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20 **IN THE UNITED STATES DISTRICT COURT**
21 **FOR THE EASTERN DISTRICT OF WASHINGTON**

22 DEFENDERS OF WILDLIFE, *et al.*,

23 Plaintiffs,

24 vs.

25 SUSAN MARTIN, *et al.*,

Defendants,

and

IDAHO STATE SNOMOBILE ASSOC. *et al.*,

Defendant-Intervenors.

) Case No. CV-05-248-RHW

)

) **PLAINTIFFS' BRIEF IN**
) **SUPPORT OF SECOND MOTION**
) **FOR INJUNCTIVE RELIEF**

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INTRODUCTION

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2 Plaintiffs Defenders of Wildlife *et al.* bring this second motion for injunctive
3 relief to prevent harms to endangered woodland caribou from the Forest Service’s
4 ongoing violations of the Endangered Species Act (“ESA”), in authorizing continued
5 snowmobiling and trail grooming activities within the Selkirk caribou’s winter habitat.

6 Specifically, as a result of Plaintiffs’ prior challenges in this matter, the U.S. Fish
7 and Wildlife Service (“FWS”) recently withdrew the Idaho Panhandle National Forest
8 biological opinion (and associated incidental take statement) (“IPNF Biop”) covering
9 winter recreation activities, and has reinitiated consultation with the Forest Service to
10 come up with a new plan – but that process will take at least two or three years to
11 complete, according to the agencies’ own estimates. Meanwhile, the Forest Service has
12 announced that it will continue to allow snowmobiling and snowmobile trail grooming
13 throughout much of the Selkirk caribou recovery area, relying on its ESA Section 7(d)
14 determination to justify this action. *See March 2006 Forest Service Determination at*
15 *FS AR D220.*¹

17 As a matter of law, withdrawal of the IPNF Biop means that the Forest Service
18 lacks any biological opinion for its actions; and it is violating its duty under ESA
19 Section 7(a)(2) to “insure” that its actions “are not likely to jeopardize” the continued
20 existence of the critically-endangered Selkirk caribou. And without a valid Incidental
21 Take Statement, neither can the Forest Service meet its separate duty to avoid unlawful
22 “take” of caribou under ESA Section 9.

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24
25 ¹ The Forest Service administrative record will be designated as “FS AR” while
the Fish and Wildlife Service record will be “FWS AR.”

1 As the record before the Court establishes – and as further detailed in the
2 accompanying declarations of caribou experts Jon Almack and Keith Simpson – the
3 Forest Service’s plan to allow continued trail grooming and snowmobile activities
4 within the Selkirk caribou recovery will cause **both** unlawful “jeopardy” and “take” of
5 this endangered species, in violation of ESA Sections 7(a)(2) and 9. Accordingly, in
6 light of the statutory commands and goals of the ESA, injunctive relief is required to
7 prevent such harms from occurring.

8 Plaintiffs thus request that the Court grant this second motion for injunctive
9 relief, and enter an injunction closing the Selkirk Caribou Recovery Area to
10 snowmobile activities and trail grooming, until the Defendants have developed a new
11 lawful winter recreation plan and completed ESA consultation over it.

12 **FACTUAL BACKGROUND**

13 As the Court is aware, Plaintiffs filed a motion for partial summary judgment in
14 November 2005, challenging the IPNF Biop and Incidental Take Statement, as well as
15 the Forest Service’s failure to consult with FWS over its Challenge Cost-Share
16 snowmobile trail grooming agreement (“Cost-Share agreement”). *See Docket No. 36.*

17 At the same time, Plaintiffs also filed their first motion for injunctive relief, over
18 just the Cost-Share agreement. *See Docket No. 35.* The Court granted the injunction on
19 December 20, 2005, prohibiting snowmobile trail grooming during the winter of 2005-
20 2006 for trails that were in or provided access to the caribou recovery area. *Order*
21 *Granting Plaintiffs’ Motion for Preliminary Injunction (Docket No. 65).*

22 Two months after the Court’s Order, the Federal Defendants decided to reinstate
23 consultation over the effects of winter recreation activities on woodland caribou,
24 through consultation over a new winter recreation travel plan that the Forest Service
25

1 would develop. *Declaration of Ranotta McNair (Docket No. 80) Exh. 1*. FWS also
2 withdrew the IPNF Biop (including the Incidental Take Statement) relating to effects of
3 winter recreation activities on woodland caribou. *McNair Decl. Exhs. 1&2*. Therefore,
4 no biological opinion or incidental take statement currently exists that covers these
5 activities, and the Forest Service estimates it will be at least two years before the new
6 consultation process is finished. *FS AR D220 at 1*.

7
8 After withdrawal of the IPNF Biop, the Forest Service in March 2006 issued a
9 directive, under ESA Section 7(d), governing snowmobile use within the caribou
10 recovery area that will be in place until consultation over a new winter recreation plan
11 is complete. *FS AR D220*. This directive recognized that a large portion of the IPNF
12 within the caribou recovery area is open to winter recreation motorized use, including
13 50 miles of groomed trails and 77,000 acres of snowplay areas. *FS AR D220 at 2*. It
14 also stated that the level of motorized winter recreation use was increasing within open
15 canopied forest habitats, likely due to advancements in snowmobile technology. *FS AR*
16 *D220 at 2*.

17 The directive also reiterated the harmful effects of snowmobiling on caribou,
18 including increased energy expenditures, displacement from habitat, and easier access
19 for predators. *FS AR D220 at 2-4*. It explained that increased energy expenditure could
20 seriously threaten winter survival of caribou; and that various studies provide strong
21 evidence that high snowmobile use displaces caribou and causes abandonment of
22 habitat. *FS AR D220 at 3-4*. And the directive acknowledged the perilous plight of
23 woodland caribou in the U.S., noting their decline over the past decade from around 25
24 animals to around three. *FS AR D220 at 2*.

25 Nevertheless, the Forest Service determined that it will continue to groom all but

1 three of the previously groomed trails in the recovery area. *FS AR D220 at 5*. And of
2 the three trails not to be groomed, two (upper Smith Creek and upper Pack River) are
3 still designated as non-groomed routes open to the public, thereby providing access to
4 high quality caribou habitat and areas of recent caribou sightings. *FS AR D221; Second
5 Declaration of Keith Simpson (filed herewith) ¶¶ 21-22*.

6 The Forest Service also decided to maintain the existing closure areas, and to add
7 one further area as a restricted-use area. *FS AR D220 at 6*. In this new area,
8 snowmobilers can still use the two designated routes that run the entire length of the
9 area, but are not supposed to go off of those routes. *FS AR D220 at 6*.

10 The directive does not explain or provide any information about how the Forest
11 Service will enforce these restrictions. *FS AR D220 at 6-7*. The absence of any
12 detailed enforcement plan for violators is problematic, as both Forest Service and
13 private monitoring show snowmobile use within various areas closed to motorized use,
14 including the Selkirk Crest closure area, over the past three years on a number of
15 occasions. *FS AR C161, D226, D224; Walker Decl. ¶ 11 & Exh. A photos 01, 33A,
16 3439, 3440, 3442, 3445, 5579, 5748 (compare to D221)*.

17 The Forest Service based the measures in its directive on three criteria: high
18 quality suitable caribou winter habitat, caribou locations since the year 2000, and
19 proximity of winter recreation activities to the two previous criteria. *FS AR D220 at 4-
20 5*. As explained in the accompanying declarations of caribou experts Jon Almack and
21 Keith Simpson, these measures are **not** sufficient to protect this population of woodland
22 caribou, as they do not properly account for caribou behavior and do not protect the
23 necessary winter habitat. *Declaration of Jon Almack; Second Declaration of Keith
24 Simpson (filed herewith)*.
25

1 For instance, the Forest Service's interim direction does not protect any travel
2 corridors to connect the southern and northern portions of the Recovery Area.
3 Therefore, these animals have no protected routes in winter to travel from prime habitat
4 along the Selkirk Crest to key habitat in Canada. *See FS AR D221*. These animals will
5 travel in winter, and the lack of any protections for travel corridors that link the
6 southern and northern portions of the population's range prohibits them from accessing
7 other parts of the recovery area and maintaining the genetic linkage critical to their
8 survival. *Second Simpson Decl.* ¶¶ 3-7; *Almack Decl.* ¶¶ 36-38; *FS AR C168 at 22,*
9 *D224, D221*.

10
11 Further, caribou movements within their range are unpredictable, as the animals
12 often use different areas within their seasonal habitats over the years. *Second Simpson*
13 *Decl.* ¶¶ 13-15; *Almack Decl.* ¶¶ 30-33; *FWS AR 00355*. In fact, it is not unusual for
14 caribou to abandon an area for a while, and then return to use that same area years later.
15 *Second Simpson Decl.* ¶ 15; *Almack Decl.* ¶ 30; *see also FS AR B143 at 3; Second*
16 *Declaration of Lauren M. Rule, Exh. 1 (filed herewith); Def. Response to Plaintiffs'*
17 *Statement of Facts (Docket No. 81) ¶¶ 1, 9 (all noting sightings of caribou in areas*
18 *after several years' absence)*. Therefore, relying only on the most recent observations
19 of caribou to predict their locations in the near future does not take into account their
20 behavior and habitat selection patterns.

21 Finally, limiting snowmobile restrictions to only a portion of the high quality
22 habitat is not sufficient for this population. A significant amount of suitable late winter
23 habitat remains unprotected under the Forest Service's interim directive. *Compare FS*
24 *AR D221 with D234*. Moreover, scientists have documented individuals from this and
25 other populations using areas considered to be lower quality habitat. *Almack Decl.* ¶¶

1 17-19; FWS AR00355; FS AR A54. Because this population is so small, it is critical to
2 manage for and protect every individual within the population, taking into account what
3 might be considered outlier behaviors. *Almack Decl.* ¶¶ 20-24.

4 In short, the Forest Service's current plans will allow continued snowmobiling
5 activity within the Selkirk caribou recovery area, which will cause further harm to the
6 critically-imperiled caribou constituting both "jeopardy" and "take" of this species. As
7 explained below, such continued authorization of harmful snowmobiling and trail
8 grooming in caribou winter habitat without **any** biological opinion or incidental take
9 statement covering these activities violates the ESA; and hence warrants entry of the
10 requested injunctive relief.

11 **ARGUMENT**

12 **I. STANDARD FOR INJUNCTIVE RELIEF.**

13 The ESA authorizes this Court to enter the requested injunctive relief to protect
14 the endangered Selkirks caribou, based on the Forest Service's violations of ESA
15 Sections 7 and 9. *See* 16 U.S.C. § 1540(g)(1) (authorizing citizen suits "to enjoin any
16 person, including the United States . . . who is alleged to be in violation of any
17 provision of this chapter or regulations issued under the authority thereof," and
18 providing that district courts "shall have jurisdiction . . . to enforce any such provision
19 or regulation").

20 By enacting the ESA, Congress altered the normal injunction standards under
21 Rule 65, to ensure protection of endangered and threatened species. As the U.S.
22 Supreme Court has noted, "the balance has been struck [by the ESA] in favor of
23 affording endangered species the highest of priorities." *TVA v. Hill*, 437 U.S. 153, 194
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25

1 (1978). “Accordingly, courts may not use equity's scales to strike a different balance.”
2 *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005).

3 After recently holding that EPA failed to consult over its authorization of certain
4 pesticides, the Ninth Circuit Court of Appeals stated that “the remedy for a substantial
5 procedural violation of the ESA – a violation that is not technical or de minimis – **must**
6 **therefore be an injunction** of the project pending compliance with the ESA.”

7 *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005) (upholding
8 injunction prohibiting EPA from authorizing use of certain pesticides within proscribed
9 distances of salmon-bearing waters until it had fulfilled its consultation obligations)
10 (emphasis added). Such an injunction is particularly necessary here due to the
11 precarious state of the Selkirks woodland caribou, as “temporary harms” during the
12 consultation process “could lead to the permanent harm of extinction. *Defenders of*
13 *Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005) (noting precarious situation of pygmy
14 owl, which numbered less than 100, when issuing injunction for inadequate consultation
15 over transfer of water pollution permitting authority to Arizona).

17 Moreover, an injunction is critically important here where there are not only
18 procedural, but substantive violations of the ESA as well. The failure to comply with
19 ESA Sections 7(a)(2) and 9 warrants an injunction to protect the endangered woodland
20 caribou, as the Ninth Circuit has repeatedly found. *Thomas v. Peterson*, 753 F.2d 754,
21 765 (9th Cir. 1985) (enjoining construction of road pending consultation); *Lane County*
22 *Audubon Soc’y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992) (enjoining timber sales
23 until consultation on underlying management plan was complete); *National Wildlife*
24 *Federation v. National Marine Fisheries Service*, 422 F.3d 782 (9th Cir. 2005)
25 (upholding injunction imposing conditions on operation of Federal dams after finding

1 consultation inadequate); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir.
2 1996) (enjoining logging to prevent take of marbled murrelet); *Palila v. Hawaii Dept. of*
3 *Land and Natural Resources*, 852 F.2d 1106, 1109-10 (9th Cir. 1988) (enjoining program
4 of stocking goats and sheep to prevent take of palila bird).

5 **II. THE FOREST SERVICE IS VIOLATING ESA SECTION 7(a)(2).**

6 The requested injunctive relief is appropriate here, first, because the Forest
7 Service is violating its duty under the ESA Section 7(a)(2) to insure that its actions do
8 not jeopardize the Selkirk Mountains population of woodland caribou.

9 The Forest Service previously relied on the IPNF Biop to contend that it was
10 complying with ESA Section 7(a)(2) in authorizing winter recreation activities that
11 affect the Selkirk caribou population. But after Plaintiffs filed their summary judgment
12 motion exposing the flaws in the IPNF Biop, the Defendants themselves acknowledged
13 that it is defective, and had to be withdrawn and redone. With the IPNF Biop
14 withdrawn, the Forest Service now lacks any ESA coverage for its continued
15 authorization of snowmobiling activities in caribou winter habitat. Simply put, it has
16 **no biological opinion** at all. Yet it continues to authorize snowmobiling and trail
17 grooming in caribou winter habitat.

18 This plainly violates ESA Section 7(a)(2), which mandates that the Forest Service
19 “shall insure” that its actions are “not likely to jeopardize the continued existence of any
20 endangered species,” and establishes the consultation process as the procedural vehicle to
21 fulfill this substantive duty. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. As explained
22 in *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987):

23
24 Congress has established procedures to further its policy of protecting
25 endangered species. The substantive and procedural provisions of the ESA
are the means determined by Congress to assure adequate protection. Only

1 by requiring substantial compliance with the act's procedures can we
2 effectuate the intent of the legislature. As we stated in *Thomas v. Peterson*,
3 753 F.2d 754, 764 (9th Cir. 1985), "If a project is allowed to proceed without
4 substantial compliance with those procedural requirements, there can be no
5 assurance that a violation of the ESA's substantive provisions will not result.
6 The latter, of course, is impermissible. (*TVA v. Hill*, 437 U.S. 153 (1978))."

7 Thus, only through the consultation process can agencies insure that their actions will
8 not jeopardize the survival and recovery of an endangered species.

9 As the Ninth Circuit has repeatedly held, agency actions that are implemented
10 without a valid biological opinion violate the mandates of ESA Section 7(a)(2). *See*
11 *Washington Toxics*, 413 F.3d at 1034; *Defenders of Wildlife*, 420 F.3d at 976; *Natural*
12 *Resources Defense Council v. Houston*, 146 F.3d 1118, 1125-1127 (9th Cir. 1998);
13 *Conner v. Burford*, 848 F.2d 1441, 1458 n.40 (9th Cir. 1988); *see also Greenpeace v.*
14 *NFMS*, 106 F. Supp.2d 1066, 1075 (W.D. Wash. 2000); *Pacific Coast Federation of*
15 *Fishermens' Ass'n v. U.S. Bureau of Reclamation*, 138 F. Supp.2d 1228, 1246 (N.D.
16 Cal. 2001).

17 It bears underscoring that the Forest Service itself recognizes that snowmobiling
18 can negatively impact caribou in multiple ways, and in fact has documented caribou
19 displacement by snowmobiles on several occasions over the years, as recently as 2004.
20 *FS AR C168 at 25-27, D220 at 3-4, A4, A31a, C164; Second Rule Decl. Exh. 1.* FWS
21 and caribou experts Keith Simpson and Jon Almack confirm that snowmobiling
22 adversely affects this species. *FWS AR 00052; Declaration of Keith Simpson (Docket*
23 *No. 38) ¶¶ 18-32; Almack Decl. ¶¶ 10-12, see also Second Rule Decl. Exh. 4 (new*
24 *study showing displacement of caribou by snowmobiles).* Yet instead of halting all
25 snowmobile activity within caribou winter habitat once FWS withdrew the IPNF Biop,
until a new consultation was completed, the Forest Service has authorized continued

1 snowmobile use within the caribou recovery area. *FS AR D220, D221*. Because this
2 violates ESA Section 7(a)(2), an injunction is needed to prevent further harm to the
3 caribou.²

4 **III. THE FOREST SERVICE IS VIOLATING ESA SECTION 9.**

5 In addition to Section 7(a)(2), injunctive relief is also warranted here under ESA
6 Section 9, which prohibits unlawful “take” of any endangered species. 16 U.S.C. §
7 1538(a)(1)(B).

8 The definition of “take” includes not only killing or injuring the listed species,
9 but also “harassment” or “harm” as well. 16 U.S.C. § 1532(19). The ESA regulations
10 define these terms as:

11
12 Harassment: an intentional or negligent Act or omission which creates the
13 likelihood of injury to wildlife by annoying it to such an extent as to
14 significantly disrupt normal behavioral patterns which include, but are not
limited to, breeding, feeding, or sheltering;

15 Harm: an act which actually kills or injures wildlife. Such an act may

16
17 ² As a matter of law, the Forest Service cannot rely on its Section 7(d)
18 determination to comply with the substantive and procedural requirements of
19 Section 7(a)(2), since 7(d) only prohibits “irreversible and irretrievable”
20 commitment of resources that may limit consultation alternatives; but does not
21 provide a basis for ensuring against jeopardizing a species. *See Conner v. Burford*,
22 848 F.2d at 1455 n.34. Further, as discussed in the accompanying Almack and
23 Simpson declarations (and discussed further below), the 7(d) determinations here
24 will **not** ensure against jeopardy to the caribou pending the new consultation.
25

1 include significant habitat modification or degradation where it actually
2 kills or injures wildlife by significantly impairing essential behavioral
3 patterns, including breeding, feeding, or sheltering.

4 50 C.F.R. § 17.3.

5 As the Ninth Circuit has held, injunctive relief is appropriate under ESA Section 9
6 to prevent unlawful take if there is a “reasonably certain threat of imminent harm” or
7 harassment to a listed species. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924-25 (9th
8 Cir. 2000); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996). This
9 standard is met when activities threaten to degrade a protected species’ habitat where
10 that degradation will affect the species' breeding, feeding, or sheltering behaviors.
11 *Marbled Murrelet*, 83 F.3d at 1067-68 (proposed logging of marbled murrelet habitat);
12 *Palila*, 852 F.2d at 1109-10 (maintaining goats and sheep that destroy palila bird's
13 habitat).

14 FWS can immunize an agency from take through an incidental take statement
15 within a biological opinion if it determines that, although the agency's activities will not
16 jeopardize a listed species, they will result in a taking of that species. 16 U.S.C. §
17 1536(b)(4); 50 C.F.R. § 17.3. Notably, the IPNF Biop contained such an incidental
18 take statement, which acknowledged that “certain actions implementing the IPNF
19 Forest Plan may result in incidental take of woodland caribou.” *FWS AR 00063*. This
20 take could occur in the form of harm “due to reduced habitat effectiveness resulting
21 from the lack of . . . a comprehensive recreation strategy,” or harassment “due to
22 uncontrolled recreational activity within caribou habitat.” *Id.* The incidental take
23 statement then listed non-discretionary terms and conditions intended to minimize this
24 incidental take, which included the requirement to develop and implement a winter
25 recreation strategy by January 2004. *Id. at 00072-73*.

1 Once FWS withdrew the IPNF Biop, however, this incidental take statement was
2 also withdrawn and hence the Forest Service could no longer rely on it for immunity
3 from take of caribou caused by snowmobile activities. *See Def. Response Br. at 10-11*
4 (*Docket No. 79*) (stating that withdrawal of IPNF Biop mooted Plaintiffs' claims
5 challenging incidental take statement). However, the causes of take remain: no
6 comprehensive recreation strategy exists and uncontrolled recreation activity is still
7 occurring. Further, the Forest Service has received no incidental take statement
8 covering its continued authorization of snowmobiling, as it has no new biological
9 opinion yet. As explained below and in the Declarations of Keith Simpson and Jon
10 Almack, the Forest Service is violating the ESA take prohibition by authorizing
11 snowmobile activities that present a reasonably certain threat of imminent harm and
12 harassment to caribou without an incidental take statement, warranting injunctive relief
13 to prevent this harm and harassment of woodland caribou.

15 **IV. INJUNCTIVE RELIEF IS NECESSARY TO PREVENT** 16 **IRREPARABLE HARM TO THE CARIBOU.**

17 The ESA's "institutionalized caution mandate" requires an injunction here to
18 protect the Selkirk woodland caribou from further harm caused by the Forest Service's
19 ongoing snowmobile authorization. *Defenders of Wildlife*, 420 F.3d at 978-79. As
20 noted above, the balance of hardships always tips sharply in favor of endangered
21 species under the ESA, *Marbled Murrelet*, 83 F.3d at 1073, and thus Courts must afford
22 these species the highest of priorities. *TVA v. Hill*, 437 U.S. at 194. The record before
23 the Court shows that the Forest Service's continuing authorization of snowmobiling will
24 harm the endangered woodland caribou absent an injunction prohibiting snowmobiling
25 in the caribou recovery area until the agencies have completed their new consultation.

1 Snowmobile use in the Selkirk Mountains of Idaho is extensive, increasing
2 dramatically over the last decade, particularly in the backcountry as machines have
3 become more powerful. *Compare FS AR B107 with Finney Decl. Exh. 2; FS AR A61,*
4 *A64, D220; FWS AR 00052.* In fact, the Selkirks are becoming known as a destination
5 area for backcountry snowmobiling riding. *Declaration of Carolyn Deshler (Docket*
6 *No. 15) ¶ 6.* Monitoring over the past four years has documented snowmobile use on
7 the IPNF in many parts of the Caribou Recovery Area, including within the Selkirk
8 Crest closure area as well as other closure areas. *FS AR C158, C161, C164, D224;*
9 *Walker Decl. ¶ 11 & Exh. A.* Although use in the backcountry appeared less than
10 previous years after the Court's injunction Order this winter, it did still occur. *FS AR*
11 *D224; Walker Decl. Exh. A photos 5570, 5572, 5579, 5739, 5740, 5748.*

13 Snowmobiling will continue to occur in the Caribou Recovery Area under the
14 Forest Service's new 7(d) directive. The Forest Service is authorizing use of groomed
15 trails as well as non-groomed routes that enter the caribou recovery area and provide
16 backcountry access to prime habitat and key travel corridors. *Second Simpson Decl. ¶¶*
17 *20-25; FS AR D221.* Much of the backcountry remains open to snowmobiling,
18 including snowplay areas such as the one covering Trapper Peak and Hidden Lake to
19 the north of Priest Lake State Forest. *Second Simpson Decl. ¶ 11; FS AR C168 at 16,*
20 *D221.* Snowmobile use in this area precludes caribou from traveling between the
21 northern and southern portions of the Recovery Area. Given that caribou will move
22 around during winter, *see Second Simpson Decl. ¶¶ 4, 6; Almack Decl. ¶¶ 37-38,*
23 Defendants' interim directive either renders the southern part of the caribou's range
24 inaccessible, or isolates caribou that already are located there.

25 The Forest Service knows that snowmobiling harms caribou, and that machines

1 have displaced individuals from this population a number of times over the years, most
2 recently from the Abandon Creek location in 2004. *FS AR A4, A31a, C164; Second*
3 *Rule Decl. Exh. 2*. A very recent study issued just this year confirms that snowmobiles
4 will displace caribou and cause them to abandon high quality habitat. *Second Rule*
5 *Decl. Exh. 4*. This displacement injures the animals by increasing their energy
6 expenditure, which reduces fitness and reproduction potential, and by forcing the
7 animals into less preferred habitat where feeding opportunities are not as good and
8 caribou are more susceptible to predators or avalanches. *FS AR C168 at 25-26, D220 at*
9 *3-4; First Simpson Decl. ¶¶ 19-25; Almack Decl. ¶¶ 10-12; Second Rule Decl. Exh. 4*
10 *at 11-12*.

11
12 Snowmobiles will also preclude caribou from using available habitat and travel
13 corridors, which harms the species by reducing feeding and breeding opportunities.
14 *Second Simpson Decl. ¶¶ 3, 12, 29; Almack Decl. ¶¶ 17-24, 34-38, 44*. Fish and
15 Wildlife Service has stated for years that the recovery area must be managed to allow
16 for unhindered movement by caribou. *FS AR A64, A84, A96 at 4; Second Rule Decl.*
17 *Exh. 3 at 4*. By allowing snowmobiles to displace animals and preclude the use of
18 important winter habitat and travel corridors, the Forest Service is harming this species.

19 The snowmobiling authorized under the Forest Service's interim direction poses
20 an imminent threat to this caribou population because it impairs caribou behavior and
21 habitat selection. As noted above, the Forest Service has failed to protect core winter
22 habitat and travel corridors between the Selkirk Crest and Canada. The Forest Service
23 has documented individual caribou in the Abandon Creek, Smith Creek, Two Mouth
24 Lakes, and Chimney Rock area over the last several years, indicating that members of
25 this population do indeed still use the Idaho habitat. *FS AR C162, C164, B143 at 3*;

1 *Declaration of Lauren M. Rule (Docket No. 42) Exh. 6; Second Rule Decl. Exh. 1.* The
2 agency's new direction, however, does not close to snowmobiling the area in the
3 vicinity of the Abandon Creek and Smith Creek sightings; and allows continued use of
4 snowmobile routes that access this core winter habitat as well as the Selkirk Crest
5 closure, where the other caribou sightings occurred. *Second Simpson Decl. ¶¶ 8, 20-22.*
6 Monitoring shows snowmobile use over the past three years in these areas. *Walker*
7 *Decl. Exh A photos 01, 04A, 09A, 33A, 3439, 3440, 3442, 3445, 5748.*
8

9 Further, the Forest Service has not protected any routes between the Selkirk Crest
10 closure area and habitat in Canada, including the travel corridors and migration routes
11 that the agency itself has designated. *FS AR C168 at 22-23, D225, D234, compare to*
12 *D221.* In fact, much of the land between these two portions of the caribou's range is
13 covered by a large snowplay area that receives heavy use. *FS AR C168 at 16, C161,*
14 *C164, D224; Second Simpson Decl. ¶ 11; see also Walker Decl. ¶ 13 & Exh. A photos*
15 *30A, 32A, 3152, 3421, 3424, 3426.* Thus all travel corridors between the Selkirk Crest
16 and Canada are open to snowmobiling.

17 It is imperative that caribou be able to travel between areas of high quality habitat
18 in the U.S. and Canada to allow the animals to access the whole recovery area and
19 maintain genetic linkage between groups of animals. *Almack Decl. ¶¶ 36-38; Second*
20 *Simpson Decl. ¶¶ 3-12.* Mountain caribou, including individuals from the south Selkirk
21 Mountains population, will move during winter, particularly along ridgelines and
22 occasionally across valleys. *Second Simpson Decl. ¶¶ 4, 6; Almack Decl. ¶¶ 37-38; FS*
23 *AR C162, D224.* Caribou winter telemetry locations show that these animals use the
24 habitat that remains open to snowmobiling. *Second Simpson ¶ 10 & Exh. A.*
25

By failing to protect core winter habitat as well as travel corridors to Canadian

1 habitat, the Forest Service is precluding access to the entire southern and eastern
2 portion of the U.S. Caribou Recovery Area, including areas closed to protect caribou,
3 and impairing the survival of this population. *Second Simpson Decl.* ¶ 12. As stated by
4 Simpson, “the agency must protect **all** available options for **all** seasonal caribou
5 movements between these areas,” and in particular, the area between the Selkirk Crest
6 and Hidden Lake “absolutely must be closed to snowmobiling to insure that caribou are
7 not displaced and to allow opportunities for north-south movement.” *Id.* ¶¶ 7, 9; *see*
8 *FS AR D221 (map)*. Yet this area remains open under the Forest Service’s new
9 directive.

10
11 Second, the Forest Service’s new authorization does not adequately protect
12 winter habitat for this population. Much of the habitat in areas that remain open to
13 snowmobiling is suitable late winter habitat. *Compare FS AR D221 with D234*.
14 Moreover, caribou from this population will use lower quality habitat as well, but the
15 Forest Service did not take this fact into account in its snowmobile authorization.
16 *Almack Decl.* ¶¶ 17-24; *FS AR D220 at 4-5* (limiting snowmobiling restrictions to high
17 quality habitat). Telemetry data shows caribou using habitat in winter that would be
18 considered lower quality, including the Trapper Peak burn area. *Almack Decl.* ¶¶ 17-
19 19; *see also FS AR A54* (noting caribou use of unsuitable habitat south of Selkirk Crest
20 closure). Snowmobiles could displace animals that use or travel through these lower
21 quality habitats, forcing them into even less preferred habitat or cutting off their route
22 of travel to higher quality areas, preventing them from reaching those sites. *Id.* ¶ 19.
23 Such a result could impair the survival of these individuals, which in turn could
24 jeopardize the survival of the entire population. *Id.* ¶¶ 20-21.

25 Managing for the individuals within this population, and taking into account what

1 might be considered outlier behaviors, is essential for the south Selkirks population as
2 this population is extremely small, and each individual is critically important. *Id.* ¶¶
3 22-23. By failing to adequately protect both high and low quality habitat, the Forest
4 Service is not insuring the survival of the population. *Id.* ¶ 24.

5 Third, the Forest Service is not sufficiently protecting caribou winter habitat
6 because, in developing its 7(d) direction, it only considered snowmobile restrictions for
7 areas that caribou had used the past few years. *FS AR D220 at 4-5*. Caribou
8 movements, however, are unpredictable, and animals will not necessarily return to the
9 same seasonal habitat year after year. *Almack Decl.* ¶¶ 30-33; *Second Simpson Decl.* ¶¶
10 13-15. This is especially true in their use of late-winter habitat, as caribou must shift
11 feeding locations to find an adequate supply of food; and it is not uncommon for
12 animals to move locations between years or even reappear in an area they had not used
13 for many years. *Second Simpson Decl.* ¶¶ 14-15; *Def. Response to Plaintiffs’*
14 *Statement of Facts* ¶¶ 1, 9. Such movement has been documented within this
15 population. *Almack Decl.* ¶¶ 31-32; *FS AR B143 at 3*; *Second Rule Decl. Exh. 1*.

17 The Forest Service is limiting the ability of caribou to shift their feeding
18 locations among many different sites by only restricting snowmobiles from areas the
19 animals used recently, and thus it is impairing this population. *Almack Decl.* ¶¶ 34-35.
20 Telemetry data shows historic caribou winter locations in many areas that remain open
21 to snowmobiling. *Compare FS AR D221 with Simpson Decl. Exh. A*. To insure this
22 population’s survival, the Forest Service should have looked at data covering several
23 generations of caribou to determine what habitats the animals used over a long time
24 frame to capture all the areas that may be important winter habitat. *Second Simpson*
25 *Decl.* ¶ 16; *Almack Decl.* ¶ 28.

1 In addition, the data on which the Forest Service relied is not sufficient to
2 accurately show even the recent habitat use by caribou. Telemetry data comes from
3 only a handful of radio-collared animals, and annual censuses are conducted just once
4 per year. *Almack Decl.* ¶ 27; *Second Simpson Decl.* ¶¶ 17-18. These limited data sets
5 are not sufficient to adequately determine the location of all members of the population,
6 and therefore cannot represent habitat use of the entire population. *Id.*

7 In sum, both of Plaintiffs' caribou experts concluded that the authorization of
8 continued snowmobiling pending the consultation process will harm woodland caribou
9 and impair the survival of this caribou population. *Second Simpson Decl.* ¶¶ 30-33;
10 *Almack Decl.* ¶¶ 42-44. The Forest Service's interim direction was not sufficient to
11 protect this population for the reasons explained above. And Fish and Wildlife Service,
12 the expert agency responsible for evaluating the effects of activities on endangered
13 species, determined that "take" of caribou could occur from uncontrolled recreational
14 activity and reduced habitat effectiveness caused by that activity. *FWS AR 00063.*

15 Yet the Forest Service is currently authorizing continued snowmobile use across
16 much of the Caribou Recovery Area in caribou winter habitat. This use will harm these
17 animals by disturbing and displacing individuals that are in the vicinity of snowmobiles
18 as well as precluding use of or travel to important habitat by other members of the
19 population. Thus, an injunction to avoid this harm is necessary to protect this critically
20 endangered species while the agencies come into compliance with their requirements
21 under the ESA.
22

23 CONCLUSION

24 For the foregoing reasons, Plaintiffs respectfully pray that the Court grant this
25 motion and enter an Order enjoining the Forest Service from authorizing snowmobiling

1 or snowmobile trail grooming in the Caribou Recovery Area until it has adequately
2 completed consultation with Fish and Wildlife Service over the effects of these
3 activities on woodland caribou.
4

5 Dated: June 16, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2006, I caused a true and correct copy of PLAINTIFFS' BRIEF IN SUPPORT OF SECOND MOTION FOR INJUNCTIVE RELIEF to be electronically filed with the Clerk of the Court using the CM/ECF System which sent notification of such filing to the following counsel of record in this matter:

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