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Lauren M. Rule (ISB # 6863)
   ADVOCATES FOR THE WEST
   P.O. Box 1612
   Boise, ID 83701
3
   (208) 342-7024
4
   (208) 342-8286 (fax)
   lrule@rmci.net
5
6
   Michael T. Leahy (D.C.B # 476062)
   DEFENDERS OF WILDLIFE
   1130 17th Street, NW
   Washington, DC 20036
8
   (202) 682-9400
   (202) 682-1331 (fax)
   mleahy@defenders.org
10
11
   Bonne W. Beavers (WSBA # 32765)
   CENTER FOR JUSTICE
12
   35 West Main, Suite 300
13
   Spokane, WA 99201
   (509) 835-5211
14
   (509) 835-3867 (fax)
   bbeavers@cforjustice.org
15
16
   Attorneys for Plaintiffs
17
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                 IN THE UNITED STATES DISTRICT COURT
              FOR THE EASTERN DISTRICT OF WASHINGTON
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                                              ) Case No.
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   DEFENDERS OF WILDLIFE,
   CONSERVATION NORTHWEST, THE LANDS)
21
                                                COMPLAINT
   COUNCIL, SELKIRK CONSERVATION
   ALLIANCE, IDAHO CONSERVATION
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   LEAGUE, and CENTER FOR BIOLOGICAL
23
   DIVERSITY,
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              Plaintiffs,
25
         VS.
   COMPLAINT - 1
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SUSAN MARTIN, Upper Columbia River Field Office Supervisor, and U.S. FISH AND WILDLIFE SERVICE; RANOTTA MCNAIR, Idaho Panhandle Forest Supervisor, and U.S. FOREST SERVICE, 5 Defendants. 6

INTRODUCTION

- This lawsuit challenges two Biological Opinions issued by Defendants 1. Martin and U.S. Fish and Wildlife Service ("Service"), as well as actions taken by Defendants McNair and U.S. Forest Service ("USFS"), that violate the Endangered Species Act ("ESA") and are allowing the last remaining woodland caribou in the continental United States to decline rapidly toward extinction as a result of National Forest management actions within the caribou's habitat and recovery area.
- Specifically, Plaintiffs challenge the Service's 2001 amended 2. Biological Opinions for the Colville and Idaho Panhandle National Forests, which both conclude that continued implementation of the respective Forest Plans will cause "no jeopardy" to the caribou despite the Service's own analysis, supported by extensive scientific information and data, demonstrating that continued implementation of these Plans is, in fact, contributing to the decline of the woodland caribou, especially with regard to increasing intrusions into caribou

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habitat from winter snowmobile activities.

jeopardize its continued existence.

3. Plaintiffs also challenge the "Incidental Take Statements" in the Biological Opinions, which authorize unlimited "incidental take" of the endangered caribou as a result of continued implementation of the Forest Plans.

These Statements anticipate potentially significant "take" of the remaining woodland caribou but do not quantify the level of take allowed; yet the Service arbitrarily and unreasonably concludes that additional take of this species will not

- 4. Plaintiffs further challenge the USFS for violating the ESA by managing national forest land to promote snowmobiling, thereby displacing caribou from necessary habitat and disrupting essential biological functions, without consulting with the Service over the effects to caribou from these activities, or creating a recreation plan to eliminate or minimize adverse effects to this endangered species as required by the Incidental Take Statements referenced above. And because the USFS continues to ignore the threats to caribou from these winter activities, it has not fulfilled its duties under the ESA to conserve the woodland caribou or to insure that its activities will not jeopardize the continued existence of this endangered species.
- 5. Because of the urgency of the threats facing the imperiled woodland caribou, immediate judicial review and relief is required in order to compel the

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agencies to come into compliance with the ESA and other requirements of law with respect to their ESA duties over the impacts of National Forest management upon the woodland caribou.

JURISDICTION AND VENUE

- 6. The Court has jurisdiction over this action under 16 U.S.C. § 1531 et seq. (ESA); 5 U.S.C. §§ 701-706 (APA); 28 U.S.C. § 1331 (federal question); and 28 U.S.C. § 2201 (declaratory judgments).
- 7. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because the challenged Biological Opinions were issued by Defendants Martin and U.S. Fish and Wildlife Service from the Service's Spokane office; the Service Defendants as well as Plaintiff The Lands Council all reside in this district; and a substantial part of the events or omissions at issue herein occurred in this district.
- 8. As required by the ESA, Plaintiffs have provided sixty days notice of their intent to bring this action.
- 9. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 701 and 16 U.S.C. § 1540(g)(1).

PARTIES

- 10. The Plaintiffs in this action are:
- A. DEFENDERS OF WILDLIFE ("Defenders") is a national non-profit conservation organization, incorporated under the laws of the District of Columbia.

Defenders has over 470,000 members nationwide, including over 18,000 in Washington and Idaho, and is headquartered in Washington, D.C. Defenders' mission is to protect all native wild animals and plants in their natural communities. Defenders has developed programs for combating species extinction, the loss of biological diversity, and habitat alteration and destruction. Defenders has long been involved in seeking to promote the protection and recovery of the woodland caribou in the United States as well as Canada; and has participated in agency proceedings relevant here.

- B. Plaintiff CONSERVATION NORTHWEST ("CNW"), formerly known as Northwest Ecosystem Alliance, is a Washington non-profit conservation organization with over 8,000 members, dedicated to maintaining the ecological integrity of the Pacific Northwest's wildlands. CNW's principle office is in Bellingham, Washington, and also has offices in Seattle, Spokane, and Republic, Washington. CNW and its staff and members seek to protect the forests of the Northwest, as well as endangered and threatened species that inhabit those forests, by integrating science, advocacy, public policy, outreach, and litigation. CNW has long been involved in seeking to promote the protection and recovery of the woodland caribou in the United States and Canada; and has participated in numerous agency proceedings relevant here.
 - C. Plaintiff THE LANDS COUNCIL ("TLC") is a Washington non-

profit membership organization dedicated to protecting and conserving the natural resources and quality of life of the Inland Pacific Northwest. TLC's principal office is located in Spokane, Washington. TLC, as an organization and on behalf of its staff and members, has been extensively involved in seeking to promote sound land management practices, including protection and recovery of woodland caribou, on the Colville and Panhandle National Forests at issue here.

- D. Plaintiff SELKIRK CONSERVATION ALLIANCE ("SCA") is a non-profit membership organization dedicated to the protection, restoration, and wise use and enjoyment of the Selkirk Mountain ecosystem of northern Idaho and northeastern Washington. SCA, with its principal office in Priest River, Idaho, has over 400 members who live primarily in eastern Washington and/or northern Idaho. SCA seeks to protect the natural resources of the Selkirk ecosystem through participation in agency proceedings, public outreach and education, advocacy, and litigation. SCA, as an organization and on behalf of its staff and members, is greatly concerned with and active in seeking to protect and improve wildlife and wildlife habitat, including woodland caribou in the Selkirk Mountains ecosystem.
- E. Plaintiff IDAHO CONSERVATION LEAGUE ("ICL") is an Idaho non-profit membership organization with over 3,000 members, which is dedicated to protecting and conserving Idaho's waters, wild lands, and wildlife. ICL is based

In Boise and has offices in central Idaho and northern Idaho. ICL seeks to protect Idaho's natural resources through citizen action, public outreach, education, advocacy, and litigation, among other efforts. ICL, as an organization and on behalf of its staff and members, is greatly concerned with and active in seeking to protect and improve wildlife and wildlife habitat in Idaho, including the woodland caribou of the Selkirk Mountains ecosystem.

- F. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("Center") is a non-profit corporation dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands throughout the United States, including the West. The Center has over 7,500 members, and has its principal place of business in Tucson, Arizona. The Center and its staff and individual members have an interest in ensuring the conservation and recovery of the woodland caribou.
- 11. Plaintiffs, both organizationally and on behalf of their staff, members, and supporters, have deep and long-standing interests in the preservation, protection and recovery of the Selkirk woodland caribou, which interests are directly harmed by Defendants' actions challenged herein.
- 12. Plaintiffs have been involved in many public and private efforts to protect and recover the woodland caribou. Plaintiffs' staff, members and supporters also frequently visit public lands, including the National Forests at issue

here, in order to observe, photograph, study, and enjoy the caribou and other native species. Plaintiffs and their members derive – or, but for the endangered status of the woodland caribou, would derive – recreational, scientific, aesthetic, spiritual, and/or commercial benefits from the existence in the wild of the species through observation, appreciation, study, photography, and other pursuits. The interests of Plaintiffs and their members have been, are being, and will continue to be

13. The above-described aesthetic, conservation, recreational, scientific and other interests of Plaintiffs and their staff, members, and supporters have been, are being, and, unless the relief prayed for is granted, will continue to be adversely affected and irreparably injured by Defendants' violations of law. Plaintiffs have no adequate remedy at law, and thus the requested relief is appropriate.

14. The Defendants in this action are:

A. Defendant SUSAN MARTIN is the Field Supervisor for the Upper Columbia River Field Office of the U.S. Fish and Wildlife Service, located in Spokane, Washington. As Field Supervisor, Defendant Martin is responsible for administering the provisions of the ESA for the Upper Columbia River region, which encompasses the Colville and Idaho Panhandle National Forests; and she was involved in and responsible for issuing the Biological Opinions challenged here. She is sued solely in her official capacity.

- B. Defendant U.S. FISH AND WILDLIFE SERVICE ("Service") is an agency of the United States within the U.S. Department of Interior, with its relevant regional office in Spokane, Washington. The Service is responsible for administering the provisions of the ESA with regard to threatened and endangered resident species, including the endangered Selkirks woodland caribou. The Upper Columbia River Office of the Service issued the Biological Opinions challenged herein.
- C. Defendant RANOTTA MCNAIR is the Forest Supervisor for the Idaho Panhandle National Forest, with management and supervisory authority over national forest management activities on the Idaho Panhandle Forest; and she has been directly involved in the management decisions challenged herein. Defendant McNair is sued solely in her official capacity.
- D. Defendant U.S. FOREST SERVICE ("USFS") is an agency of the United States within the U.S Department of Agriculture. The USFS is charged with managing the public lands and resources of the Idaho Panhandle National Forest, in accordance and compliance with federal laws and regulations.

GENERAL ALLEGATIONS

The Decline of the Woodland Caribou

15. The woodland caribou is the most severely imperiled mammal species in the lower 48 states today. The caribou's range once covered the northern tier of

the United States—but the animals have now been extirpated from this country except for a very small population in the Selkirk Mountains of northern Idaho and northeastern Washington.

- 16. Woodland caribou consist of two distinct ecotypes—the northern ecotype and the mountain ecotype. The Selkirk Mountains population of caribou is part of the mountain ecotype, which is found only in Idaho, Washington, and southern British Columbia. This population containing the only remaining woodland caribou in the United States numbers perhaps 30-40 animals at present. These animals inhabit both the United States and Canada, but their numbers observed within the United States have declined from about two dozen in the early 1990's to just three in the last several years.
- 17. Additional populations of mountain woodland caribou exist in southern British Columbia, but many of these populations are declining as well.

 Overall, mountain caribou numbers have plummeted from around 2400 animals in 1997 to just 1670 today. Each of the populations, including the Selkirk population, was originally part of one large metapopulation. Fragmentation of their habitat caused the division of these populations, most of which are now disconnected from each other and declining in numbers. The Selkirk population is one of these disconnected, imperiled populations.
 - 18. Mountain woodland caribou have a low reproductive rate, and calf

mortality is high even under the best conditions. Human actions further disrupt the animal's reproductive success and contribute heavily to the continuing decline of the species. For instance, logging and motorized recreation have fragmented, isolated, and severely degraded the caribou's historic habitat, while poaching has removed individual caribou critical to such a small population.

- 19. These animals migrate seasonally based on elevation. In winter, mountain caribou move to higher elevations with moderate slopes, where they stand on top of compacted snow and feed almost exclusively on arboreal lichens found above the snow line on mature trees. Because the lichens have limited nutritional value, the caribou's nutritional intake is limited during this period. Winter survival thus poses a major challenge to mountain woodland caribou, even under the best conditions.
- 20. Human intrusions into this critical winter habitat, such as motorized recreation, disrupt the caribou's feeding, sheltering, and survival. Not only does the intrusion add stress to the animals during this time of limited nutritional intake, but it can displace caribou into more marginal habitat, such as steeper terrain that is more avalanche prone or that contains fewer feeding opportunities. In addition, compacted snowmobile trails allow predators to access caribou winter habitat that otherwise would be inaccessible due to deep snow. All of these factors contribute to the continuing decline of the species.

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21. Recognizing the imperiled status of this species, the Service "emergency listed" the woodland caribou as endangered under the ESA in 1983, and then published a final listing rule in 1984 under ESA Section 4. 48 Fed. Reg. 1722 (Jan. 14, 1983); 49 Fed. Reg. 7390 (Feb. 29, 1984).

- 22. In addition, pursuant to ESA Section 4, the Service issued a Recovery Plan for the woodland caribou in 1985, and updated it in 1994.
- 23. As amended in 1994, the Recovery Plan establishes a designated Recovery Area for the Selkirk Mountains woodland caribou of approximately 2,200 square miles, with about 53% of this recovery area located in the United States. Federal public lands, managed by USFS within the Colville and Panhandle National Forests, comprise nearly 80% of the United States recovery area.
- 24. The Recovery Plan establishes "interim" objectives for recovery of the woodland caribou, including: (1) managing for an increasing population; (2) reestablishing a herd in the Washington portion of the Selkirks; and (3) securing and managing sufficient habitat in the recovery area to support a self-sustaining caribou population.
- 25. The Recovery Plan also addresses the need to effectively manage snowmobile use within caribou habitat, calling for the "reduc[tion] or eliminat[ion] [of] the impacts of recreational activity on the caribou and their habitat." The

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Recovery Plan states that "[u]ncontrolled or inappropriate recreational activity may have detrimental effects on caribou and their habitat," such as displacement from important habitat. *Recovery Plan at 33*.

26. Despite the ESA listing and Recovery Plan, however, woodland caribou numbers continue to drop as the species heads rapidly towards extinction. According to recent agency surveys, the caribou population observed in Idaho and Washington has been reduced to 3 known individual adults as part of an estimated population of 33 caribou that traverse the U.S. and Canada border in the southern Selkirk mountain range. <u>See W. Wakkinen, Idaho Dept. of Fish and Game, 2004 Woodland Caribou Census</u> (conducted April 1-2, 2004).

The Colville and IPNF Biological Opinions

- 27. Pursuant to the requirements of ESA Section 7, since the listing of woodland caribou as "endangered" in 1984, the Service has engaged in formal consultation with the USFS over the effects of the Forest Service's management of federal public lands upon woodland caribou and habitat within the Recovery Area. The Service has thus issued Biological Opinions for the Colville National Forest (hereafter "Colville Biop"), which was most recently amended in 2001, and for the Idaho Panhandle National Forest (hereafter, "IPNF Biop"), also amended in 2001.
- 28. These Biological Opinions are similar in their descriptions of the severe threats currently facing the woodland caribou, including by human activities

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on the respective National Forests. Indeed, the Biological Opinions paint a starkly unfavorable picture for the continued existence of the woodland caribou within the United States.

- 29. For example, the Service acknowledges in the Biological Opinions that the Selkirk Mountains population of the woodland caribou again, the only remaining population of woodland caribou in the continental United States is "in decline and in danger of extirpation." *IPNF Biop at 15; Colville Biop at 15.* The Service also notes that the "general pattern for woodland caribou populations [] throughout most of the past century appears to be one of population decline and range reduction." *IPNF Biop at 15; Colville Biop at 14.*
- 30. After observing that the "principal concerns" about the continued survival of the caribou are: (1) "loss of winter food supply;" (2) "fragmentation of usable habitat areas;" (3) "human access and associated disturbance or mortality;" and (4) "alteration of predator-prey relationships," the Service emphasizes that one of the significant threats to caribou and their habitat is "growing recreation pressure," particularly from snowmobiles. *IPNF Biop at 15-16, 17; Colville Biop at 15,16*.
- 31. Specifically, the Biological Opinions note that snow machine intrusion into the Selkirk Mountains particularly in the caribou Recovery Area has "increased rapidly over the last decade." And with the "number of people

- 32. This infringement into caribou habitat by snow machines is particularly harmful to the species because, as the Biological Opinions acknowledge, "[w]inter is a particularly stressful time for caribou [as] [t]heir mobility is restricted by deep snow, and . . . nutritional intake is seriously limited." *IPNF Biop at 48; Colville Biop, at 34.* Thus, any "[a]dditional stress at this time of year can significantly affect their normal behavior, including feeding, breeding, and sheltering, and could ultimately affect their survival capability." *Id*.
- 33. The Biological Opinions further acknowledge that various scientific studies suggest that, compared to other winter recreation activities, "snowmobiling represents the highest potential threat" to caribou. *IPNF Biop at 48; Colville Biop at 34.* Snowmobile use on caribou winter ranges can "displace caribou from important habitats or preclude their use of such habitat." *Id.* This reduction in caribou range "can render caribou more susceptible to natural predators and increase energy expenditures associated with feeding." *Id.* And other studies

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indicate that snowmachine use on caribou winter ranges "affected reproduction and survival," and "can disrupt cow-calf bonds and cause increased calf mortality." *Id.*

34. In addition, the Biological Opinions admit that much of the caribou's winter habitat has already been fragmented or destroyed in the Selkirk ecosystem, and maintaining travel corridors between the remaining high quality habitat is essential to the long-term viability of the caribou. *IPNF Biop at 17; Colville Biop at 16.*

Inadequacy of Forest Plans To Meet Caribou Survival and Recovery Needs

- 35. The analysis in the Biological Opinions further confirms the Service's recognition that, to conserve the woodland caribou, the Forest Service must: (1) maintain sufficient, well-connected stands of mature and old growth habitat; (2) protect the remaining suitable late winter habitat from winter recreation pressures; and (3) control predation. *IPNF Biop, at 16; Colville Biop, at 15.*
- 36. The Service's own analysis underscores that the respective Forest Plans do not meet these goals. For example, the Service noted that the Idaho Panhandle Forest Plan contains "outdated" habitat management guidelines, and fails to require the "comprehensive implementation of [existing] standards [] needed to ensure protection of caribou habitat effectiveness." *IPNF Biop, at 53*. Similar deficiencies were noted in the Colville Forest Plan. *Colville Biop, at 38*-

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37. The Service further observed that both Forest Plans: (1) "lack [] broad scale habitat management strategies, such as a comprehensive recreation plan"; (2) allow "increasing levels and distribution of recreation activities"; and (3) "lack clear direction and limits on recreational activities within caribou habitat." *IPNF Biop, at 54; Colville Biop, at 39-40.* These deficiencies, in turn, could "preclude caribou from using key habitats and travel corridors" and "[i]ncrease[] risk of caribou displacement, harassment, or potential mortality." *Id.*

- 38. Thus, the Forest Plans, as implemented, could "influence caribou distribution within the recovery area, affect their use of key habitats, and/or contribute to increased loss of caribou and/or reduced reproductive potential associated with higher stress levels," and thereby "ultimately affect the reproduction, numbers, and distribution of caribou within the ecosystem." *IPNF Biop at 54; Colville Biop at 40*.
- 39. The Biological Opinions also recognize that activities on state and private lands in the Selkirk Mountains, including increasing recreational pressures, "represent significant threats" to caribou. Although the Service does not describe in detail these activities, it acknowledges that their "cumulative effects" are expected to result in increased human access and habitat fragmentation, "which could result in significant impacts to caribou and their habitat." *IPNF Biop at 55*-

No Jeopardy Determination

- 40. Despite the Service's own recognition of the perilous status of the caribou population, the threats facing the caribou, and the inadequacies of the Forest Plans, the two amended Biological Opinions both reach the same unfounded, arbitrary, and capricious conclusion that the Forest Service's continued implementation of the Forest Plans for the Colville and Idaho Panhandle National Forests will **not** "jeopardize" the continued existence of the woodland caribou in the United States, under ESA Section 7.
- 41. Specifically, both Biological Opinions state that: "[A]fter reviewing the current status of the Selkirk Mountains woodland caribou population, the environmental baseline for the action area, the effects of continued implementation of the [] Forest Plan, and cumulative effects, it is the Service's biological opinion that the continued implementation of the [] Forest Plan is not likely to jeopardize the continued existence of the Selkirk Mountains woodland caribou." *IPNF Biop at 57; Colville Biop at 42*.
- 42. In light of the admittedly precarious status of the species and the numerous activities adversely impacting the caribou within its range, all as described and admitted by the Service in the Biological Opinions, the Recovery Plan, and the listing rule, these "no jeopardy" conclusions are arbitrary, capricious,

and contrary to law – including contrary to the ESA's requirement that the Service utilize the best available scientific data when fulfilling its consultation duties. 16 U.S.C. § 1536(a)(2).

Unlimited Incidental Take Allowed

- 43. The Service has further acted in an arbitrary, capricious and unlawful manner by issuing, in the amended Biological Opinions, the associated Incidental Take Statements which purport to authorize "incidental take" of caribou through continued implementation of the Forest Plans, but without specifying any level of take and without recognizing that a species in the caribou's imperiled state cannot sustain <u>any</u> take, no matter how limited.
- 44. Indeed, the best available scientific data demonstrate that continued management of the Colville and Idaho Panhandle National Forests under the respective Forest Plans is certain to result in <u>increased</u> take of caribou, and will jeopardize the continued existence of the species.

New Information Requiring Reinitiation of Consultation

45. While they fail to identify the amount or extent of authorized take, the Incidental Take Statements contain certain "non-discretionary" terms and conditions to minimize impacts of this incidental take. One such condition required the USFS to develop and implement by January 2004 a comprehensive recreation strategy setting "specific standards and restrictions necessary to protect caribou

and their habitat." *IPNF Biop at 68; Colville Biop at 50.* The strategy "should identify key caribou habitat and linkage corridors between these habitats, where high levels of human recreation activities are restricted, as well as areas where such activities (including motorized activities) are appropriate." *Id.*

- 46. The USFS has not yet developed, let alone implemented, such a strategy to fulfill the requirements of the Incidental Take Statements. Thus, the agency has not specified any new standards or restrictions to protect caribou from motorized recreation and minimize take, contrary to the non-discretionary terms and conditions of the Incidental Take Statements.
- 47. Additionally, the USFS has documented increasing use of highelevation caribou habitat for winter recreation, including use within the few existing off-limit areas within the caribou recovery zone and travel corridors, such as wilderness areas or the Selkirk Crest closure area, which was closed in 1994 due to snowmobile harassment of caribou.
- 48. This new information about snowmobiles traveling into closed areas and having much greater impacts in high elevation habitat, combined with the information that the USFS has not complied with the terms and conditions of the Incidental Take Statements, reveals adverse effects to caribou not considered in the 2001 Biological Opinions. Yet, contrary to requirements under the ESA, the Service and USFS have not reinitiated consultation to address this new

information.

49. Further, the Service and USFS have failed to utilize their authorities to promote the conservation and recovery of the Selkirk woodland caribou, particularly with respect to efforts to protect caribou from winter recreation activities, again in violation of the ESA. 16 U.S.C. § 1536(a)(1).

USFS Challenge Cost Share Agreement

- National Forest, it authorizes, manages, and oversees use of 251 miles of linear snowmobile routes, including 77 miles of groomed trails, which traverse and bisect the caribou Recovery Zone. These routes provide access to over 50,000 acres of "snowmobile play areas" within the Recovery Zone, where snowmachines go off-trail and run unhindered throughout large open areas.
- 51. According to the USFS, of the various winter recreation activities on the Panhandle National Forest, "snowmobiling is by far the greatest winter recreational use within the recovery area." The area around Priest Lake is particularly popular for snowmobiling, especially with residents of Spokane and other areas of northeastern Washington.
- 52. To promote snowmobile recreation on the Idaho Panhandle National Forest, and continue the grooming program, the USFS entered into a Challenge Cost Share Agreement with county and state agencies in March 2004. The

Agreement expresses that all parties are "to work together in promoting and maintaining the snowmobile recreation program," and that the USFS has a specific interest in "providing enhanced recreation opportunities" on the forest.

- Annual Operating Plan and the Financial Plan prior to each grooming season; (2) authorize National Forest System lands to be used for snowmobiling and the grooming program; (3) meet with the other parties to coordinate activities undertaken pursuant to the agreement; (4) provide assistance, funds and personnel to assist with the snowmobile trail-grooming program to the extent funding and regulations allow; (5) perform any necessary off-season maintenance activities on approved snowmobile routes; and (6) monitor the snowmobile routes to ensure that grooming is occurring on the approved routes.
- 54. The parties thereafter executed Annual Operating Plans and Financial Plans for subsequent fiscal years. These Operating Plans must include "designated grooming routes," parking areas, and projects that result in "development or betterment." The operating plans for the 2004 year, for example, called for the USFS to develop a sign plan for the snowmobile trails and trailheads, and maintain all signs posted along the trail system; provide program managers to oversee grooming activities; assist in patrolling the trail system and trailheads; and authorize development and improvement projects, among other tasks.

- 55. Despite its recognition that snowmobiling has adverse impacts on woodland caribou, the USFS never initiated consultation with the Service over the impacts from the Challenge Cost Share Agreement and its operating plans, in violation of ESA Section 7 consultation requirements.
- 56. Further, by implementing the Challenge Cost Share Agreement and authorizing and facilitating continued snowmobile use throughout caribou winter habitat, the USFS is failing to conserve, and in fact is jeopardizing, the continued existence of the Selkirk woodland caribou, in violation of ESA Section 7.

Other USFS Violations

- 57. The USFS is further jeopardizing the caribou by relying on an invalid biological opinion as justification for its continued implementation of the Forest Plan. As discussed above, the conclusion from the 2001 Biological Opinion that implementation of the Idaho Panhandle Forest Plan will not jeopardize the woodland caribou is arbitrary and capricious. Because the USFS has an independent duty to insure that its actions are not jeopardizing the caribou, it is not justified in relying on this flawed biological opinion when fulfilling that duty.
- 58. Likewise, the USFS cannot rely on the Incidental Take Statement within the biological opinion to eliminate any liability for "take" of caribou, both because the Incidental Take Statement is unlawful; and because USFS has not complied with the non-discretionary term and condition to implement a recreation

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strategy with standards and restrictions on winter recreation activities by January 2004.

- 59. In light of the myriad adverse impacts to caribou associated with snowmobiling, the USFS's authorization, facilitation, and implementation of activities that support and increase snowmobiling on the forest are resulting in unauthorized and unlawful "take" of caribou in violation of Section 9 of the ESA.
- 60. Indeed, the USFS is taking no action with regard to winter recreation activity to protect and recover the caribou population in the Selkirk Mountains.

 The agency has failed to comply with terms of the biological opinions, the Recovery Plan, and the Woodland Caribou Emergency Action Plan to reduce impacts from winter recreation needed to maintain and recover the population.
- 61. Even the Forest Plan requires the USFS to follow Recovery Plans for listed species and give those species priority; and to provide habitat needed to support a recovered population of caribou. Yet, instead of taking action to reduce conflicts with snowmobilers and protect the caribou and its habitat, the USFS is taking actions to promote and increase snowmobile use within the forest without any new standards or restrictions in place. Thus, the USFS is not utilizing its authorities in furtherance of the purposes of the ESA to protect and recover the caribou, as required under ESA Section 7(a)(1).
 - 62. Woodland caribou in the United States face imminent and ongoing

threats of irreparable harm, including the threat of extinction, as a result (in part) of Defendants' unlawful actions as herein alleged. Plaintiffs have no adequate remedy at law for Defendants' violations of law as alleged herein. Without declaratory and injunctive relief ordering Defendants to comply with the requirements of law, Plaintiffs, the public interest, and the woodland caribou will all suffer irreparable harm.

FIRST CLAIM FOR RELIEF: "NO JEOPARDY" DETERMINATIONS ARE UNLAWFUL

- 63. Plaintiffs incorporate by reference all preceding paragraphs.
- 64. This First Claim for Relief seeks judicial review and reversal of the Service's "no jeopardy" determinations in the amended Colville and IPNF Biological Opinions, as being arbitrary, capricious, an abuse of discretion, and/or contrary to law, pursuant to the ESA and the APA, 5 U.S.C. § 701 et seq.
- 65. As alleged hereinabove in more detail, the "no jeopardy" determinations in the Colville and IPNF Biops are unlawful and must be reversed and remanded for many reasons, including without limitation:
- a. The Service has acted in an arbitrary and capricious manner by ignoring its own scientific analysis in the Biological Opinions, and failing to base its determinations on the best scientific and commercial data available, as required by 16 U.S.C. § 1536(a)(2);
 - b. The Service has violated its own regulations' requirement to consider

cumulative effects of other State and private activities that are reasonably certain to occur within the area when fulfilling its consultation duties, 50 C.F.R. §§ 402.14(g)(3), 402.02;

- c. The Service has further violated the ESA's requirement that it insure its actions are not likely to jeopardize the continued existence of the woodland caribou, 16 U.S.C. § 1536(a)(2).
- 66. The Service's unlawful "no jeopardy" determinations have caused substantial prejudice to Plaintiffs' interests and allowed continued harm to the endangered caribou, in violation of the ESA.
- 67. Accordingly, the "no jeopardy" determinations in the Colville and IPNF Biological Opinions must be reversed and set aside by this Court pursuant to the ESA and/or the APA; and remanded with instructions for the Service to issue new Biological Opinions for the Colville and/or Idaho Panhandle National Forests pursuant to the ESA, on a court-ordered expedited basis.

WHEREFORE, Plaintiffs pray for relief as set forth below.

SECOND CLAIM FOR RELIEF INCIDENTAL TAKE STATEMENTS ARE UNLAWFUL

- 68. Plaintiffs incorporate by reference all preceding paragraphs.
- 69. This Second Claim for Relief seeks judicial review and reversal of the Service's Incidental Take Statements in the amended Colville and IPNF Biological Opinions, as being arbitrary, capricious, an abuse of discretion, and/or contrary to

law, pursuant to the ESA and the APA, 5 U.S.C. § 701 et seq.

- 70. As alleged hereinabove in more detail, the Incidental Take Statements are not based upon the best available scientific information, as required by the ESA; and further are arbitrary, capricious, an abuse of discretion, and contrary to law, in light of the best available scientific information and the record, for multiple reasons. These include, without limitation, that the Incidental Take Statements fail to quantify the amount or extent of authorized "incidental take," and in fact allow unlawful take of caribou that jeopardizes its continued existence.
- 71. The Service's unlawful Incidental Take Statements have caused substantial prejudice to Plaintiffs' interests and allowed continued harm to the endangered caribou, in violation of the ESA.
- 72. Accordingly, the Incidental Take Statements in the Colville and IPNF Biological Opinions must be reversed and set aside by this Court pursuant to the ESA and/or the APA; and remanded with instructions for the Service to issue new Incidental Take Statements for the Colville and/or Idaho Panhandle National Forests pursuant to the ESA, on a court-ordered expedited basis.

WHEREFORE, Plaintiffs pray for relief as set forth below.

THIRD CLAIM FOR RELIEF: VIOLATIONS OF ESA CONSULTATION AND OTHER REQUIREMENTS

- 73. Plaintiffs incorporate by reference all preceding paragraphs.
- 74. This Third Claim for Relief alleges violations by the Service and

USFS of ESA Section 7 and Section 9 and implementing regulations, which as alleged hereinabove in more detail include the following:

- A. Not reinitiating consultation after the Idaho Panhandle National Forest failed to develop and implement the recreational management plan that was a fundamental element of the Incidental Take Statement, in violation of 50 C.F.R. § 402.16;
- B. Not consulting over USFS' actions to authorize, promote, and manage motorized winter recreation on the Idaho Panhandle National Forest that impact woodland caribou, including entry into and implementation of the Challenge Cost Share Agreement;
- C. Failing to insure that their actions are not likely to jeopardize the continued existence of the woodland caribou, as required under 16 U.S.C. § 1536(a)(2);
- D. Failing to utilize their authorities to conserve the woodland caribou, as provided under 16 U.S.C. § 1536(a)(1);
- E. Causing "take" of woodland caribou by authorizing and promoting winter snowmobile recreation throughout caribou winter habitat and the recovery zone without a winter recreation plan or any restrictions on such activity in place, in violation of 16 U.S.C. § 1538(a)(1)(B).
 - 75. These violations of the ESA have caused substantial prejudice to

Plaintiffs' interests and allowed further harm to the endangered caribou.

WHEREFORE, Plaintiffs pray for relief as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Order, declare, and adjudge that the Service has violated the ESA and acted in a manner that is arbitrary, capricious and/or contrary to law in issuing the "no jeopardy" determinations and/or the Incidental Take Statements in the amended Colville and/or the IPNF Biological Opinions;
- B. Order, declare, and adjudge that Defendants are in violation of the ESA, including by: (1) failing to reinitiate consultation; (2) failing to consult over the Challenge Cost Share Agreement; (3) failing to insure that their actions are not likely to jeopardize the woodland caribou; (4) failing to utilize their authorities to conserve the caribou; and (5) causing "take" of woodland caribou.
- C. Order Defendants to fully comply with the consultation requirements of the ESA, and order the Service to promptly issue new or amended Colville and/or IPNF Biops that comply with law, including by imposing requirements sufficient to protect the caribou from further declines and to promote actual recovery of the Selkirk woodland caribou;
- D. Issue such injunctive or other remedial relief as may specifically be requested hereafter by Plaintiffs;

1	E.	Award Plaintiffs their reasonable attorney fees, costs, and litigation
2	expenses, under the ESA, Equal Access to Justice Act, and/or any other applicable	
3	onpolicos, direct die Esta, Esquisitation de la constant de la con	
4	provision of	f law; and/or
5	F.	Grant such further and additional relief as the Court may deem just
6	and proper.	
7	Dated	d this 17th day of August, 2005.
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9		<i>h</i>
10		Bonne W. Beavers (WSBA # 32765)
11		CENTER FOR JUSTICE
12		35 West Main, Suite 300
		Spokane, WA 99201
13		(509) 835-5211
14		(509) 835-3867 (fax)
15		Lauren M. Rule (ISB # 6863)
16		ADVOCATES FOR THE WEST
10		P.O. Box 1612
17		Boise, ID 83701
18		(208) 342-7024
10		(208) 342-8286 (fax)
19		MC 11 T 11 (D C D # 476062)
20	***************************************	Michael T. Leahy (D.C.B # 476062) DEFENDERS OF WILDLIFE
20		1130 17th Street, NW
21		Washington, DC 20036
22		(202) 682-9400
23		(202) 682-1331 (fax)
		Attorneys for Plaintiffs
24	-	Attorneys for Frantis
25		