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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

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ALLIANCE FOR THE WILD ROCKIES, )	CV-14-M-272-DLC
NATIVE ECOSYSTEMS COUNCIL, )	Consolidated with
ROCKY MOUNTAIN WILD, AND )	CV-14-270-M-DLC
SIERRA CLUB, INC., )	)
)	PLAINTIFFS' BRIEF IN
Plaintiffs )	SUPPORT OF MOTION FOR
v. )	SUMMARY JUDGMENT

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)  
MICHAEL BEAN, in his official capacity as )  
Principal Deputy Assistant Secretary for )  
Fish and Wildlife and Parks at the U.S. )  
Department of the Interior; S.M.R. )  
JEWELL, in her official capacity as )  
Secretary of the U.S. Department of the )  
Interior; and U.S. FISH AND WILDLIFE )  
SERVICE, )  
) )  
Defendants. )

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... i

I. INTRODUCTION AND SUMMARY ..... 1

II. FACTS ..... 2

    A. Description of the Canada lynx and its Habitat ..... 2

    B. Critical Habitat Designation for the Canada lynx and prior  
    Litigation ..... 3

    C. Overview of Excluded Areas ..... 5

    D. Lynx Critical Habitat Requirements ..... 6

III. STANDARD OF REVIEW ..... 7

IV. ARGUMENT ..... 9

    A. The FWS Exclusion of Occupied Habitat in the National  
    Forests in Montana, Idaho and the Southern Rockies was  
    Contrary to the prior Order, the ESA and APA. .... 9

        1. Montana & Idaho ..... 9

        2. Colorado and the Southern Rockies ..... 12

            a. Colorado is occupied lynx habitat. .... 12

            b. Colorado contains the PCEs. .... 13

            c. The FWS exclusion of Colorado due to alleged  
            lack of quantity and spatial arrangement of the  
            PCEs is again arbitrary and capricious. .... 14

                1. *FWS’s proxies are contrary to Lyder and  
                are arbitrary and capricious* ..... 14

                2. *FWS fails to make a rational connection  
                between the facts and the conclusion.* ..... 20

B. FWS’s Exclusion of “Unoccupied” Habitat does not Comply with ESA §3(5)(a)(ii) and the APA. .... 21

    1. Currently Occupied Habitat is not Sufficient to Conserve the Species, Especially due to Projected Habitat loss from Climate Change..... 22

    2. FWS Failed to Include all Necessary Corridors and Linkages. .... 25

C. The PCEs are Arbitrary, Vague, and Incomplete..... 28

V. CONCLUSION ..... 30

CERTIFICATE OF COMPLIANCE..... 31

## TABLE OF AUTHORITIES

### Cases

<i>Alliance for Wild Rockies v. Lyder</i> , 728 F.Supp.2d 1126 (D. Mont. 2010).....	passim
<i>Cape Hatteras Access Pres. Alliance v. U.S. Dept. of Interior</i> , 344 F.Supp.2d 108 (D.D.C. 2004).....	25
<i>Defenders of Wildlife v. Norton</i> , 239 F.Supp.2d 9 (D.D.C. 2002).....	4
<i>Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service</i> , 378 F.3d 1059 (9th Cir. 2004).....	21
<i>Motor Vehicle Mfrs. Assn. of U.S. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	8, 30
<i>Native Ecosystems Council v. Dombeck</i> , 304 F.3d 886 (9th Cir. 2002).....	8
<i>Ocean Advocates v. U.S. Army Corps of Engrs.</i> , 361 F.3d 1108 (9th Cir. 2004).....	9
<i>Sierra Club v. U.S. Fish and Wildlife Service</i> , 245 F.3d 434 (5th Cir. 2001).....	28

### Statutes

5 U.S.C. §706(2).....	1, 8
16 U.S.C. §1531.....	1
16 U.S.C. §1532(5)(A).....	passim
16 U.S.C. §1533.....	4, 14, 27
16 U.S.C. §1536(a)(2).....	28

**Regulations**

50 C.F.R. §424.12(b) ..... 28

**Federal Register**

63 FR 36994 (July 8, 1998) ..... 22

65 FR 16052 (March 24, 2000) ..... 3

68 FR 40076 (July 3, 2003) ..... 19

73 FR 10860 (February 28, 2008) ..... 12, 23

73 FR 76990 (Dec. 18, 2008) ..... 26

74 FR 8615 (February 25, 2009) ..... passim

78 FR 59429 (September 26, 2013)..... 13, 20, 23

79 FR 54781 (September 12, 2014)..... passim

**Other Authorities**

ESA §3(5)(A)..... 2, 21

ESA §4(b)(1)(B)(2)..... 19

## I. INTRODUCTION AND SUMMARY

Pursuant to FRCP 56, Plaintiffs Alliance for Wild Rockies *et al.* (collectively “Alliance” or “Plaintiffs”) request summary judgment in their favor and against Defendants. The revised critical habitat designation for the Canada lynx issued by the U.S. Fish and Wildlife Service (FWS or “the Service”) on September 12, 2014 (79 FR 54781; hereafter “the Final Rule”) does not meet the requirements of the Endangered Species Act (ESA), 16 U.S.C. §1531 *et seq.*, or the Administrative Procedure Act (APA), 5 U.S.C. §706(2).

In *Alliance for Wild Rockies v. Lyder*, 728 F.Supp.2d 1126 (D. Mont. 2010), these same plaintiffs challenged FWS’s 2009 critical habitat designation for the lynx, and the Court found FWS’s omission of the Southern Rockies, including but not limited to Colorado, and its omission of the Clearwater, Nez Perce, Beaverhead-Deerlodge, Bitterroot, and portions of the Helena and Lolo National Forests, to be arbitrary and capricious, an abuse of discretion and/or contrary to the Endangered Species Act, and remanded the rule to FWS to reconsider these areas. For the reasons set forth below, FWS has not fully complied with that remand order, and once again FWS has wrongfully omitted these areas from critical habitat designation.

FWS did not include all necessary occupied habitat as required by ESA §3(5)(A)(i). It excluded occupied areas which included the “primary constituent elements” that require inclusion in the critical habitat designation and/or once again based its exclusions on unduly restrictive criteria. Also, FWS did not include any unoccupied habitat in its designation as required by ESA §3(5)(A)(ii). It did this based on an improper standard and contrary to the record showing that many unoccupied areas are necessary for the conservation and recovery of the species.

## **II. FACTS**

Pursuant to L.R. 56.1, Alliance files its *Statement of Undisputed Facts* concurrent with this brief. For background purposes, Alliance provides a brief factual summary below.

### **A. Description of the Canada lynx and its Habitat**

*Lynx canadensis*, the Canada lynx (“lynx”), is a medium-sized wild cat comparable to the bobcat in size. The lynx is distinguishable from similar-sized cats by its long legs and large paws, which both make it well-adapted to hunting in deep snow, and its tufts of dark hair on the ears. The Canada lynx is highly dependent on snow-covered areas due to its highly specialized predator-prey relationship with the snowshoe hare – a species evolved to survive in areas that receive deep snow. Complaint ¶¶23-24; Answer ¶¶23-24.

The Canada lynx historically roamed throughout the boreal forests of North America, including Alaska, Canada and throughout parts of the contiguous United States. Canada Lynx Conservation Assessment and Strategy (LCAS), LIT-9835; Lynx Recovery Outline, LIT-11437; 74 FR 8616, 8618 (Feb. 25, 2009). Throughout the 1900s, lynx populations declined in the United States due to trapping for fur and loss of habitat from forest clear-cutting and associated road building, and large-scale development. Complaint ¶26.

Only approximately 1,000 lynx remain in the contiguous United States, which is considered to be the southern portion of its range. Most of the remaining lynx in the lower 48 states live in forested and high elevation snow-capped areas in Montana, Washington, Idaho, Colorado and Wyoming. *Id.*

### **B. Critical Habitat Designation for the Canada lynx and prior Litigation**

FWS's listing and critical habitat designation for the lynx is the result of over a decade of litigation. FWS listed the contiguous United States Distinct Population Segment ("DPS") of the lynx as "threatened" on March 24, 2000. 65 FR 16052. However, FWS failed to propose critical habitat concurrently with the listing or within one year, as required by the ESA, 16 U.S.C. §1533(b)(6)(C). As a result it was ordered to "undertake prompt

rulemaking” to designate critical habitat for lynx. *Defenders of Wildlife v. Norton*, 239 F.Supp.2d 9, 26 (D.D.C. 2002).

In 2006, FWS finally designated critical habitat for the lynx, but limited it to 1,841 square miles in Minnesota, Montana, and Washington. FWS later acknowledged that designation was unsupported and withdrew it. 74 FR 8618.

FWS issued a revised critical habitat for the lynx on February 25, 2009 (the “2009 Rule”). *Id.* at 8615. FWS designated approximately 39,000 square miles of critical habitat in Maine, Minnesota, Montana, Wyoming, Idaho, and Washington. *Id.* at 8642, 8661(map). However, FWS excluded many large areas from the 2009 Rule, including certain National Forests in Montana and Idaho, which are occupied by lynx and share the same primary constituent elements as the designated areas. FWS also excluded all habitat in the Southern Rockies, including all occupied lynx habitat in Colorado. FWS also did not include any unoccupied habitat in the critical habitat designation. *Id.*

As a result, Plaintiffs in the instant case filed suit against FWS in 2009 in this Court. This Court found that FWS’s exclusion of these areas was arbitrary and capricious and remanded the rule to FWS to correct its deficiencies. *Lyder*, 728 F.Supp.2d at 1145.

FWS issued a new critical habitat designation in response to the remand order, on September 12, 2014 (hereafter the “Final Rule”). 79 FR 54781,

54782. However, FWS continued to exclude the same areas that were the subject of the *Lyder* litigation. Consequently, Alliance filed the instant lawsuit on November 17, 2014 to once again have FWS's exclusion of these areas vacated and remanded to the agency, to include these areas in the critical habitat designation.

### **C. Overview of Excluded Areas**

As it did in the 2009 Rule, FWS excluded the Bitterroot, Flathead, Lewis & Clark, Beaverhead-Deerlodge, Gallatin, Targhee, Clearwater, Idaho Panhandle, and portions of the Helena NF and Lolo NF from the Final Rule. This Court in *Lyder* required FWS to consider the physical and biological features of the occupied areas of these forests in Idaho and Montana. *Lyder*, 728 F.Supp.2d at 1135.

One of the greatest flaws in the Final Rule, as in the 2009 Rule, is the exclusion of all lynx habitat in Colorado. Lynx are indigenous to Colorado and were reintroduced starting in 1999. *Lyder*, 728 F.Supp.2d at 1135-36. Location maps show them spread through the western part of the state. LIT-20553-55. Estimates are between 200 and 300 cats (and 141 kittens as of 2010). LIT-18733.

Colorado contains nearly 8,000,000 acres of suitable lynx habitat, which constitutes approximately eight percent of all remaining lynx habitat in

the contiguous United States. Southern Rockies FEIS, LIT-21303. Colorado's White River National Forest contains 1,125,762 acres of suitable lynx habitat. Plaintiffs' 12/19/13 Comments, PI-6232-33 citing the Southern Rockies Biological Opinion, LIT-11615. Further, Colorado contains 1,869,975 ha of predicted high quality winter habitat and 1,791,675 ha of predicted high quality summer habitat. PI-2454; LIT-3353. Nevertheless, like the 2009 rule, the new Final Rule excludes all of Colorado and the Southern Rockies.

#### **D. Lynx Critical Habitat Requirements**

Under §3(5)(A) of the ESA, the term "critical habitat" includes occupied and unoccupied lynx habitat, with different tests for each. "Occupied" habitat includes: "(i) the specific areas within the geographic area occupied by the species, at the time it is listed..., on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. §1532(5)(A)(i).

As noted in *Lyder*, 728 F.Supp.2d at 1132, FWS defines the "essential biological or physical features" for the lynx's critical habitat in terms of "primary constituent elements" (PCEs). 2009 Designation, 74 FR 8635. These PCEs are:

1. Boreal forest landscapes supporting a mosaic of differing successional forest stages and containing:

- a. Presence of snowshoe hares and their preferred habitat conditions, which include dense understories of young trees, shrubs or overhanging boughs that protrude above the snow, and mature multistoried stands with conifer boughs touching the snow surface;
- b. Winter snow conditions that are generally deep and fluffy for extended periods of time;
- c. Sites for denning that have abundant coarse woody debris, such as downed trees and root wads; and
- d. Matrix habitat (e.g., hardwood forest, dry forest, non-forest, or other habitat types that do not support snowshoe hares) that occurs between patches of boreal forest in close juxtaposition (at the scale of a lynx home range) such that lynx are likely to travel through such habitat while accessing patches of boreal forest within a home range.

*Id.* at 8638.

Unoccupied habitat includes the “specific areas outside the geographical area occupied by the species at the time it is listed...upon a determination by the Secretary that such areas are essential for the conservation of the species.” 16 U.S.C. §1532(5)(A)(ii). Hence, under the language of the statute, this “unoccupied” habitat need not contain the PCEs in the area to qualify as critical habitat.

### **III. STANDARD OF REVIEW**

Judicial review of an agency’s compliance with the ESA is governed by the APA. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th

Cir. 2002). Agency decisions “shall” be “set aside” under the APA if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A). Agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Assn. of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The court must ask “whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment...[The court] also must determine whether the [agency] articulated a rational connection between the facts found and the choice made. [The] review must not rubber-stamp...administrative decisions that [the court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” *Ocean Advocates v. U.S. Army Corps of Engrs.*, 361 F.3d 1108, 1119 (9th Cir. 2004) (internal citations and quotations omitted).

#### **IV. ARGUMENT**

##### **A. The FWS Exclusion of Occupied Habitat in the National Forests in Montana, Idaho and the Southern Rockies was Contrary to the prior Order, the ESA and APA.**

Count Two of the Complaint charges FWS failed to designate all necessary occupied critical habitat. Under §3(5)(A)(i) of the ESA, the term “critical habitat” means: “(i) the specific areas within the geographic area occupied by the species, at the time it is listed..., on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.” 16 U.S.C. §1532(5)(A)(i) (emphasis added).<sup>1</sup>

##### **1. Montana & Idaho**

In the Final Rule, FWS includes a map of critical habitat in Montana and Idaho. 79 FR 54844. The Final Rule excludes the Beaverhead-Deerlodge, Bitterroot, Nez Perce, Clearwater, Idaho Panhandle, and portions of the Lolo

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<sup>1</sup> The lynx habitat in the areas in question require “special management considerations or protections,” *see, e.g.*, the LCAS, LIT-9825; Lynx Recovery Outline, LIT-11434; the Southern Rockies Lynx Amendment FEIS, LIT-21185; the Southern Rockies Lynx Amendment ROD, EC-11079; the Northern Rockies Lynx Amendment ROD, LIT-21114. Therefore, Alliance focuses on the first element for occupied habitat - the physical and biological features.

and Helena National Forests. In *Lyder*, this Court directed FWS to “consider the actual physical and biological features” of excluded occupied forests in Montana and Idaho. *Lyder*, 728 F.Supp.2d at 1135. FWS claims that there is no evidence that the Beaverhead-Deerlodge, Bitterroot, and Nez Perce NFs were occupied at the time of listing, that subsequent surveys did not detect lynx presence, and therefore these forests do not contain PCEs. 79 FR 54818. Similarly, FWS claims that the Clearwater is unoccupied and therefore does not contain PCEs, and that the undesignated portions of the Helena and Lolo are unoccupied and therefore do not contain PCEs. *Id.* at 54819.

The Northern Rockies Lynx Amendment and the Lynx Conservation Assessment Strategy both find these areas occupied. *See* SUF ¶¶58-63. Once an area is “occupied,” it stays “occupied.” *Id.* Moreover, the *Lyder* court has established that these forest areas were “occupied” at the time of listing. *Lyder*, 728 F.Supp.2d at 1134-35. Data provided by Montana and Idaho showed these areas to be occupied. *See* SUF ¶¶212-222. Rather than make a remedial determination that these areas were unoccupied at the time of listing (which is what FWS did) FWS’s requirement upon remand was to assess the physical and biological features of these areas. FWS failed to do so.

FWS lists the physical and biological factors to consider, including space, nutritional requirements, shelter, breeding and rearing sites, and habitat

protected from disturbance, and that generally these are found in “boreal forest or cold temperate forest.” 79 FR 54805. In the Northern Rocky Mountains, FWS states that the dominant vegetation in lynx habitat is subalpine fir, Engelmann spruce, and lodgepole pine. *Id.* at 54808. FWS states that “many places” have all the PCEs but “do not and cannot support lynx populations” if the “physical and biological features essential to lynx in adequate quantities and spatial arrangements on the landscape” are absent. *Id.* at 54812. To designate critical habitat, FWS identified areas that were occupied at the time of listing, then tried to identify the occupied areas that “contain the physical and biological features in adequate quantities and spatial arrangements to support lynx populations over time.”

In formulation of the Final Rule, FWS determined that the areas already found to be occupied by this Court did not qualify as “occupied” for purposes of identifying critical habitat. Thus FWS did not comply with the remand order of this Court, which was to consider the physical and biological features of these areas. For example, the “most important” PCE is presence of hares. *Id.* at 54807. FWS either did not survey hares in these forests, or followed inadequate protocols. *See, e.g., Id.* at 54818. Moreover, FWS has only “limited” snow data for these forests. *Id.* at 54810. FWS essentially relied on

the proxy method of assorted lynx surveys to determine if PCEs are present, which fails to comply with the ESA and this Court's remand order in *Lyder*.

## **2. Colorado and the Southern Rockies**

### **a. Colorado is occupied lynx habitat.**

"Lynx are indigenous to Colorado." *Lyder*, 728 F.Supp.2d at 1135. FWS found Colorado occupied by lynx when it issued the 2009 rule. *Id.* at 1131 *citing* 73 FR 10860, 10871. Lynx have historically occupied the boreal forests of Colorado, lynx have persisted in Colorado, a resident lynx population existed in Colorado at the time of listing, and a resident lynx population exists in Colorado today. SUF ¶¶115-162; Plaintiffs' 12/19/13 Comments at PI-6212-13; 1/29/14 Peer Review Comments of Dr. Tanya Shenk (National Park Service landscape ecologist and former lead biologist on Colorado's lynx reintroduction effort from 1999-2010) at PI-2453. FWS admits that Colorado was occupied at the time of listing. Canada Lynx Distinct Population Segment Designation, 78 FR 59429, 59449 (Sept. 26, 2013); and FWS Memo, EC-11286.<sup>2</sup>

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<sup>2</sup> FWS states there were "few if any" native lynx in Colorado at the time of listing. 79 FR 54787. It states that there were 17 "verified" records of lynx in Colorado as of 1999. *Id.* This appears to be referring to the 17 "verified" historic records in McKelvey's review (not numbers of lynx). In 1999, 41 lynx were reintroduced to Colorado, and in 2000, 55 more were released. So potentially 96 animals were on the ground in Colorado at the time of listing.

**b. Colorado contains the PCEs.**

In *Lyder*, the court noted FWS defined the PCEs in a “single - albeit compound - primary constituent element for lynx: ‘boreal forest landscapes supporting a mosaic of differing successional forest stages’ and containing snowshoe hares for prey, abundant range, wood debris piles for denning, and deep, fluffy snow for extended periods of time.” 728 F.Supp.2d at 1132, citing 74 FR 8638. The new Final Rule keeps the same PCEs. *See, e.g.*, 79 FR 54811-12.

The record demonstrates that occupied lynx habitat in Colorado contains these elements. SUF ¶¶163-200; Shenk, PI-2454 (identifying mountain ranges and other areas with the PCEs); Plaintiffs’ 12/19/13 Comments, PI-6228-40(describing general habitat, foraging, denning, securing, breeding, connectivity and prey in the San Juan Mountains and White River National Forest based on FWS, CDOW and Forest Service data); DOW 12/23/13 Comments at PI-6040-41 (setting forth “deep fluffy snow” weather data); LCAS, LIT-9840-47, 9891-92; Lynx Recovery Outline, LIT-11438-39; Southern Rockies Lynx Amendment FEIS, LIT-21297-308; and

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LIT-20515. Currently, there are 200-300 lynx plus kittens spread throughout western Colorado. LIT-20553-55, 18733.

2013 Canada Lynx Habitat Working Group at PR-5047 (finding each PCE present in Colorado).

Regarding snowshoe hares, the record demonstrates that many large areas of Colorado include this PCE. They exceed the minimum of .5 per hectare required by the Lynx Recovery Outline; FWS misapplied hare data; and that lynx in Colorado subsist on a greater variety of prey, particularly red squirrels. *See* SUF ¶¶167-176; Shenk, PI-2454-55; Plaintiffs’ 12/19/13 Comments, PI-6221-26, 6231-32; DOW 12/23/13 Comments, PI-6040.<sup>3</sup>

**c. The FWS exclusion of Colorado due to alleged lack of quantity and spatial arrangement of the PCEs is again arbitrary and capricious.**

***1. FWS’s proxies are contrary to Lyder and are arbitrary and capricious***

Despite the overwhelming evidence of the PCEs in Colorado, FWS states Colorado does not “possess the physical and biological features essential to lynx *in sufficient quantity and spatial arrangement to sustain lynx populations over time*. Therefore, we find that the habitat in Colorado and elsewhere in the Southern Rocky Mountains does not contain the PCE.” 79

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<sup>3</sup> FWS argues the snowshoe hare population is insufficient, 79 FR 54817, but this is contrary to the record, is based impermissibly on an alleged lack of data, *Lyder*, 728 F.Supp.2d at 1126,1134; and FWS did not apply the best scientific data available contrary to 16 U.S.C. §1533(b)(1)(B).

FR 54817 (emphasis supplied). This rationale was also in the 2009 rule, which was set aside in *Lyder*. *See*, 728 F.Supp.2d at 1136.

FWS does not determine whether PCEs actually were in Colorado, rather it uses proxies to determine the PCEs' quantity and spatial arrangement. *Lyder* rejected reproduction as a proxy. 728 F.Supp.2d at 1135. But FWS is still pressing three others: a) historical presence (79 FR 54794-95, 54816); b) long-term sustainability (*Id.* at 54807, 54817); and c) lack of connectivity or isolation from other populations (*Id.* at 54817).

FWS used these same three elements in the 2009 Rule to support its finding that whether Colorado's population was "self-sustaining" was "uncertain," and therefore the PCEs lacked sufficient quantity and spatial distribution. *Lyder*, 728 F.Supp.2d at 1136. *Lyder* found FWS "did not link this uncertainty to the lack of the [PCEs]." *Id.* at 1136-37. And furthermore, "uncertainty" was not grounds to exclude Colorado because "[e]vidence of a self-sustaining population indicates the necessary [PCE] for viability are present, but its absence does not -- on its own -- mean that the habitat features are missing." *Id.* at 1137. Thus, FWS has violated *Lyder* on remand.

The *Lyder* court also found: “A self-sustaining population means an area has the habitat features necessary for conservation.” *Id.*<sup>4</sup> Thus, since Colorado does contain a self-sustaining lynx population, the area must also contain the physical and biological features essential for lynx to survive. FWS itself has previously said the same thing: “evidence of breeding populations is the best way to verify that the physical and biological features essential to lynx are present in sufficient quantity and spatial configuration to meet the needs of the species.” 2009 Designation, 74 FR 8640.

Even if these three proxies were appropriate, FWS’s findings are contrary to the record. First, lynx have historically occupied Colorado. SUF ¶¶115-141; Shenk, PI-2453; and *Lyder*, 728 F.Supp.2d at 1135-36 (discussing data). But even if it had not, that could be due to trapping and other human factors, not necessarily the lack of PCEs. *Id.*<sup>5</sup> Also, critical habitat is based on occupancy at the “time of listing,” not “historically”. To the extent there is a lack of monitoring data on historic lynx, SUF ¶¶127-131, FWS wrongfully

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<sup>4</sup> Conversely, the absence of a self-sustaining population “only means there is something holding the population back, which may—but not necessarily—stem from the lack of the primary constituent example.” 728 F.Supp.2d at 1137. For example, human-caused mortalities or a lack of habitat connectivity could be suppressing lynx populations, rather than a lack of snow conditions or snowshoe hares. *Id.*

<sup>5</sup> Lynx mortalities can be attributed to many causes. Almost 30 percent of the 118 lynx deaths in Colorado as of August 2009 have been human caused by either hunting or traffic. LIT-20542, SUF ¶159.

based its decision on a lack of data on the proxy, not on the presence of PCEs. *Lyder*, 728 F.Supp.2d at 1135.

Second, the “long-term sustainability” proxy fails. This test was rejected in *Lyder*, 728 F.Supp.2d at 1136-37. It also repeats the *Lyder* error of establishing a criterion they know the species cannot meet due to a lack of data (*e.g.*, by requiring more than 20 years of data).

And, FWS’s determination is contrary to the facts. The lynx re-introduction started in the San Juan range in southwest Colorado. Final Rule, 79 FR 54797. It would have made little sense if the Colorado Division of Wildlife thought the habitat was insufficient to support a population. That the re-introduced population has succeeded and reproduced shows the PCEs *are* there in sufficient quality and quantity. *See, Id.* at 54788 where FWS states: “We acknowledge that the Colorado population has persisted from its 1999-2006 introduction until the present.” The re-introduced population is reproducing, its kittens are having kittens,<sup>6</sup> and it meets every criteria of Colorado Parks and Wildlife for becoming “self-sustaining,” hence its chief

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<sup>6</sup> Monitoring of the 218 lynx released in Colorado revealed high initial post-release survival, followed by long-term survival, site fidelity, reproduction, and recruitment of Colorado-born lynx into the breeding population. SUF ¶¶150,180. At least 116 lynx kittens have been born in Colorado since 2003, with Colorado-born lynx giving birth to kittens. *Id.* at 156-159. FWS acknowledges this. 74 FR 8641.

researcher stated her “strong belief that the habitat in Colorado will sustain lynx over the long term.” Plaintiffs’ 12/19/13 Comments at PI-6216-17 and cites therein.

Future “uncertainty” of the species’ survival is not evidence that the PCEs were not there at the time of listing. As one Forest Service biologist pointed out, this test could not be met by virtually any endangered species. LIT-18898. Limiting critical habitat to “stable populations” is contrary to the ESA because, while it might promote the survival of the species, it does not comport with statutory requirements to identify areas that promote conservation of the species. *Lyder*, 728 F.Supp.2d at 1138.

The FWS finding is also contrary to designating Colorado a “Provisional Core Area” in the Lynx Recovery Outline in 2000. SUF ¶¶183-186. The characteristics of a “Core Area” mirror the PCEs for critical habitat in terms of *quality and quantity*. *Id.* at 187-88. The only difference between a “Core Area” and a “Provisional Core Area” is that the latter contains a reintroduced lynx population. *Id.* at 189. Therefore, Colorado contains the PCEs in sufficient quality and quantity, which is the standard for including “occupied” habitat in the critical habitat designation. 16 U.S.C. §1532(5)(A)(i); SUF ¶190. In 2003, FWS further found that the Southern

Rockies contain the “habitat conditions” essential to lynx. 68 FR 40076, 40082.

FWS’s findings are also contrary to its concurrence with the Forest Service and that planning process. SUF ¶¶191-200. The Forest Service found the LCAS provides “sufficient habitat quantity, quality, distribution and conditions to allow the species to maintain breeding populations within most historic habitats...” LIT-21335; PI-6246. The Forest Service’s Southern Rockies Lynx Amendment Record of Decision (ROD) found it will “maintain viable populations” and “is expected to maintain habitat quality and connectivity, and will provide for persistence of the lynx population in the Southern Rockies over the long-term.” EC-11111. The Forest Service stated that its analyses were based on the “best scientific information available,” which meets the criteria of ESA §4(b)(1)(B)(2) , and that in “its Biological Opinion (2008), the [FWS] concluded that the selected alternative will support lynx populations in the Southern Rocky Mountains Lynx Amendment area, and will contribute to recovery of the lynx.” EC-11111.<sup>7</sup>

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<sup>7</sup> FWS’s conclusion that habitat in the Southern Rockies is too fragmented to sustain a population is also contradicted by the LCAS, LIT-9890-93; Recovery Outline, LIT-11438-39; Southern Rockies FEIS, LIT-21297-308; CDOW Monitoring Report, LIT-10282-86, 10289-90, 10295; and the tables of acres of habitat in Lynx Analysis Units in Colorado prepared by FWS, PI-2595-96.

Third, FWS's "connectivity" proxy fails. Colorado lynx are connected to northern populations. SUF ¶¶201-204. They act as a "source" population for the surrounding areas and for known lynx populations in northwest Wyoming and Montana. Lynx from the Colorado population consistently move into surrounding habitat in Montana, Wyoming, Utah, and New Mexico, and sometime stay for multiple consecutive years. CDOW Lynx Report, LIT-10291-96; PI-2465; LIT-10297, 10310, 10318. Against this record, FWS is being arbitrary and capricious by requiring Southern Rockies lynx to be a source for populations further away before they can be considered essential to the recovery of the species, while FWS only requires other populations to be a source for their immediate region.

Even assuming that the Colorado lynx population is isolated, that is not grounds to exclude it. The ESA contains no provision that allows the exclusion of critical habitat because the population it supports is disconnected from other populations. Isolation is not a unique characteristic— the same can be said for most of the populations within the Lynx DPS. *See*, 78 FR 59434, 59449; PI-7958. Thus, FWS has arbitrarily imposed a higher burden on Colorado.

***2. FWS fails to make a rational connection between the facts and the conclusion.***

To satisfy the APA, Defendants must state a rational connection between the facts found and the decision made. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1065 (9th Cir. 2004). In *Lyder*, the court found that the reproduction proxy was insufficient because FWS did not define what rate would “satisfy its murky metric.” 728 F.Supp.2d at 1137. FWS has made the same error again. FWS does not explain what level of these three proxies would be sufficient to demonstrate sufficient quantity or spatial arrangement of the PCEs. It also ignores that certain areas within Colorado could meet those standards (*e.g.*, the San Juan Mountains) even if others could not, and instead excludes the entire Southern Rocky Mountains as insufficient.

**B. FWS’s Exclusion of “Unoccupied” Habitat does not Comply with ESA §3(5)(a)(ii) and the APA.**

Count Three of the Complaint charges FWS failed to designate all necessary unoccupied critical habitat in violation of the ESA. Under ESA §3(5)(A)(ii), the term “critical habitat” includes the “specific areas *outside the geographical area occupied by the species at the time it is listed...upon a determination by the Secretary that such areas are essential for the conservation of the species.*” 16 U.S.C. §1532(5)(A)(ii) (emphasis added). Under the language of the statute, this “unoccupied” habitat need not contain

the PCEs in the area to qualify as critical habitat. However, FWS did not include *any* unoccupied habitat in the Final Rule's critical habitat designation. Final Rule, 79 FR 54813-14.

**1. Currently Occupied Habitat is not Sufficient to Conserve the Species, Especially due to Projected Habitat loss from Climate Change.**

The Final Rule wrongly contends that designating occupied habitat alone is sufficient to ensure conservation of the species, and excludes all unoccupied habitat from the critical habitat designation on that basis. *Id.* at 54814. However, FWS's assertion is at odds with its listing of the lynx as threatened, where it found that the “[l]oss of suitable habitat for Canada lynx reduces the potential for population growth or recolonization of the lynx and further confines lynx to smaller, more isolated habitat units...Isolation increases the susceptibility of the lynx to human-caused threats, natural stochastic events, and effects of genetic bottlenecks...” 63 FR 36994, 37005. Therefore, limiting lynx protections to its current occupied range denies it habitat for expansion and risks perpetuating its threatened status.

The FWS assertion that protecting currently occupied habitat alone will conserve and recover the species is also contrary to the record. FWS previously found “up to two-thirds of lynx range in the lower 48 states may become unsustainable by 2100” due to climate change. Distinct Population

Segment Revised, 73 FR 10860, 10867 (Feb. 28, 2008). The Final Rule does not address whether the occupied habitat alone will be sufficient after this loss. But it found previously increased temperatures will lead to decreased snow cover, resulting in a “likely shift upward in elevation and northward in latitude.” 2009 Designation, 74 FR 8617. Thus, the higher elevation southern Rocky Mountains, which are now occupied, will be increasingly important as climate change shifts historic temperature and snowfall patterns. Canada Lynx Distinct Population Segment Designation, 78 FR 59443. Similarly, the higher elevation areas of Montana will become increasingly important and should have been included in the critical habitat designation. *See* SUF ¶¶66-106, 288-99, 237-239 (describing climate change impacts and need to designate critical habitat in unoccupied areas to account for population shifts).

The report by Patrick Gonzalez of The Nature Conservancy with the Forest Service identifies the future habitat at risk due to climate change. LIT-1430. Comparing that report to FWS’s designation would show the areas that should be included. And, the record in this case is substantially modified from the *Lyder* case, including notably numerous Forest Service documents. New to the record in this case, but which FWS did not address in the Final Rule, is a report by Dr. Healy Hamilton that Plaintiffs submitted. She mapped the lynx habitat that will be left in 2090 under two different CO<sub>2</sub> emissions

scenarios. Her results show that some of the last climate refuges for the lynx will be in areas that were omitted from FWS's critical habitat designation, focusing on southwest Montana, and explains why protecting these areas is important. Hamilton Dec., COR-107. Unoccupied linkage areas are essential in light of climate change to protect corridors between the current occupied habitat and the future habitat, regardless of whether the future habitat is currently occupied, to enable lynx to migrate into those areas. COR-108-12; PI-6251-53.

The *Lyder* opinion considered climate change, but misconstrued the law on including the unoccupied areas. *Lyder* found FWS did not need to include these unless they also contained the other necessary physical and biological features. 728 F.Supp.2d at 1142. That was an error because it applies the occupied standards of the ESA to unoccupied habitat. *See* 16 U.S.C. §1532(5)(A).

The Court believed the *Lyder* plaintiffs were asking FWS to designate “backup habitat in the hope it will someday become useful to the lynx.” 728 F.Supp.2d at 1142-43. But the record is clear that these areas will be climate change refugia. Therefore, this case differs from *Cape Hatteras Access Pres. Alliance v. U.S. Dept. of Interior*, 344 F.Supp.2d 108 (D.D.C. 2004), which found that FWS may not designate occupied lands on the “mere hope” they

will develop PCEs in the future. *Id.* at 122. It did not address “dynamic land,” *i.e.*, land that is changing and for which future conditions must be considered in the present to determine whether the land is essential to the conservation of the species. *Id.* at 123 n. 4. Lynx habitat is “dynamic” considering climate change as well as fire, insects, wind, ice, disease and forest management all act upon it. Final Rule, 79 FR 54805; LCAS, LIT-9851-930. Therefore, it is appropriate and necessary to account for future conditions when establishing critical habitat for the lynx.

**2. FWS Failed to Include all Necessary Corridors and Linkages.**

The other significant unoccupied areas FWS wrongly omitted are the lynx travel corridors. SUF ¶¶201-204, 230-237, 240 (on why linkage areas are necessary for conservation of species and identifying ones omitted from FWS designation). The Lynx Conservation Assessment and Strategy (LCAS) states that corridors are “essential” for lynx expansion and re-colonization into currently unoccupied areas. LIT-9895, 9938. FWS’s omission of these areas is also contrary to Objective 2 of the Lynx Recovery Outline, which expressly requires sufficient habitat be available to accommodate travel between each core area and adjacent secondary areas. LIT-11445.

The LCAS included maps showing travel corridors from Colorado, through Utah, north to the southwestern Montana lynx population, to the

northern Montana and Idaho populations, and linking them to Canada. The Forest Service has mapped these areas, identifying linkages in the central and eastern Idaho national forests, to and from the Lolo, Bitterroot and Beaverhead-Deerlodge national forests, and into Wyoming, Utah and Colorado, which connect the southern lynx populations to the northern ones. PI-7980. Likewise, the Forest Service's Southern Rockies FEIS lists 38 habitat linkage zones in need of protection. LIT-21494-98. It stresses that "the connectivity and linkage standards may be some of the most critical standards for lynx." *Id.* at 21331. According to the Colorado Division of Wildlife, numerous "travel corridors" were used repeatedly by more than one lynx, and lynx from Colorado have spread into New Mexico, Utah and Wyoming. LIT-10290-92, 96. FWS included the New Mexico population of lynx in the "threatened" listing. 73 FR 76990. The southern linkage areas were mapped by the Forest Service in 2006. PI-2575-77. *See also* COR-108-12 (identifying omitted critical lynx linkages based on U.S. Forest Service data). Just as FWS included *some* linkage corridors between critical habitat and populations in the critical habitat designation, it should have included these corridors as well. *See* PI-6250-53.

Finally, FWS has another rationale for excluding Colorado. FWS states that "with the exception of western Colorado" the rest of lynx habitat

was “not occupied” at the time of listing. Final Rule, 79 FR 54797-8. FWS excludes all of that “unoccupied” habitat (much of which is currently occupied by lynx, *see* Statement of Facts *supra* at pp.5-6) as not “essential to the conservation and recovery” of the species. Thus FWS wrongly applied the unoccupied standard to occupied habitat. 16 U.S.C. §1532(5)(A) defines critical habitat “at the time of listing”; and critical habitat “shall” be designated “concurrently” with the listing. 16 U.S.C. §1533(a)(3)(A). This indicates the occupancy determination should coincide with the listing *and* critical habitat determination. Since FWS violated the ESA and did not designate critical habitat until nine years after the listing (or 14 years using the current rule), to meet the intent of the Act it should have determined Colorado occupancy based on the time of the critical habitat designation. The record contains this information. 2009 AR A-2337; LIT-20553-55, 18733.

FWS also reasons designation would not “contribute meaningfully to addressing and ameliorating” the threat for which the species was listed, namely the inadequacy of the “existing regulatory mechanisms” at the time of listing. 79 FR 54798. But this adds a new and unstatutory definition to the critical habitat requirement. Even if applicable, FWS misapplied it, since critical habitat designation is a regulatory mechanism that does provide additional protections to the species, beyond protecting jeopardy, by

prohibiting adverse modification of critical habitat. *See, Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 441 (5th Cir. 2001); 16 U.S.C. §1536(a)(2).

**C. The PCEs are Arbitrary, Vague, and Incomplete.**

The ESA defines critical habitat as the area occupied by a listed species at the time of listing that has physical and biological features essential to the conservation of the species and may require special management considerations, as well as unoccupied areas essential to the conservation of the species. 16 U.S.C. §1532(5)(A). FWS has to “focus on the principal biological or physical constituent elements” that are essential to the conservation of the species and list these elements with the description of the critical habitat. 50 C.F.R. §424.12(b).

FWS determined the PCEs to be “boreal forest landscapes supporting a mosaic of differing successional forest stages” that contain hares, deep fluffy snow, denning sites with woody debris, and matrix habitat that lynx are likely to travel through. FWS uses the term “‘boreal forest’ because it generally encompasses most of the vegetative descriptions of the transitional forest types that comprise lynx habitat in the contiguous United States.” 79 FR 54806. In the Northern Rocky Mountains the dominant vegetation in lynx habitat is subalpine fir, Engelmann spruce, and lodgepole pine. Boreal forests

used by lynx are “heterogeneous mosaics of vegetative cover types and successional forests stages” *Id.* at 54807, 54806. These vegetative descriptions were not included in the PCE, which renders it too vague to be meaningful.

Without a definition of the term “boreal forest” within the PCE description itself, land managers may arbitrarily assign definitions and meanings to interpret the term. This results in disparate applications protections of the PCEs based on personal predilections by land managers. For example, one current Forest Service logging project, the Greater Red Lodge Project on the edge of the Absaroka-Beartooth Wilderness in Montana, although the project allows hundreds of acres of logging in designated lynx critical habitat, the local land managers interpreted “boreal forest” to include only subalpine fir and spruce vegetative types, thereby denying that any protection or special consideration was required for all other boreal forest vegetative types in the project, such as lodgepole pine. *See* Michael Garrity Declaration ¶14.

In addition to the vague terms in the PCE definition, the PCEs fail to include a crucial element of lynx habitat because they fail to include any element to provide for maintenance and recruitment of winter habitat ( as opposed to hare winter habitat, which is more broad). The winter season is

“critical” for lynx survival and recovery, and is the “most constraining” in terms of resource use. 79 FR 54808; LIT-11052. In winter lynx prefer mature, multistoried stands with dense horizontal cover where tree boughs touch the snow, and they avoid clearcuts and large forest openings. 79 FR 54806-08; LIT-11052-53. However, the PCEs lack any element specific to lynx winter habitat that is so important for the recovery of the species. This failure is arbitrary and capricious, since it ignores the “important factor” that lynx winter habitat is essential to survival and recovery. *See State Farm*, 463 U.S. at 43. This omission of lynx winter habitat element is also a failure to apply the best available science, since FWS is aware of the critical importance of recruitment of winter habitat.

## **V. CONCLUSION**

For the reasons set forth above, Alliance respectfully requests summary judgment against Defendants, and that the Final Rule be remanded to the agency to address the legal deficiencies set forth above, so that the agency can include the areas unlawfully omitted from the critical habitat designation for the Canada lynx. Alliance further asks the Court to retain the current critical habitat designation until it can be superseded by a new final rule.

Respectfully submitted this 24th day of July, 2015.

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### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that the foregoing brief is 6448 words, excluding the caption, signature blocks, and certificate of compliance.

Under Local Rule 7.1(d), a table of contents and table of authorities and list of exhibits are provided for this brief.

/s/Timothy M. Bechtold