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## WESTERN ENVIRONMENTAL LAW CENTER

July 15, 2020

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RE: Notice of Intent to Sue for Violations of the Endangered Species Act

WildEarth Guardians, Friends of the Wild Swan, Cascadia Wildlands, Oregon Wild, San Juan Citizens Alliance, Wilderness Workshop, and Rocky Mountain Wild—represented by the Western Environmental Law Center—provide this notice of intent to sue the addressees of this letter for violations of the Endangered Species Act (“ESA”), when making a final determination under section 4(f)(1) of the ESA, 16 U.S.C. § 1533(f)(1), that a recovery plan for Canada lynx (“lynx”) would not promote the conservation of the species. This final decision was made by the U.S. Fish and Wildlife Service’s (“Service’s”) Regional Director (Mountain-Prairie Region) on December 11, 2017, and approved by the Acting Director of the Service on December 20, 2017. This notice of intent to sue letter is provided as required by the ESA. 16 U.S.C. § 1540(g)(2).

The conservation organizations named above have significant, concrete interests in ensuring the long-term survival and recovery of lynx in the contiguous United States. They intend to

initiate litigation after 60 days have elapsed unless the violations of law described below are cured.

## **I. Background on Recovery Planning**

The Service is required to prepare recovery plans for all species listed as threatened or endangered under the Endangered Species Act unless it determines such plans would not promote the conservation of the species. 16 U.S.C. § 1533(f)(1).

Recovery plans are one of the most important tools for ensuring the survival and recovery of listed species, as they are the “road map” to recovery and lay out “where we need to go and how best to get there.” Interim Endangered and Threatened Species Recovery Planning Guidance, Version 1.4 (July 2018 Update) at 1.1-1 (hereinafter “Guidance”). According to the Service’s Guidance, “[r]ecovery is the process by which listed species and their ecosystems are restored and their future is safeguarded to the point that protections under the ESA are no longer needed.” *Id.* The Service notes that “without a plan to organize, coordinate and prioritize the many possible recovery actions, the effort may be inefficient or even ineffective.” *Id.* Further, the Service explains “prompt development and implementation of a recovery plan will ensure that recovery efforts target limited resources effectively and efficiently into the future.” *Id.*

In fulfilling these purposes, recovery plans: (1) “[d]elineate those aspects of the species’ biology, life history, and threats that are pertinent to its endangerment and recovery”; (2) “[o]utline and justify a strategy to achieve recovery”; (3) “[i]dentify the actions necessary to achieve recovery of the species”; (4) “[i]dentify goals and criteria by which to measure the species’ achievement of recovery.” *Id.*

Although the ESA does not specify a specific timeframe in which recovery plans are to be completed after a species is listed as threatened or endangered, the Service’s Guidance explains “[f]inal recovery plans should be completed within 2.5 years of listing, unless an extension for a particularly complex plan has been approved....” *Id.* at 1.5-2.

As noted, the Service can determine that a recovery plan would not promote the conservation of the species, thereby avoiding the requirement to prepare a recovery plan for the species. 16 U.S.C. § 1533(f)(1). However, as the Service’s Guidance explains, “[t]here are very few acceptable justifications for an exemption from having a recovery plan....” Guidance at 2.2-1. The Service then provides three possible scenarios in which it may be justifiable to forego the preparation of a recovery plan for a listed species: (1) delisting is anticipated in the near future because the species is presumed to be extinct or the species was listed in error; (2) the species’ current and historic ranges occur entirely under the jurisdiction of other countries; and (3) other circumstances that are not easily foreseen, but in which the species would not benefit from a recovery plan. *Id.*

## II. Recovery Planning for Canada Lynx

In March 2000, the Service listed Canada lynx in the contiguous United States as a threatened Distinct Population Segment (DPS) under the ESA. Despite the Service's own internal guidance to immediately begin recovery planning and complete a recovery outline within sixty days after listing, Guidance at 1.5-2, the Service did not complete a recovery outline for lynx for nearly five and a half years.

In the September 14, 2005 recovery outline, the Service indicated it would initiate recovery planning "in early 2007" and anticipated "a draft recovery plan would be available for public review in January 2008." But instead of moving forward with the preparation of a recovery plan for lynx, on February 9, 2010, the Service decided to simply revise the 2005 recovery outline. The revised recovery outline noted the Service intended to "begin formal recovery planning for lynx in early 2011" and release a draft recovery plan for public review in January 2012, and a final recovery plan for lynx by June 2012. This never occurred.

In July 2010, the Service lost a lawsuit regarding lynx critical habitat designations. In response to a federal court order requiring the Service to revisit lynx critical habitat designations, the Service attempted to use recovery planning as a bargaining chip to forgo or delay another critical habitat designation for lynx. In documents obtained from the Service in lynx-related litigation, the Service stated it was "proposing to begin recovery planning efforts in lieu of another round of critical habitat designations" and noting that "winning has a price." If it needed to redo lynx critical habitat designations, the Service explained "recovery planning would be postponed indefinitely due to that necessity."

In January 2013, a number of conservation non-profit organizations sent a notice of intent to sue letter to the Service regarding the lack of a recovery plan for lynx. In response, the Service informed those organizations it would prepare a recovery plan for lynx "as soon as resources allow" and "anticipates initiating recovery planning for lynx after submitting the final [lynx] critical habitat rule...unless we are prevented from doing so by additional litigation." Not satisfied with this answer, the conservation organizations sued the Service in March 2013 over its failure to prepare a recovery plan for lynx.

In May 2013—after initiation of the March 2013 recovery plan litigation—the Service changed course and announced it would not undertake recovery planning for lynx as previously stated. Rather, it would finalize a five-year status review for lynx and only begin recovery planning "if the review determines that the species still requires protection under the [ESA]."

After considering extensive arguments from the parties, a federal district court judge ruled in May 2014 in favor of the conservation groups. Judge Molloy concluded that the fourteen year-delay in preparing a recovery plan for lynx constituted an unreasonable delay, and set a January 2018 deadline for the Service to either (1) complete a recovery plan for lynx; or (2) determine that a recovery plan would not promote the conservation of the species.

In December 2017—one month before the court deadline—the Service determined a recovery plan would not promote the conservation of lynx on the grounds that lynx were recovered and were no longer a threatened species under the ESA.

### **III. The Service’s Determination to Forgo a Lynx Recovery Plan**

In a December 2017 memo prepared by Service Regional Director Noreen Walsh, and approved by Service Deputy Director James Kurth, the Service made its official determination “that a recovery plan would not promote conservation of the species....” Memo From Regional Director Noreen Walsh to Deputy Director James Kurth, 4(f)(1) Determination Regarding Recovery Planning for the Canada Lynx, December 11, 2017 at 3 (hereinafter “Determination”).

The Service based this determination on a 2017 5-Year Status Review for Lynx, which was itself informed by a Species Status Assessment (“SSA”) summarizing the Service’s view of the best available science related to lynx. *Id.* at 2. The December 2017 memo explained “[a]ll five geographic units that currently support resident lynx populations are expected to continue to do so through mid-century (2050).” *Id.* Because of the Service’s expectation that lynx would “retain a wide geographical distribution of populations, maintaining redundancy within the DPS[,]” the Service “concluded in the 5-year review that the lynx DPS may not meet the definition of a threatened species.” *Id.*

The December 2017 memo conclusion that a “recovery plan will not contribute to the conservation of the lynx DPS” and “exemption from recovery planning efforts for the lynx DPS” was explicitly warranted as being an “other circumstance” as contemplated by the Service’s Guidance. *Id.* The Service explained the “other circumstances that are not easily foreseen, but in which the species would not benefit from a recovery plan” for lynx was the Service’s “recommendation to delist the lynx DPS due to recovery as described in the lynx DPS 5-year review.” *Id.* The memo concluded by noting “[a] proposed delisting rule should be prepared by the Service.”

As of the date of this letter, the Service has not released a draft rule to delist lynx, nor has it initiated recovery planning for lynx.

### **IV. Endangered Species Act Violations Related to Canada Lynx Recovery Planning**

The Service’s December 2017 section 4(f)(1) determination that a recovery plan would not promote the conservation of lynx violates the ESA in two primary ways: (1) a decision to not prepare a recovery plan on the grounds that the species is recovered is not a valid reason to not prepare a recovery plan for a species; and (2) even if it was, Canada lynx are not recovered, and still qualify as a listed species under the ESA, making the Determination arbitrary, capricious, and not in accordance with law.

**a. No valid rationale or support in the Service's own guidance for not preparing a recovery plan.**

First, a belief by the Service that lynx are recovered and no longer merit ESA-listing is not a valid reason to not prepare a recovery plan for a species. Nor does the Service's own guidance recognize it as such.

The ESA states that a recovery plan can only be avoided if a determination is made "that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1). But as noted above, "[t]here are very few acceptable justifications for an exemption from having a recovery plan...." Guidance at 2.2-1.

Here, the Service asserts that lynx recovery qualifies as "other circumstances that are not easily foreseen, but in which the species would not benefit from a recovery plan." *See* Determination at 2. This, however, is an attempt by the Service to force a square peg in a round hole. Species recovery is undoubtedly the goal of the ESA, so how can species recovery be another circumstance that is not easily foreseen? Further, without a robust recovery plan, as described above, there simply is no metric by which the Service can assess species recovery. Indeed, the recovery plan is designed to provide the road map to species recovery, including identifying goals and criteria by which to measure the species' achievement of recovery. Without the recovery plan, there is no reasonable way for the Service to truly assess whether lynx are recovered in the contiguous United States.

**b. The Determination conflicts with the lynx recovery outline.**

Second, the Service's finding conflicts with or does not address the requirements of its own recovery outline for lynx. Although a recovery outline does not meet the requirements of a full recovery plan, the 2005 recovery outline for lynx does include a number of recovery actions needed for lynx. The Service's SSA and determination do not address these recovery actions. For example, the Lynx Recovery Outline includes seven recovery actions (with a number of sub-actions), which include:

- Establishing management commitments in core areas;
- Maintaining baseline inventories of lynx habitat in each core area;
- Monitor lynx use in lynx analysis units ("LAU") or other management units at least once every ten years;
- Identify habitat facilitating movement between each core area and lynx populations in Canada;
- Ensure that habitat in secondary areas remains available for occupancy by lynx;
- Identify population and habitat limiting factors for lynx in the contiguous United States;
- Develop a post-delisting monitoring plan.

Recovery Outline (2005) at 12-14. Neither the SSA nor Determination address these recovery actions (and sub-actions), or describe what progress, if any, have been made on these items. While some of the actions may have been completed, or had progress made towards their completion, many have not, and the failure to address these issues renders the Determination as being in violation of the ESA and APA. Similarly, to the extent the Determination conflicts with the Recovery Outline, it supports the conclusion the Determination violates the ESA and APA.

**c. No peer review or public comment.**

Third, the Service's conclusion that lynx are recovered was made without peer review, and without the benefit of public review and comment. The ESA requires all recovery findings and determinations that a species no longer qualifies for listing under the ESA be made only after complying with all ESA requirements, including publication of a draft rule in the Federal Register, public notice and comment opportunity, and under USFWS policy, peer review. 16 U.S.C. § 1533(c)(2). Notably, here, the Service put the proverbial cart before the horse by saying it was going to delist lynx (because they are no longer threatened by the five factors and recovered) in December 2017 *well before* issuing even a draft proposed rule to delist lynx.

**d. Nearly three years have gone by since the section 4(f)(1) determination was made.**

Fourth, the Service made a determination that lynx were recovered and should be delisted in 2017. In the nearly three years since that time, the Service has not attempted to delist lynx. Instead, it has used this purported conclusion to deprive lynx of a much-needed recovery plan to guide the recovery of the species. This is particularly important as National Forests across lynx range in the contiguous United States amend their forest plans and change the management regime for lynx. It appears the Service is simply trying to find a way to avoid a recovery plan instead of completing its mandatory duties under the ESA. The lynx recovery plan should have been completed by 2002 or 2003. That it is 2020 and there is no recovery plan is unacceptable, and reflects a dereliction of duty by the Service.

**e. Lynx are not recovered, and continue to meet the definition for an ESA-listed species.**

Fifth, the conclusion that a recovery plan would not promote the conservation of lynx is erroneous, not in accordance with the best available science, not supported by any kind of record, and importantly, not based on an analysis of the ESA's five listing/delisting factors. Even if an internal Service conclusion that lynx are recovered could serve as justification for not preparing a recovery plan, the underlying conclusion that lynx can be delisted (because they are no longer threatened by the ESA's five factors and fully "recovered") is arbitrary, capricious, and contrary to the ESA.

Specifically, as outlined below, the Service failed to use the best available scientific and commercial information to assess threats and the listing/delisting factors, population status, and future recovery of the species (failed to use best available science); applied an incorrect definition of “foreseeable future”; defined the “foreseeable future” in much too narrow terms; neglected to consider that protections for lynx are decreasing as National Forests amend their forest plans; and ignored important information—including in its own Species Status Assessment—in making its decision.

**f. The Service ignored the findings of its own SSA and other important information.**

The Service asserts lynx no longer qualify as a listed species based on the Service’s review of lynx science in the SSA, as well as the 5-year status review for lynx. The conclusions in those documents, however, ignore other important conclusions found in the same documents, as well as comments by SSA peer reviewers. In particular (and not limited to), the final SSA makes clear that lynx face considerable challenges in the future:

- “Although the timing and extent of climate-mediated impacts are uncertain, continued warming is expected to cause a northward and upslope contraction of the boreal forest, snow conditions, and hare populations that support lynx, along with several other potential impacts. This, in turn, will likely result in smaller, more fragmented, and increasingly isolated patches of habitat and smaller, more isolated lynx populations in the DPS that would be more vulnerable to stochastic demographic and catastrophic events and genetic drift.” Lynx SSA at 5.
- Climate change “also may improve conditions for other terrestrial hare predators, potentially resulting in increased competition and displacement of lynx from areas that currently support resident populations.” *Id.*
- “Climate-driven increases in the frequency, size, and intensity of wildfires and forest insect outbreaks are also expected to continue, although we do not anticipate that such events alone would cause the permanent loss of breeding lynx populations in any geographic unit. We are aware of no management actions that could be expected to abate the projected long-term retreat of boreal forests, declining hare populations, and diminished snow conditions expected under continued climate warming.” Lynx SSA at 6.
- Lynx researchers believe current geographic units have a 70-90% likelihood of continuing to support resident populations through 2050, “albeit in reduced numbers and distributions.” *Id.*
- Only Unit 3 (MT and ID) “has a high (78 percent) likelihood of supporting resident lynx by 2100” and the remaining geographic units “were deemed to have a 50 percent or greater likelihood of functional extirpation...by the end of the century.” *Id.*

Importantly, climate change was not considered as a factor for listing when lynx were first listed under the ESA in 2000, and the lynx recovery outline notes USFWS “anticipate[s] 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.” Lynx Recovery Outline at 11 (2005).

Lynx also face different threats in different geographic regions. For example, it appears lynx range in Montana has contracted (such as out of the Garnet Range), and similarly, lynx in Wyoming have suffered distribution contraction. In Washington, the Washington Fish and Wildlife Commission recently uplisted lynx from threatened to endangered status under state law due to the effects of climate change, habitat loss (logging, wildfire<sup>1</sup>, and insects), habitat fragmentation, small population size, and motorized winter recreation. WDFW Lynx Status review at 5-7 (2016) (attached as Exhibit 1). The Washington Department of Fish and Wildlife explained lynx face considerable threats to their persistence in Washington:

The loss and fragmentation of habitat as a result of wildfires and the direct and indirect effects of climate change are considered substantial threats to this [Washington’s] population. The effects of small population size, the population’s position at the margin of the species’ range, a possible lack of immigration from British Columbia, and Allee effects are also likely to work in concert with habitat loss and fragmentation to threaten the remaining lynx population in Washington.

WDFW Lynx Status Review at iii. WDFW also noted the “conservation status of Washington’s lynx population has not improved since it was state (1993) or federally (2000) listed.” *Id.* at 8. As a result, WDFW recommended that the Washington Fish and Wildlife Commission uplist lynx from threatened to endangered status under Washington law:

Given the reduced distribution, small and restricted population, and an increase in the number and severity of threats to lynx in Washington, WDFW recommends that the status of the lynx in the state be changed from threatened to endangered. Up-listing the lynx from threatened to endangered status could result in new efforts to conserve lynx habitats and populations, and it could focus greater attention on these efforts and lynx conservation in Washington.

*Id.*

A recent peer reviewed paper came out concluding that lynx are only occurring in approximately 20% of their potential habitat in Washington based on a multi-year extensive camera trap study conducted by Washington State University, the U.S. Forest Service, and National Park Service, and the researchers predict that lynx are similarly constrained

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<sup>1</sup> In Washington’s Okanogan Lynx Management Zone, 18% of all lynx habitat were lost in forest fire over two years. WDFW Lynx Status Review at 5 (2016).

throughout their range in the United States, in particular at the southern periphery of their range. King et al., WILL LYNX LOSE THEIR EDGE? CANADA LYNX OCCUPANCY IN WASHINGTON, *The Journal of Wildlife Management* at 1-21 (January 2020) (attached as Exhibit 2).

Finally, as forests have been revising their forest plans under the 2012 planning rule, the Forest Service is actively removing and weakening the provisions of the Northern and Southern Rockies Lynx Amendments that have somewhat constrained logging activities in the past, thereby allowing additional logging in high quality lynx habitat above and beyond that allowed by the prior amendments. *See* Defenders of Wildlife et al., *Objections to the Rio Grande National Forest Plan Revision*, October 1, 2019 (attached as Exhibit 3).

Here, the Service is saying that even though the best available science tells us that only one lynx geographic unit (Unit 3-MT and ID) has a high likelihood of supporting resident lynx by 2100, and that the remaining geographic units had a 50% or greater chance of functional extirpation by 2100, that lynx are recovered and no longer qualify as an ESA-listed species. The Service believes it can avoid looking at the status of lynx beyond 2050 because the Service “ha[s] low confidence in assessing the risk to DPS populations beyond 2050.” *Canada Lynx 5-Year Review* at 4 (2017). This, however, is largely unsupported. While the SSA, and the documents upon which the SSA is based (such as the *Canada Lynx Expert Elicitation Workshop Final Report*) recognize that certainty regarding predictions increases the further out one looks, nowhere do these documents state that the level of uncertainty is too great to be reliable. Indeed, review of the *Expert Elicitation Workshop Final Report* shows lynx experts nearly uniformly agree that lynx face significant threats that will threaten the persistence of the species by the end of the century. The specific effects and precise number of units with no more persistent lynx may vary slightly, but there is agreement that lynx within the DPS will be extirpated from much of their current range (and the range at the time of listing) come the end of the century.

**g. The Service relied on an improper metric.**

In the December 2017 Determination, the Service notes its determination is based on a conclusion in the *Lynx 5-Year Review* stating: “In light of potential threats considered *at the time of listing*, lynx conservation measures and habitat management guidance...have substantially addressed the conservation of lynx habitats and populations and snowshoe hare habitat.” *Determination* at 2 (emphasis added). This, however, neglects to consider any threats not considered at the time of listing, such as (but not limited to) climate change. If the Service is basing its December 2017 Determination only on threats that existed at the time of listing—now more than 20 years old—it has failed to consider important aspects of the problem and violated the ESA. It must consider whether all past, current, and future threats to lynx have been ameliorated to the extent that lynx no longer qualify as a threatened or endangered species.

**h. The Service’s threats assessment for lynx is arbitrary and conflicts with the best available science.**

Under ESA Section 4(a)(1), 16 U.S.C. § 1533(a)(1), and the Service’s ESA implementing regulations, the Service is required to determine whether a species is threatened or endangered because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of the species’ range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other manmade factors affecting the species’ continued existence. These factors are listed in the disjunctive, such that any one factor or combination of them can be sufficient for a finding that a species qualifies as threatened or endangered under the ESA.

In determining that lynx are “recovered” and no longer threatened, the Service failed to evaluate and analyze each of these threat factors (individually and in the aggregate) as required by the ESA

While some of these factors are discussed in the SSA, their analysis is not tied to the ESA threats assessment. Importantly, the Service ignores the magnitude of and details surrounding many of these threats, including, but not limited to:

- Logging and vegetative “treatments” on National Forest/BLM lands, state lands, and private lands destroying or converting lynx/hare/red squirrel habitat (including loss of horizontal cover);
- Over-snow-vehicle use on National Forest/BLM lands;
- Increased habitat fragmentation and isolation of subpopulations;
- Loss of connectivity with lynx in Canada and in between subpopulations in the contiguous United States;
- Small population sizes;
- Road construction on National Forest/BLM lands;
- Disease risks for lynx;
- Risk of unintentional lynx trapping;
- The adequacy of the Northern Rockies Lynx Amendment and Southern Rockies Lynx Amendment, as well as changes made to Forest Plans as they are revised (such as on the Rio Grande and Flathead National Forests);
- Climate change (increase in fires, loss of snowpack in occupied areas, loss of habitat due to new vegetation types, etc...)

**i. The Service’s 3Rs framework misrepresents and ignores threats to the species.**

The December 2017 Determination, and underlying SSA, rely on a metric of representation, redundancy, and resiliency (the 3Rs) to assess whether lynx are recovered or not. The Service focuses on how the current population in various geographic units contributes to

representation, redundancy, and resiliency. But this metric is contrary to the conservation purposes of the ESA, 16 U.S.C. § 1531(b), because it prevents any area that currently lacks a recovered population from being considered a “significant” portion under the ESA’s definition of threatened and endangered species.

This means that a species would never need to be recovered in any portion of its historical range because a small population could never meaningfully contribute to the 3Rs. Under the Service’s metric, losing populations of lynx from their historic range would not matter for a delisting determination. Similarly, this could mean that a struggling population, such as that in Washington, can be ignored in deciding whether or not lynx meet the definition of a threatened or endangered species. Especially given the recent findings from King et al. (2020) showing that lynx only occupy approximately 20% of potential habitat—which under the Service’s metric means that the remaining 80% of unoccupied potential habitat could be ignored—the Service’s 3Rs metric impermissibly narrows what is relevant in assessing status as a threatened or endangered species.

**j. The Service demands the best possible science, instead of relying on the best available science.**

The ESA requires the Service to rely on the best scientific data available, not the best scientific data possible. *See Defenders of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 999-1000 (D. Mont. 2016) (explaining standard). “The Service ‘may not base its listings on speculation or surmise,’ but ‘where there is no superior data, occasional imperfections do not violate the ESA.’” *Id.* (citations omitted). Here, the Service disregarded scientific information regarding lynx status extending to 2100 on the grounds that it did not have confidence in such information. Canada Lynx 5-Year Review at 4. To throw all of this information out, however, is indicative of the agency simply burying its head in the sand and ignoring information about lynx status contained in the SSA related to the time period beyond 2050 simply because it is inconvenient.

**k. The Service inappropriately bases much of its analysis on persistence.**

Much of the information in the SSA, 5-Year Review, and December 2017 Determination is based on lynx persistence. This, however, ignores that the species could still persist in an area, but still face threats significant enough that it still meets the definition of a threatened or endangered species. By focusing on lynx persistence, the Service ignores the impacts of other threats that may be different from simply impacting persistence.

Further, “persistence” is not “recovery” as defined by the ESA. The goal of the ESA is to ensure the survival and recovery of listed species. These are two related but independent obligations and managing solely for persistence falls short of the ESA’s mandate.

**1. The Service defined foreseeable future too narrowly, but even if it was defined correctly, the threats to lynx in the near term still justify continued listing under the ESA.**

The Service defines “foreseeable future” for lynx as the present to 2050, noting that it did not have confidence in information relating to lynx status between 2050 and 2100. This definition of foreseeable future is arbitrary and capricious, and runs counter to the ESA’s mandate that the Service rely on the best available scientific information. This definition of foreseeable future for lynx violates the agency definition in existence in December 2017 when the determination was made, and also violates the current agency definition for foreseeable future. The SSA clearly describes extensive information about lynx persistence between 2050 and 2100, as well as threats lynx are likely face in that time period, but decides they are too speculative to consider in deciding whether lynx deserve ESA protections.

The SSA includes the median most likely probabilities of lynx persistence by 2025, 2050, and 2100 for each lynx geographic unit. The probabilities reflect the median “most likely” probabilities of persistence provided by 10 lynx experts for each geographic unit considering the current status of lynx populations and current and likely future stressors to those populations.” SSA at 180 n.2. And these probabilities paint a dire picture for lynx, with all but one unit showing a 50% probability or less of persistence by 2100. Indeed, one unit has only a 15% probability of persistence by 2100 (and that same unit only has a 35% probability of persistence by 2050). SSA at 178-79.

The Service itself explained that even with increasing uncertainty about predictions beyond mid-century:

[W]e nonetheless conclude it is very unlikely that resident lynx populations will persist through 2100 in all 5 of the geographic units that currently support them. That is, we believe that resident populations will likely persist at the end of the century in 2 or 3 of the 5 units that currently support them, but that resident populations may be functionally extirpated from 2 to 3 of the units by then. Even where populations persist, they will be reduced in number and distribution and, therefore, resiliency.

The loss of viable resident lynx populations from 1 or more geographic units would represent reduced future redundancy, representation, and resiliency within the lynx DPS.

SSA at 171. The SSA also explains “resident lynx populations in all geographic units that currently support them are expected to become smaller and more fragmented and isolated, each geographic unit and the DPS as a whole will be less resilient in the future.” SSA at 173. Importantly,

Projected continued climate warming is expected to exert the greatest influence on the resiliency of individual populations, and thus continued presence of resident lynx in each geographic unit. Climate models project that boreal forests and snow conditions favorable for lynx at the southern periphery of the range will retreat northward and upslope with continued warming, further fragmenting and diminishing the quality of lynx and hare habitat within the DPS. Although uncertainty remains regarding the timing, extent, and biological consequences of such impacts, as habitat conditions decline, hare and lynx reproductive and survival rates are likely to decrease, resulting in population declines in both species. As snow conditions become less favorable, competitors (e.g., coyotes and bobcats) may outcompete and displace lynx. This in turn would reduce lynx abundance and density within populations, making populations more susceptible (i.e., less resilient) to stochastic events.

*Id.* While there are issues with using persistence as the exclusive metric, even by only looking at persistence, there are significant issues for lynx in both the near and long-term. These issues can only lead to the conclusion that the Service's recovery finding is premature and unsupported (by even its own models and predictions).

In the near term, lynx still face a number of threats that merit continued listing under the ESA, including, as the Service describes in the SSA, that climate change will have major impacts on lynx, lynx habitat, and prey populations; Unit 1 will have a 50% decrease in habitat by 2032, SSA at 178; climate models predicting deteriorating snow conditions (depth, quality, and duration), *id.*; limited elevation refugia, *id.*; habitat loss due to wildfire and beetle kill, SSA at 178-79; loss of some small sub-populations, *id.* at 178; amongst others. Further, the SSA notes considerable uncertainty about many threats, such as frequency and severity of fires and disease outbreaks, response of hares to changing snow conditions, disease and parasites impacting lynx, adequacy of lynx immigration from Canada, amongst others. SSA at 178-79. But uncertainty is not grounds to delist lynx. Rather, the ESA's precautionary approach dictates that uncertainty be resolved in favor of continued protections for lynx.

Additionally, there is some doubt, as noted by peer and state reviewers, some geographic units maintain a sufficient connection with Canadian population (including due to increased trapping in Canada).

**m. The Service did not conduct a significant portion of its range ("SPR") analysis.**

The ESA requires the Service to evaluate whether a species, subspecies, or DPS is endangered or threatened "throughout all or a significant portion of its range." 16 U.S.C. §§ 1532(6), (16), (20). Here, the Determination, 5-Year Review, and SSA do not conduct this analysis, and therefore any determination that a species is recovered or no longer meets the definition of a threatened species violates the ESA. Further, to the extent those documents

reflect an SPR analysis, at the time they were finalized, the Service was relying on a since vacated SPR policy, and therefore it violates the ESA. *See Desert Survivors v. U.S. Dept. of the Interior*, 336 F. Supp. 3d 1131 (N.D. Cal. 2018).

## V. Conclusion

In closing, this sixty-day notice of intent to sue serves to put the Service, the Department of the Interior, and the named officials above of their liability for violating the ESA and making an arbitrary and capricious decision that violates the ESA related to whether or not a recovery plan would promote the conservation of lynx. The parties named above intend to file a lawsuit in federal court unless the Service rectifies the deficiencies described in this letter.

We would, however, prefer to avoid litigation. As such, we welcome the opportunity to meet with the Service to discuss these concerns, and attempt to come to a meaningful resolution of these issues to avoid seeking relief from a court after costly and time-consuming litigation. Please let us know at your earliest convenience if you would be interested in such a meeting.

Thank you for your consideration of these issues, and we look forward to hearing from you.

Sincerely,



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On behalf of: WildEarth Guardians, Friends of the Wild Swan, Cascadia Wildlands, Oregon Wild, San Juan Citizens Alliance, Wilderness Workshop  
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