



Western Environmental Law Center

Defending the West

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SENT VIA CERTIFIED U.S. MAIL (RETURN RECEIPT)

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Re: Sixty-Day Notice of Intent to Sue for Violations of Section 7 of the Endangered Species Act

Dear Sirs and Mesdames:

On behalf of Forest Guardians, Sinapu, Center for Native Ecosystems, Animal Protection Institute ("API"), Animal Protection of New Mexico ("APNM"), and Carson Forest Watch, and

other interested parties, we hereby provide this notice of violations of section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536. These violations arise from the failure of two National Forests in the Southern Rockies –the Carson and Santa Fe National Forests -- to initiate and complete formal consultation on how implementation of its Land and Resource Management Plans (hereinafter “Forest Plans”) is affecting Canada Lynx (hereinafter “lynx”).

INTRODUCTION

The listing of lynx as a “threatened” species under the ESA has highlighted the need to modify existing regulations and management plans – in particular Forest Plans – to include conservation measures to protect lynx and lynx habitat. Indeed, both the Forest Service and the U.S. Fish and Wildlife Service (“FWS”) have concluded that the single, most significant factor threatening the contiguous U.S. population of lynx is inadequate Forest Plans – Forest Plans that authorize activities such as timber harvesting, fire management, livestock grazing, and recreation on National Forest lands but fail to include the necessary conservation measures and criteria to adequately protect lynx and lynx habitat.

Concerns over inadequate Forest Plans prompted all National Forests in the Southern Rockies, with the exception of the two at issue in this notice, to initiate and complete formal consultation on lynx with the FWS. As a result of this consultation process, and consideration of the relevant scientific literature on lynx (i.e., the Lynx Biology Team’s Lynx Conservation Assessment and Strategy (LCAS) and the lynx Science Report) all of the National Forests in southern Wyoming and western Colorado are now in the process of amending their respective Forest Plans to include protective measures for lynx and lynx habitat.

The two National Forests that have not participated in this process are the Carson National Forest and Santa Fe National Forest – two National Forests in the heart of north-central New Mexico and the lynx’s Southern Rocky Mountain Geographic Area. Despite the presence of lynx and lynx habitat in these two National Forests, they have failed and continue to fail to: (1) utilize their authority to carry out programs for the “conservation” of lynx; and (2) consult with the FWS to insure that implementation of its current Forest Plans are not jeopardizing the continued existence of lynx. Both the Carson and Santa Fe National Forests are therefore in violation of section 7 (a)(1), section 7 (a)(2), and section 7 (d) of the ESA. 16 U.S.C. §§ 1536 (a)(1), (a)(2), (d).

This sixty-day notice letter serves to put the Forest Service on notice of its liability under the ESA and inform the Agency of our intent to bring a citizen suit to enjoin the violations described herein after the sixty day period has run. This notice is provided pursuant to, and in accordance with, section 11 (g)(2) of the ESA, 16 U.S.C. § 1540 (g)(2).

LYNX IN THE SOUTHERN ROCKIES

The FWS, the U.S. Forest Service, and the Lynx Biology Team (the team that prepared the comprehensive LCAS), define the lynx’s “Southern Rocky Mountain Geographic Area” as

encompassing the mountainous regions of Colorado, south-central Wyoming, and north-central New Mexico. The LCAS recognizes that although no records of lynx exist from New Mexico (historic trapping records from the 1800s/early 1900s do not exist and the more recent records (post-1930) are not helpful because they do not distinguish between bobcats and lynx, referring generally to both species as “lynx cats”), suitable habitat does extend into north-central New Mexico along the Sangre de Cristo mountain range and, especially, in the San Juan Mountains.

This area of “suitable habitat” in the Sangre de Cristo and San Juan Mountains includes the Carson and Santa Fe National Forests. The Carson National Forest which borders the San Juan and Rio Grande National Forests in southern Colorado (two National Forest just across the border that provide identical lynx habitat and have consulted with the FWS) includes 1.5 million acres in north-central New Mexico ranging from 6,000 to 13,100 feet in altitude. Similarly, the Santa Fe National Forest covers 1.6 million acres ranging from 6,000 to 13,000 feet in altitude in the heart of north-central New Mexico.

In an effort to establish and restore a viable population of lynx to the Southern Rocky Mountains, the Colorado Division of Wildlife (“CDOW”) released ninety-six lynx in southwestern Colorado in 1999 and 2000. Forty-one lynx were reintroduced in the winter and spring of 1999 and an additional fifty-five lynx were released in April and May of 2000.

The CDOW picked southwestern Colorado’s San Juan Mountains as the place to release lynx because of its outstanding lynx habitat. The area includes relatively large populations of snowshoe hare (the lynx’s primary prey), low road densities, large forested areas of public land, and was historically occupied by lynx. This area is now known as the “core lynx recovery area.”

As of February 26, 2003, forty-five of the original ninety-six lynx released in the core recovery area are known to have been killed. Of these forty-five mortalities, twenty-five are lynx released in 1999 and twenty are from lynx released in 2000. The causes of death include: starvation (9), hit by vehicles (6), shot (6), probable predation (1), plague (3), and unknown human caused deaths (20). The CDOW is currently tracking thirty-one of the fifty-one lynx still possibly alive. Twenty lynx are considered missing. 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. Other missing lynx may still have functioning collars but are outside the research area.

To augment the existing population of reintroduced lynx and ensure there are enough lynx in the wild to establish a viable, self-sustaining reproducing population, the CDOW plans to release an additional 150 to 180 lynx obtained from Canada and Alaska over the next four years. These efforts got underway this spring with the release of an additional thirty-three lynx in the core lynx recovery area. Just this year, the CDOW documented the first verified reproduction of lynx in the wild. CDOW confirmed the birth of sixteen lynx from three separate high elevation dens in southwestern Colorado’s San Juan Mountains. CDOW is confident that more births will be discovered by the end of the year.

Not surprisingly, the lynx being released in southwestern Colorado’s San Juan Mountains – a mountain range that extends into north-central New Mexico – have moved and continue to

move south along the San Juans into northern New Mexico's Carson and Santa Fe National Forests. According to the New Mexico Department of Game and Fish ("NMDGF"), lynx almost certainly occurred in New Mexico in the San Juan and Sangre de Cristo Mountains.

Indeed, through extensive aerial and satellite tracking, the CDOW has tracked, and continues to track the movement patterns of the released animals. Most lynx tracked stayed within the core recovery area. However, there were a number of movements to the south – into northern New Mexico's Carson and Santa Fe National Forests. Aerial telemetry locations of lynx released in 1999 reveal that a number of lynx moved 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 twenty lynx missing from the San Juan Mountains may also inhabit north-central New Mexico. In fact, the CDOW identified a number of travel corridors extending into New Mexico which are used repeatedly by more than one lynx, possibly suggesting route selection based on olfactory cues.

Southerly movements into New Mexico's Carson and Santa Fe National Forest, includes a corridor running down the east side of Wolf Creek Pass to the southeast to the Conejos River Valley. Recognizing these movements, the CDOW issued a statement suggesting that north-central New Mexico is now considered part of the lynx recovery area: "[m]ost lynx that we are currently monitoring continue to use terrain within the core research area: New Mexico north to Gunnison, west as far as Taylor Mesa and east to Monarch Pass."

Over the last three years, we know of *at least* four lynx that have been killed in New Mexico. Two were shot near Chama, New Mexico, 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). The CDOW recognized that lynx mortalities occurred throughout the recovery area. However, it determined that "mortalities occurred in New Mexico in higher proportion to all lynx locations in that area than elsewhere."

At present, the NMDGF acknowledges that lynx "may occur in parts of New Mexico" and as such, issued a public notice about the difference between bobcats and lynx on its website. The State is therefore well aware that lynx are entering New Mexico and, given the CDOW's plans over the next three years for an additional 180 releases, is aware that an increased number of lynx will be making their way into the State.

SECTION 7 OF THE ESA.

Section 7 of the ESA includes both a substantive and procedural component directing Federal agencies like the Forest Service to use their existing authority to "conserve" threatened and endangered species and, in consultation with FWS, to ensure that their actions do not jeopardize listed species or destroy or adversely modify critical habitat. 16 U.S.C. §§ 1536 (a)(1), (a)(2).

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

means 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).

Section 7 of the ESA also directs that “[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). 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. § 402.02.

The obligations to conserve listed species and insure against a likelihood of jeopardy requires the agencies to give the benefit of the doubt to listed species and to place the burden of risk and uncertainty on the proposed management action. See Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987).

To partially fulfill section 7 of the ESA’s requirements, federal agencies must consult with FWS when an activity they permit, conduct, or fund could affect listed species. 16 U.S.C. § 1536(a)(2). The goal of the consultation process is to identify and resolve conflicts between: (1) the protection and enhancement of listed species; and (2) proposed federal action. The process begins with the action agency requesting information from FWS on whether any listed species may be present in the area of the proposed action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). If a listed species may be present, the federal agency must prepare a “biological assessment” (BA) to determine whether the listed species may be affected by the proposed action. *Id.* This first step of correspondence between the federal agency and FWS (called “informal consultation”) is designed to assist the federal agency in determining whether formal consultation is required.

Federal agencies are required to proceed to “formal consultation” if the BA determines that their actions “may affect” listed species or their habitat. 50 C.F.R. § 402.14. After formal consultation is completed, FWS must provide the action agency with a “biological opinion” (BO) explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536 (b); 50 C.F.R. § 402.14. If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species (i.e., issues a “jeopardy finding”), the BO must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the BO concludes that the action will not result in jeopardy (i.e., issues a “no jeopardy finding”), FWS must provide an “incidental take statement” specifying the impact of such incidental taking on the species, any “reasonable and prudent measures” that FWS considers necessary to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the agency to implement those measures. 16 U.S.C. § 1536(b)(4).

During the consultation process, the agency is prohibited from making 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. 16 U.S.C. § 1536 (d). Also, the agency must reinitiate formal consultation with FWS if new information reveals that the agency action may impact a species in ways not previously considered or if a new species is listed that may be affected by the identified action. 50 C.F.R. § 402.16.

Compliance with the procedural provisions of the ESA – making the determination of the effects of the action through the consultation process – is integral to compliance with the substantive requirements of the Act. Under this statutory framework, federal actions that “may affect” a listed species or critical habitat may not proceed unless and until the federal agency insures, through completion of the consultation process, that the action is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; Conner, 848 F.2d at 1455. See, e.g., Pacific Coast Fed’n of Fishermen’s Assoc. v. U.S. Bureau of Reclamation, 138 F.Supp.2d 1228 (N.D. Cal. 2001) (enjoining operation of water projects until a valid consultation is complete); Conner v. Burford, 848 F.2d at 1441, 1453-55 (enjoining oil and gas lease sales and related surface-disturbing activity until comprehensive biological opinion assessing the effects of all phases of the oil and gas activities was complete); Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994) (“the individual sales cannot go forward until the consultation process is complete on the underlying plans which BLM uses to drive their development”); Greenpeace v. National Marine Fisheries Service, 106 F.Supp.2d 1066 (W.D. Wash. 2000) (enjoining ocean-bottom fishing until § 7(a)(2) consultation was complete).

Even after the procedural requirements of a consultation are complete, however, the ultimate duty to ensure that an activity does not jeopardize a listed species lies with the action agencies. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion to satisfy its duty to avoid jeopardy is arbitrary and capricious. See, e.g., Stop H-3 Ass’n v. Dole, 740 F.2d 1442, 1460 (9th Cir. 1984).

THE FOREST SERVICE’S PROGRAMMATIC CONSULTATION ON LYNX

In December 1999, the Forest Service, along with the Bureau of Land Management (“BLM”), completed a nationwide “Biological Assessment on the Effects of National Forest Land and Resource Management Plans and Bureau of Land Management Land Use Plans on Canada Lynx” (hereinafter “BA”). Using the best available scientific and commercial information, including the “Science Report” on lynx and a draft LCAS, the BA identified the potential impacts to lynx resulting from 57 Forest Plans and 56 BLM Resource Management Plans. The BA’s analysis was broken down by five geographic areas: (1) Cascade Mountains; (2) Northern Rocky Mountains; (3) the Northeast; (4) Great Lakes; and (5) the Southern Rockies.

As mentioned earlier, the Southern Rocky Mountain geographic area includes, and is defined in the BA as, the area that “encompasses south-central Wyoming, western Colorado, and north-central New Mexico.” The “Southern Rocky Mountain Geographic Area encompasses the Northern Rocky Mountain Forest, Central Rocky Mountain Basins, Colorado Rocky Mountain, and New Mexico Rocky Mountain Ecoprovinces.”

A total of eight National Forests participated in the BA for the Southern Rocky Mountain geographic area. These include: the Arapaho-Roosevelt National Forest, Medicine Bow National Forest, Routt National Forest, San Juan National Forest, Rio Grande National Forest, White River National Forest, Grand Mesa/Uncompagre/Gunnison National Forest, and the Pike-San Isabel National Forest. Neither the Carson National Forest or Santa Fe National Forest in north-central New Mexico – part of the lynx’s Southern Rocky Mountain geographic area, participated in the BA.

The BA made a number of findings with respect to how the current Forest Plans are affecting lynx in the Southern Rocky Mountain geographic area. Both the BA and the LCAS determined that Forest Plans in Southern Rockies may adversely impact lynx and lynx habitat by: (1) having a fire exclusion policy which changes the vegetative mosaic maintained by natural disturbances; (2) allowing grazing of domestic livestock, which reduces forage for lynx prey; (3) allowing roads and winter recreation trails that facilitate access to historical lynx habitat by competitors; (4) allowing levels of human access via forest roads that may present a risk of incidental trapping or illegal shooting of lynx; (5) having limited direction in the Forest Plan pertaining to tree thinning and foraging habitat; and (6) having weak direction for distributing lynx habitat components across the landscape.

As a solution to the adverse impacts, the BA recommended amending or revising all Forest Plans to incorporate conservation measures, outlined in the LCAS, that would reduce or eliminate the adverse effects to lynx.

Following completion of the BA, the Forest Service entered into a “Conservation Agreement” with the FWS (hereinafter “CA”) to promote the conservation of lynx and its habitat on federal lands, including National Forest Lands. The CA identifies actions, based on the LCAS, that certain Forest Service Regions have agreed to take to reduce or eliminate adverse effects or risks to lynx and its habitat. Regions 1, 2, 4, 6, and 9 of the Forest Service were a party of the CA. As with the BA, Region 3 of the Forest Service, which encompasses north-central New Mexico’s Carson and Santa Fe National Forests, did not participate in the CA.

After the March 24, 2000 listing of the U.S. contiguous population of lynx as threatened, the FWS used the Science Report, LCAS, Forest Service’s BA, and subsequent CA to issue a Biological Opinion (“BO”) and complete formal consultation on lynx. In the BO, the FWS concluded that the current Forest Plans, as implemented in conjunction with the CA, are not likely to jeopardize the continued existence of the lynx.

The FWS’s “no jeopardy” finding on the current Forest Plans was premised on the following factors: (1) the Forest Service’s increased commitment toward the conservation of lynx as outlined in the CA and BA; (2) per the CA, the Forest Service’s agreement that Forest Plans include measures necessary to conserve lynx for all administrative units identified as having lynx habitat; (3) per the CA, the Forest Service’s agreement to amend the Forest Plans to include/consider the lynx conservation measures outlined in the Science Report, the LCAS, and final rule; (4) per the CA, the Forest Service’s agreement to immediately begin identifying and mapping lynx habitat on federal lands; (5) per the CA, the Forest Service’s agreement to consider the recommendations in the LCAS to determine whether a proposed action may affect lynx, prior

to making any new decisions to undertake actions in lynx habitat; (6) the Forest Service's agreement to defer projects that do not involve third parties and may adversely affect lynx until the Forest Plans incorporate the measures necessary to conserve lynx; and (7) the fact that the amendments to many Forest Plans are already in progress and are adopting provisions of the LCAS. In sum, the FWS arrived at its "no jeopardy" opinion based on the assumption that the CA would be implemented.

At present, the eight National Forests in the Southern Rocky Mountain Geographic area that participated in the BA, CA, and were considered in the BO (i.e., the Arapaho-Roosevelt National Forest, Medicine Bow National Forest, Routt National Forest, San Juan National Forest, Rio Grande National Forest, White River National Forest, Grand Mesa/Uncompaghre/Gunnison National Forest, and the Pike-San Isabel National Forests) are now in the process of amending their respective Forest Plans to adopt conservation measures for lynx. These eight National Forests are now examining, through an Environmental Impact Statement (EIS) process, the biological, social, and economic effects of the proposed amendment and various alternatives. The proposed amendments will include direction as specified in the LCAS to conserve lynx and lynx habitat.

As previously mentioned, neither the Carson National Forest nor Santa Fe National Forest – two National Forests in north-central New Mexico that are part of the Southern Rocky Mountain Geographic area and home to lynx and lynx habitat – were included in the BA, CA, or considered in the FWS's final BO. As a result, neither the Carson National Forest nor Santa Fe National Forest are in the process of amending their respective Forest Plans to include conservation measures for lynx.

THE CARSON AND SANTA FE NATIONAL FOREST'S FAILURE TO CONSULT ON LYNX

The Carson and Santa Fe National Forests are violating sections 7 (a)(1), 7 (a)(2), and 7 (d) of the ESA, 16 U.S.C. §§ 1536 (a)(1), (a)(2), (d), as well as the implementing regulations at 50 C.F.R. § 402 et. seq. In implementing its current Forest Plans, an action that "may affect" lynx, the Carson and Santa Fe National Forests are failing to "utilize their authority" for the "conservation" of lynx and, having not initiated, completed, and/or reinitiated formal consultation, are failing to ensure that its Forest Plans are not likely to jeopardize the continued existence of lynx. 16 U.S.C. § 1536 (a)(1), (a)(2). The Forest Service must use its authority to "conserve" lynx and "insure" that implementation of its Forest Plans are not likely to jeopardize the continued existence of lynx.

The Carson and Santa Fe National Forests are also violating section 7 (d) of the ESA's mandate not to make "any irreversible or irretrievable commitment of resources" prior to, or during the consultation process. See 16 U.S.C. § 1536 (d).

With this letter, therefore, the Forest Service is put on notice that if the aforementioned violations of the ESA are not remedied within 60 days of the date of this letter, we intend to file a citizen suit seeking preliminary and permanent injunctive relief, as well as attorney fees and costs.

Sincerely,

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