, this has caused a reduced snowpack, which can greatly alter water resources throughout the year. As a result of thermal and precipitation regime changes, the IPCC expects the snowline (the lower elevation of year-round snow) in mountainous regions to rise 150m (492 ft) for every 1 degree C (1.8 degree F) increase in temperature. The IPCC concluded that snow-season length and depth of snowpack are very likely to decrease in most of North America.

2. The Impacts of Climate Change on Canada Lynx and its Habitat

44. The dependence of *Lynx canadensis* (Canada Lynx) on winter snow and boreal forest renders it especially vulnerable to climate change. Climate change has occurred within the range of the Canada Lynx and this has caused, and will cause in the future, a reduction of habitat available to the Canada lynx.

45. The Fish and Wildlife Service described the adverse impacts of climate change on the Canada lynx and its habitat in its 2005 Lynx Recovery Outline (p. 11):

Scientific evidence has demonstrated that globally the climate has been warming as evidenced by changes in the amount of snow cover, among other indicators (Intergovernmental Panel on Climate Change 2001). Continued warming temperatures are likely to negatively affect the cold climatic conditions that create and maintain the boreal forest ecosystem for which lynx

are highly adapted. As a result, we anticipate that continued warming trends may eventually cause the boreal forests in the contiguous United States to recede north and/or recede to higher, colder elevations, which would likely result in adverse effects to the contiguous United States population of lynx.

46. The Fish and Wildlife Service acknowledged the adverse impacts of climate change on the Canada lynx and its habitat in the Final Rule, 74 FR at 8617:

[N]ew information on regional climate changes and potential effects to lynx habitat has been developed (e.g., Gonzalez et al. 2007, entire; Knowles et al. 2006, pp. 4545-4559; Danby and Hick [sic] 2007, pp. 358-359), and this new information suggests that climate change may be an issue of concern for the future conservation of lynx because lynx distribution and habitat is likely to shift upward in elevation within its currently occupied range as temperatures increase (Gonzalez et al. 2007, pp. 7, 13-14, 19).

47. Climate change provides justification for FWS to designate areas as critical habitat, in addition to the areas designated in the Final Rule. These additional areas of critical habitat would include those that retain high levels of snowfall under various climate change scenarios. This could include areas not currently occupied by lynx.

48. Designating additional areas as critical habitat to account for the impacts of climate change would make allowances for changes in the quantity, quality and location of lynx habitat. In addition, designation of additional areas to account for climate change could include areas that lynx

could use to travel safely between areas of suitable habitat when certain areas lose their suitability over time due to climate change and lynx need to disperse from those areas.

3. The Importance of Designating Areas as Critical Habitat in light of the impacts of Climate Change

49. The scientific study by Gonzalez *et. al.* referenced by the Fish and Wildlife Service in the Final Rule is the best available science on the impacts of global climate change on the habitat of the Canada lynx. It identifies the loss of lynx habitat that will occur as a result of climate change through the year 2100, and identifies specific areas that will remain. It finds that “intensive management” is necessary to address this loss of habitat over time.

50. The scientific study by Knowles, *et. al.* referenced by the Fish and Wildlife Service in the Final Rule is the best available science on the trends in snowfall versus rainfall in the Western United States due to climate change. It concludes that there is: 1) more precipitation falling as rain instead of snow; and 2) earlier snowmelt. This means that there will be a loss of Canada lynx habitat over time.

51. The scientific study by Danby and Hik referenced by the Fish and Wildlife Service in the Final Rule is the best available science on the variability, contingency and rapid change in recent subarctic alpine tree line

dynamics due to climate change. It concludes that impacts in mountainous areas are expected to be marked. "Tree line" will undergo a significant change in structure and position. This means that there will be a loss of Canada lynx habitat over time.

52. The Administrative Record of the Final Rule contains additional scientific information on climate change and its impacts to the lynx and its habitat.

53. The Southern Rockies are particularly important in regards to climate change due to their higher elevation. Lynx occurrences in the southern Rockies are, in general, at higher elevations (1,250 to over 3,750 meters (4,100-12,300 feet)) than other areas in the contiguous United States. This is especially true compared to areas outside of the western United States. The existence of such higher elevation habitat may be important in the lynx's ability to respond to ongoing and future climate warming. The Southern Rockies region may also serve as a refugium for the contiguous United States population of the Canada lynx in the face of climate warming.

54. The effects of climate change, such as the upward movement of snowline elevations and forested areas, will significantly shrink lynx habitat and will change its migration patterns. Since many lynx occurrences in the Southern Rockies are well above the 1500m mark, this habitat may retain

snow conditions appropriate for Canada lynx, while snow conditions may deteriorate in many of the other areas inhabited by lynx populations.

55. Some models predict that over the next 100 years subalpine fir will mostly recede from its range in the northern U.S. Rockies while several predict the species core range will remain strong in the Southern Rocky Mountains. Research also predicts that forests known to be prime lynx habitat will move upslope, which means that the higher elevations in the southern Rockies may become critical to the recovery of the lynx. Thus, protection of high elevation forests and areas that retain snowpack in the southern Rockies may be very important to the species' ability to respond to climate change.

56. In addition, because of its ecological setting in relatively high elevation habitats in the Southern Rocky Mountains, the reintroduced population in the Southern Rockies may be important to the ability of the lynx distinct population segment to persist as the climate warms. This will maximize the chances that, regardless of the effects of climate change, the lynx will persist in the southern portion of its range in another 100 years.

4. The FWS Failed and Refused to Consider Climate Change in its Critical Habitat Designation

57. The best available scientific data in the Administrative Record of the Final Rule indicates that climate change may cause

adverse impacts to, and a reduction of, Canada lynx habitat.

58. In spite of the scientific information on climate change and its impact on the lynx and its habitat in the Administrative Record (e.g. the report by Gonzalez *et. al.*), the FWS stated at 74 FR at 8617:

This information . . . still needs to be evaluated further to determine how climate change might affect lynx and lynx habitat. We are evaluating this information in the 5-year review we are conducting for lynx. . . . Revisions to the critical habitat designation may be necessary in the future to accommodate shifts in the occupied range of the lynx.

59. Thus, although the FWS stated it might consider changes to the critical habitat designation *in the future* to account for climate change, it did not designate critical habitat in the present Final Rule to account for climate change.

60. The FWS did not determine whether some areas of currently *unoccupied* habitat are essential to the conservation of the species because they will be among the areas remaining after climate change reduces the amount and/or changes the latitude or altitude of available habitat.

61. The FWS did not determine whether areas of currently unoccupied habitat should be designated as critical habitat in the present and manage them accordingly, so that lynx may move into in these areas in the future, as lower, warmer habitat is lost due to climate change.

62. The FWS also stated that its future consideration of climate change would be limited to considerations of shifts in the “occupied range” of the lynx. As a result, the FWS did not consider any currently unoccupied habitat as critical habitat for future occupation by lynx, as the habitat shifts over time due to climate change.

63. By its approach the FWS disregarded the fact that best available scientific data in the Administrative Record indicates that some of the best high elevation habitat is in the Southern Rockies. The FWS failed to adequately consider the extent to which the Southern Rockies provisional core area may contribute to the persistence of the lynx in light of climate change, and to include the Southern Rockies in the critical habitat designation on this basis.

64. By its approach the FWS disregarded the fact that due to the loss of habitat due to climate change, the habitat will become increasingly fragmented and isolated, thus increasing the need for the designation of corridors between currently occupied habitat, as well as between currently unoccupied habitat that could provide future habitat for the species. This includes providing for and protecting corridors for interaction between the Canadian population of lynx and the populations in Montana, Wyoming, Colorado and New Mexico, as well as providing for and protecting corridors

for interactions between the current and future populations within and between those states.

65. Despite its statement that “[t]he revised critical habitat units in this rule include higher-elevation habitats that lynx would be able to continue to use if lynx distribution or habitat shifted upward in elevation,” 74 FR at 8612, the FWS did not designate all occupied higher elevation lynx habitat that lynx would be able to continue to use when lynx distribution or habitat shifts upward in elevation. For example, the FWS did not include the upper elevations of the mountains in Southern and Central Colorado, which are occupied by lynx.

66. The FWS’s limitation of critical habitat to occupied areas is inconsistent with the ESA, 16 U.S.C. § 1532(5)(A). As a result, many areas that are occupied or used by lynx presently, and which could be used or relied on by the lynx when the habitat shifts due to climate change, were excluded from the critical habitat designation.

67. Finally, the definition of Critical Habitat in the ESA includes the “specific areas within the geographical area occupied by the species that may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i). As the Gonzales study noted, because of climate change it may be necessary to intervene with intensive natural resource management

to conserve lynx habitat. This includes areas that were omitted from the critical habitat designation in the Final Rule.

### **FIRST CLAIM FOR RELIEF**

(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 and Administrative Record on Climate Change)

68. The allegations of paragraphs 1 - 67 are incorporated by reference.

69. 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 on climate change and its impact on the Canada lynx and its habitat. 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).

70. 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).

71. The FWS's failure to base its decision on the information in the record on climate change, and on the impact on the Canada lynx and its habitat in particular, also 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).

72. In addition, the FWS's postponing assessment of current climate change science that implicates critical habitat designation to its "five-year review" constituted a refusal to base the decision on the "best available scientific data" and "such data as may be available at that time," as required by the ESA, and/or it 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).

## **SECOND CLAIM FOR RELIEF**

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

73. The allegations of paragraphs 1 - 72 are incorporated by reference.

74. 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).

75. For example, the FWS excluded areas that were within designated core areas or provisional core areas and which require special management under the FWS’s Lynx Recovery Outline.

76. Areas of Montana were excluded as critical habitat despite supporting lynx populations. Some of these areas are threatened by habitat alteration from timber harvest. Therefore, they require special management considerations or protection. This is shown by the Lynx Conservation Assessment and Strategy.

77. Another example is the Southern Rockies in Southwest Colorado. This area was occupied by Canada lynx at the time the lynx was listed. This area contained the physical and biological features essential to the conservation of the species. For instance, it had moist boreal forests that have cold, snowy winters and a snowshoe hare prey base. It contains

mountainous areas with the boreal forests the lynx use characterized by scattered moist forest types with high hare densities in a matrix of other habitats (e.g., hardwoods, dry forest, non-forest) with low hare densities.

78. The Southern Rockies also may require special management considerations or protection. This is evidenced by: a) the Lynx Recovery Outline; b) the Lynx Conservation Assessment and Strategy; and/or c) the Gonzalez climate change report recommending “intensive management.”

79. Nonetheless, the FWS omitted the Southern Rockies because it found that did not include “self sustaining lynx populations,” and because they allegedly had “not been shown to support a breeding population of lynx.” 74 Fed. Reg. at 8619. That is not the correct legal standard under 16 U.S.C. § 1532(5)(A)(i), and it was contrary to the evidence before the agency.

80. In addition, the FWS definition of “occupied” was unduly restrictive. For example, it required population data after 1995 to designate an area occupied. Thus it discounted areas that had records of occupancy before 1995 but had not been monitored for lynx since then. This definition resulted in the FWS treating potentially occupied areas as unoccupied, and applying the critical habitat standard for unoccupied habitat to them. It also resulted in FWS ignoring or overlooking population and occurrence data

showing that certain areas are occupied. This includes, but is not limited to, the Kettle Range in Washington and areas in Montana and Colorado.

81. 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).

### **THIRD CLAIM FOR RELIEF**

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

82. The allegations of paragraphs 1 - 81 are incorporated by reference.

83. 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).

84. In this case, the FWS excluded any area that it deemed unoccupied. Therefore, FWS found 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.

85. 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.

86. In addition, 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 in regards to occupied habitat.

87. 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).

#### **FOURTH CLAIM FOR RELIEF**

(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 )

88. The allegations of paragraphs 1 - 87 are incorporated by reference.

89. FWS failed to use the best scientific data 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) determining 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) deciding that the Southern Rockies are “unoccupied” as opposed to “occupied” lynx habitat, and that the Southern Rockies lynx population is not self-sustaining, and not connected to Canada;

c) failing to consider the potential effects of climate change, such as decreasing snowpack, in determining which habitat was necessary for the conservation of the species;

d) examining lynx populations in each of the six core areas to determine their viability; and

e) determining whether there is a need for special management on certain federal land.

90. The FWS’s failure to base its decision on the best available science 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) consider the impacts of climate change on the habitat of the Canada lynx and add areas to the critical habitat designation to account for this factor; and
  - (iii) 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 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 26th day of May, 2009.

**s/ Eric E. Huber**

Eric E. Huber  
Colo. Bar No. 40664  
Douglas P. Hayes  
Colo. Bar No. 39216  
Sierra Club  
1650 38<sup>th</sup> St. Ste. 102W  
Boulder, CO 80301  
(303) 449-5595  
(303) 449-6520 (fax)  
[eric.huber@sierraclub.org](mailto:eric.huber@sierraclub.org)

**s/ Timothy Bechtold**

Mont. Bar No. 4376  
Timothy M. Bechtold  
Bechtold Law Firm, PLLC  
317 East Spruce Street  
PO Box 7051  
Missoula, Montana 59807  
406-721-1435  
406-830-3085 fax  
[tim@bechtoldlaw.net](mailto:tim@bechtoldlaw.net)

**s/ Rebecca Smith**

Rebecca K. Smith  
Mont. Bar No. 9658  
PUBLIC INTEREST  
DEFENSE CENTER, P.C.  
P.O. Box 7584  
Missoula, MT 59807  
Tel: (406) 531-8133  
Fax: (406) 830-3085  
[publicdefense@gmail.com](mailto:publicdefense@gmail.com)