



# Western Environmental Law Center

*Defending the West*

February 6, 2004

Mr. Harv Forsgren  
Regional Forester  
Southwestern Region  
USDA Forest Service  
333 Broadway SE  
Albuquerque, NM 87102

**Re: The Forest Service's Refusal to Conduct Section 7 Consultation on Canada Lynx in the Carson and Santa Fe National Forests (File Code: 1570/2670)**

Dear Mr. Forsgren:

We are disappointed to hear that the Carson and Santa Fe National Forests will not conduct *any* section 7 consultation on Canada lynx (lynx).

As you know, the goal of our October 30, 2003 letter was to put your agency, Region 3 of the Forest Service, on notice about lynx in north-central New Mexico and the Agency's responsibilities under section 7 of the Endangered Species Act (ESA). We had hoped that by informing your agency about the existence and even death of lynx in the Carson and Santa Fe National Forests, and by articulating the legal requirements of section 7 of the ESA, we could find resolution without resorting to litigation. We hoped to resolve any disputed issues in an amicable, non-litigious manner. Unfortunately, you have rendered this impossible.

Your December 29, 2003 letter refusing to conduct any section 7 consultation on lynx has compelled us to take legal action. We simply cannot accept the Forest Service's determination that lynx are free game in New Mexico – that “any Canada lynx found in New Mexico have no ESA status and, therefore, no Section 7 consultation is required.”

Legally, this determination is premised on a fundamental misunderstanding and misapplication of the U.S. Fish and Wildlife Service's (FWS's) distinct population segment (DPS) policy (61 Fed. Reg. 4722), the Final Rule listing the lynx (65 Fed. Reg. 16052), and the plain language and very purpose of section 7 of the ESA. DPS characteristics apply to species – to population segments, not to individual states. To say, therefore, that New Mexico was excluded because it does “not have [DPS] characteristics” makes no sense. This statement is also legally incorrect. New Mexico was not excluded from the contiguous U.S. DPS population because it lacked certain habitat characteristics.

The Final Rule determined “threatened status for the contiguous U.S. DPS” and explained that this DPS occurs in four different ecological regions (the Northeast, Great Lakes, Southern Rockies, and Northern Rocky/Cascades) which are separated from each other by natural barriers consisting of unsuitable lynx habitat. Within these four ecological regions, the Final Rule does

list specific states within the range of lynx. It is true that New Mexico is not mentioned on this list or included as part of the lynx's Southern Rocky Mountain range. The Clarification to the Final Rule explains that New Mexico was not "included within the range of lynx" because of a lack of reliable records of native lynx. See 68 Fed. Reg. 40076. The FWS's oversight and failure to mention New Mexico within the range of the lynx, however, *does not* mean that lynx have no "ESA status" in the State.

The Final Rule does not, and surely the FWS did not intend to, exclude contiguous high-elevation habitat extending from southwestern Colorado into north-central New Mexico. See 65 Fed. Reg. 16052; see also 61 Fed. Reg. 4724 (state boundaries are inappropriate to determine DPS). The FWS did not intend to divide the Southern Rocky Mountain range into two separate management areas – one north of the Colorado/New Mexico border where lynx are protected and one south of the Colorado/New Mexico border where lynx can be shot on sight. After all, the Southern Rockies' San Juan and Sangre de Cristo Mountains – where lynx are being released, denning, giving birth, and being killed – run from southwestern Colorado into north-central New Mexico. New Mexico's San Juan and Sangre de Cristo Mountains form the southern end of the Southern Rockies. Why would the FWS adopt a hyper-technical Final Rule that severs this area of suitable habitat from the rest of the Southern Rocky Mountain ecological region? Don't lynx need more, not less, habitat? It simply makes no sense from either a legal or biological perspective.

Indeed, your position that lynx have no "ESA status" in New Mexico is entirely illogical. A lynx that wakes up in Colorado's San Juan Mountains, goes hunting, and chases a snowshoe hare across the Colorado/New Mexico border would be unprotected for the few hours it chases the hare in New Mexico. Any time spent south of the state border would be unprotected time. Lynx traveling south along the San Juan Mountains could be shot upon crossing the state boundary. A federally protected species traveling on federal land, i.e., from Colorado's San Juan and Rio Grande National Forests into New Mexico's Carson and Santa Fe National Forests, would lose protective "ESA status" simply by crossing an artificial, political boundary. And why? According to your reasoning, because New Mexico was not mentioned in the Final Rule. This position is contrary to the spirit, purpose, and letter of the ESA.

Granted, there are situations in which animals can and do lose their ESA protective status by moving about the landscape. But this only occurs when there is overlap among the same species, i.e., when a listed species moves into an area where the same species exists in strong numbers. See e.g., grizzly bears (listed in lower 48 but unlisted in Canada); brown pelicans (listed west of Mississippi-Alabama state line and unlisted east of the line); gray wolf (listed as endangered in all states except Minnesota where it is listed as threatened). In such circumstances, it makes sense to use political boundaries to differentiate between an imperiled and healthy population of the same species. This however, is not the case with respect to lynx in the Southern Rockies.

There is not a strong, resident population of lynx in New Mexico that would warrant excluding the State from ESA protective status for this listed species. Only Alaska and Canada are home to strong numbers of lynx and thus these are the only two areas where lynx have no "ESA status." Even a cursory look at the Final Rule listing the lynx confirms this point. See 65 Fed. Reg. 16052.

It is also worth emphasizing, that for the purposes of section 7 of the ESA, this entire discussion about whether lynx are or are not listed in New Mexico is irrelevant – it really doesn't matter whether the lynx have "ESA status" in New Mexico or not. As explained in our October 30, 2003 notice letter, the Forest Service has a duty to consult on any action that "may affect" a listed species. There is no question that lynx in Colorado are a listed species and are traveling, if only temporarily, into the Carson and Santa Fe National Forests. There is also no question that Forest Plans that fail to provide conservation measures for lynx are the number one threat to the species. See 65 Fed. Reg. 16052 (lynx threatened by the inadequacy of Forest Plans). As such, section 7 consultation on how the Carson and Santa Fe National Forest Plans "may affect" Colorado lynx is required.

On a final note, the Forest Service's determination that there is no suitable lynx habitat in New Mexico rests on incomplete and out of date data. The Forest Service relies on the fact that the American Society of Mammalogists' (ASM's) "list of Mammals of New Mexico" fails to include lynx. This ASM list, however, is incomplete and is currently being revised. Indeed, it was prepared by a student at the University of New Mexico -- not even a professional mammalogist. This is clearly not the best available scientific evidence upon which to dismiss our requests for section 7 consultation. See 16 U.S.C. § 1536 (a)(2) (each agency shall use "the best scientific and commercial data available").

For a more up to date, professional list of mammals in New Mexico, we suggest you review the "Southwest Mammal Resource Page" at [http://leopold.nmsu.edu/jfrey/mammal\\_lists.htm](http://leopold.nmsu.edu/jfrey/mammal_lists.htm). Indeed, a five-minute internet search regarding the ASM's "Mammals of New Mexico" list revealed that the list was recently supplanted by a newer "Checklist of New Mexico Mammals" prepared by a Dr. Jennifer Frey (a copy of this new Checklist of New Mexico Mammals is attached for your review). This new, up-to-date checklist includes lynx as a mammal of New Mexico. In fact, when we contacted Dr. Frey to discuss how this new list came to include lynx, she explained that north-central New Mexico's San Juan and Sangre de Cristo Mountains, i.e., the two ranges located within the Carson and Santa Fe National Forests, were undoubtedly part of the lynx's Southern Rocky Mountain range (personal communication with Dr. Jennifer Frey, February 2, 2004).

We suggest therefore, that before summarily dismissing our claims, you consult the best available science as required by section 7 of the ESA. See 16 U.S.C. § 1536 (a)(2). You should consult with experts in the field and your own literature on lynx in the Southern Rockies. Please review the Interagency Lynx Biology Team's Lynx Conservation Assessment and Strategy (LCAS), which states that "[a]lthough no records exist from New Mexico, suitable habitat extends into north-central New Mexico along the Sangre de Cristo Mountain range and, especially, in the San Juan Mountains." LCAS at 51. The Forest Service's own "Biological Assessment of the Effects of National Forest Land and Resource Management Plans on Canada Lynx" includes an entire discussion on the "New Mexico Rocky Mountains Ecoprovince" as occurring within the lynx's Southern Rocky Mountain range. See Lynx Biological Assessment, Appendix C at 125, 126.

Additional resources to consider include: (1) the FWS's recently released document entitled "How to Avoid Incidental Take of Lynx (in the "contiguous United States, lynx may occur

in...New Mexico”); (2) the Colorado Division of Wildlife’s (CDOW’s) Final Conservation Plan with the FWS for Canada Lynx in Colorado (documenting the death of lynx in New Mexico); (3) CDOW’s 2000 and 2001 Annual Progress Reports to the FWS (lynx “[m]ortalities occurred throughout the areas through which lynx moved. However, mortalities occurred in New Mexico in higher proportion to all lynx locations in that area than elsewhere”); (4) the New Mexico Department of Game and Fish’s (NMDGF’s) notice to hunters regarding lynx in the State; (5) the NMDGF’s Biota Information System of New Mexico (“lynx almost certainly occurred in New Mexico’s San Juan and Sangre de Cristo Mountains”); (6) a recently completed thesis on the “Distribution, Habitat Characteristics, and Population Demographics of Snowshoe Hare at the Extreme Southern Edge of its Geographic Range”; and (7) the attached maps of the Southern Rocky Mountains depicting the contiguous habitat between Colorado and New Mexico. Complimentary copies of each of these documents are attached for your review.

Again, our goal in drafting this letter and submitting the above reference documents is to bring the Forest Service to the table. While your December 29, 2003 response letter has left us no choice but to pursue litigation on this matter, we would still like to continue the dialogue.

Thank you in advance for taking the time to consider this letter and the attached documents. If you would like to discuss these issues further or have any questions or comments, please do not hesitate to call me at (505) 751-0351.

Sincerely,

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