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23 **IN THE UNITED STATES DISTRICT COURT**
24 **FOR THE EASTERN DISTRICT OF WASHINGTON**

25 DEFENDERS OF WILDLIFE, *et al.*,

Plaintiffs,

vs.

SUSAN MARTIN, *et al.*,

Defendants.

)
) Case No. CV-05-248-RHW
) **PLAINTIFFS' OPENING BRIEF IN**
) **SUPPORT OF MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
)
)
)
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1 **INTRODUCTION**

2 Plaintiffs Defenders of Wildlife *et al.* seek partial summary judgment over
3 multiple violations of the Endangered Species Act (“ESA”) by Defendants U.S. Fish
4 and Wildlife Service (“Service”) and U.S. Forest Service (“Forest Service”), with
5 respect to the endangered Selkirk Mountains woodland caribou in the Idaho
6 Panhandle National Forest (“IPNF”).

7 As explained below, the woodland caribou is the most critically endangered
8 mammal in the lower 48 states; and its survival is increasingly threatened by
9 expanding snowmobile activities on the IPNF. The agencies acknowledge this
10 threat, and that the IPNF Forest Plan has no standards or restrictions on
11 snowmobiling. Yet the Service’s 2001 Biological Opinion concludes that continued
12 implementation of the Plan is not likely to jeopardize the caribou’s existence. Not
13 only is this “no-jeopardy” conclusion contrary to the best available science and the
14 Service’s own analysis, but the Service has also authorized unlimited “take” of
15 caribou, even though loss of even a single animal could send this species toward
16 extinction. Accordingly, these decisions were arbitrary, capricious, and violate the
17 ESA, thus warranting partial summary judgment for Plaintiffs under their First and
18 Second Claims challenging the IPNF Biological Opinion.

19
20 Further, the Forest Service has failed to adopt restrictions on snowmobile use
21 in caribou habitat on the IPNF, which the Service required as a non-discretionary
22 condition within the Biological Opinion; but the agencies have not reinitiated
23 consultation, as they are required to do in light of this failure. Finally, the Forest
24 Service never consulted over its IPNF Challenge Cost-Share Agreement, by which it
25 directly authorizes, funds, and carries out winter snowmobile trail grooming that

1 allows snowmobile access into caribou winter habitat. The agencies are thus again
2 in violation of ESA Section 7; and accordingly, Plaintiffs are entitled to partial
3 summary judgment on these issues as well.

4 **FACTUAL BACKGROUND**¹

5 **The Endangered Selkirk Woodland Caribou.**

6 The only remaining population of woodland caribou in the coterminous
7 United States occurs in the Selkirk Mountains of northern Idaho, northeastern
8 Washington, and southern British Columbia. *SOF ¶ 9; Rule Decl. Exh. 1 at 13.*
9 Woodland caribou, which consist of three distinct ecotypes—boreal, northern, and
10 mountain—once roamed throughout Canada and across the northern tier of the U.S.
11 *SOF ¶¶ 2, 9; Rule Decl. Exh. 35 at 1, Exh. 1 at 13, 15.* By the early 1980’s,
12 however, the mountain caribou had declined dramatically, and the isolated Selkirks
13 population fell to just 25-30 animals. *SOF ¶¶ 10-11; Rule Decl. Exh 1 at 15.*

14 In 1983, the Service “emergency listed” this population as endangered under
15 the ESA, and then published a final listing rule in 1984. *SOF ¶ 11; Rule Decl. Exhs.*
16 *3,4.* It issued a Recovery Plan for the Selkirk population in 1985, which was revised
17 in 1994. *SOF ¶ 12; Rule Decl. Exh. 2.*

18 Mountain woodland caribou have a unique migration system, making seasonal
19 migrations based on elevation to access different food sources. *SOF ¶ 4; Rule Decl.*
20

21
22 ¹ The relevant facts are spelled out in detail in the accompanying Plaintiffs’ Separate
23 Statement of Undisputed Material Facts (“SOF”), and Declarations of Lauren M.
24 Rule, Keith Simpson, Paul Mitchell, Mark Sprengel, and Joe Scott.
25

1 *Exh. 1 at 13-14, Exh. 2 at 5.* In early winter, mountain caribou use dense forest
2 stands at lower elevations, where trees intercept early season snow and allow access
3 to lichens on downed logs and shrubs under the forest canopy. In late winter, once
4 the snow has compacted caribou move to higher elevations with moderate slopes and
5 open canopied forests, where their wide, splayed hooves allow them to travel on top
6 of the snow. There, they feed almost exclusively on lichen found above snowline on
7 mature and old growth trees. *SOF ¶¶ 5-6; Rule Decl. Exh. 1 at 14.* Because this
8 lichen has low nutritional value, the caribou's nutrient intake during late winter is
9 limited. *SOF ¶ 6; Rule Decl. Exh. 1 at 14.*

10
11 Despite efforts to bolster the Selkirk Mountains population of woodland
12 caribou through transplants from other populations in British Columbia, the
13 population estimates from the past five years remain at 33-35 animals, with only 1 to
14 3 located per year in Idaho. *SOF ¶¶ 13-14; Rule Decl. Exhs. 5, 6.* The sightings of
15 animals in Idaho have occurred in several locations ranging from the very northwest
16 corner of the state to areas near the Selkirk Crest east of Priest Lake. *SOF ¶ 14;*
17 *Rule Decl. Exhs. 5-9.* These animals can travel long distances, and telemetry studies
18 prove that individual animals from the Selkirk population have moved many miles
19 between habitat in Canada and Idaho. *SOF ¶ 15; Mitchell Decl. Exh. 1.*

20 **Snowmobile Threats to Caribou.**

21 Research shows that snowmobiling is harmful to caribou. As discussed in
22 both the Service's and Forest Service documents, snowmobile use can displace
23 caribou from important winter habitat or preclude their use of such habitat. *SOF ¶*
24 *16; Rule Decl. Exh. 1 at 48, Exh. 10 at 25-26; see also Simpson Decl. ¶¶ 7, 20-25.*
25 Several studies demonstrate that caribou abandoned areas they previously used as

1 winter habitat when those areas started receiving heavy snowmobile use, resulting in
2 either extirpation from some areas or a decline in numbers of caribou. *SOF ¶ 17;*
3 *Rule Decl. Exh. 10 at 26, Exh. 11; Simpson Decl. ¶¶ 7, 21 and Exh. 2.*

4 This type of displacement is harmful to caribou as it can force them out of
5 preferred winter habitat into more marginal habitat, where there are fewer feeding
6 opportunities, or a higher risk of predation or avalanches. *SOF ¶ 18; Rule Decl.*
7 *Exh. 1 at 48, Exh. 10 at 26, Exh. 12 at 4-7; Simpson Decl. ¶¶ 13-19, 25.*

8 Snowmobiles also directly harass caribou, increasing their stress levels during
9 this time of limited nutritional intake. Expending energy to avoid snowmobiles
10 leaves the animals more susceptible to predation, and causes a loss of body fat
11 crucial for winter survival, reproduction, and calf survival. *SOF ¶ 19; Rule Decl.*
12 *Exh. 1 at 48, Exh. 10 at 25; Simpson Decl. ¶¶ 13-16, 19, 25.* Snowmobile trails also
13 provide access into high elevation habitat for predators that normally would be
14 precluded from those areas by deep snow. *SOF ¶ 20; Rule Decl. Exh. 10 at 26, Exh.*
15 *12 at 6; Simpson Decl. Exh. 3 at 2.*

17 As summarized by the Forest Service: “snowmobile use within caribou winter
18 range increases caribou vigilance and movements, thus potentially resulting in
19 reduced survival. Winter recreation use causes displacement in most cases and
20 potentially avoidance of areas used by snowmobiles. Long term effects of
21 snowmobile use includes fragmentation and isolation of local herd groups, disruption
22 of winter movement patterns and reduction of amount of area available to caribou.”
23 *SOF ¶ 21; Rule Decl. Exh. 10 at 26-27.*

24 **Agency Actions Addressing Snowmobiling.**

25 In the early 1990’s, several instances of snowmobile harassment of caribou

1 occurred on the IPNF, displacing the animals and causing the Forest Service to close
2 a small portion of the forest—14 square miles—to snowmobiling in 1994, a closure
3 that was expanded to 22 square miles the following year and remains in place. *SOF*
4 ¶¶ 22-24; *Rule Decl. Exhs. 13-15*.

5 The Service acknowledged the threat of snowmobiles in the 1994 Recovery
6 Plan, noting that snowmobile use may displace caribou from important habitat; and
7 included an objective to “reduce or eliminate the impacts of recreational activity on
8 caribou and their habitat.” *SOF* ¶ 25; *Rule Decl. Exh. 2 at 33*. To fulfill this
9 objective, the agencies were to “develop standards pertaining to recreational activity
10 in caribou habitat,” and implement those standards as soon as possible. *Id.*

11 The Service expressed concerns two years later when the IPNF proposed to
12 build a new parking lot for snowmobile trailers, stating that “we already know that
13 [snowmobile] use is high and is increasing exponentially. . . . If snowmobilers are
14 running all over caribou winter habitat, this will prevent caribou from ever moving
15 into an area.” *SOF* ¶ 27; *Rule Decl. Exh. 19*. As a condition of the project, the IPNF
16 agreed to develop and start implementing a winter recreation strategy prior to 1998
17 to reduce any adverse effects on caribou recovery. *SOF* ¶ 28; *Rule Decl. Exh. 20*.

18 The Service continued to emphasize the rapid expansion of snowmobiling in
19 caribou winter habitat and the imminent need for a winter recreation strategy. *SOF*
20 ¶¶ 29-30; *Rule Decl. Exhs. 21, 22*. And the International Mountain Caribou Steering
21 Committee included a requirement within its “Emergency Caribou Recovery Action
22 Plan” to “develop a snowmobile access strategy by September 1999” that would
23 identify areas of conflict and make recommendations for reducing or eliminating
24 those conflicts. *SOF* ¶ 31; *Rule Decl. Exh. 23*. Yet, by the beginning of 2001, no
25

1 strategy existed. *SOF ¶ 40; Rule Decl. Exh. 1 at 49.*

2 **Consultation Over IPNF Plan.**

3 In April 2001, the Service issued a revised Biological Opinion (“Biop”)
4 addressing the impacts to grizzly bear and caribou of continued implementation of
5 the IPNF Plan. *See Rule Decl. Exh. 1.* The Service had previously consulted with
6 the Forest Service over the Plan in 1986, but revised its opinion in order to conform
7 to amended ESA regulations and address new information about the status of the
8 species, the environmental baseline, the effects of the action, and cumulative effects.
9 *SOF ¶ 33; Rule Decl. Exh. 1 at 1.*

10 The 2001 amended IPNF Biop described the Selkirk Mountains population of
11 woodland caribou as being “in decline and in danger of extirpation,” and noted that
12 one of the conservation needs of the species included “protection of the remaining
13 suitable late winter habitat from winter recreation pressure.” *SOF ¶¶ 34-35; Rule*
14 *Decl. Exh. 1 at 14-16.*

15 The IPNF Biop stated that snowmobiling in the Selkirks had increased rapidly
16 in the past decade and continued to expand, both in numbers of participants and
17 geographic area as more advanced machines allowed riders to venture farther off
18 trails into previously inaccessible caribou habitat. *SOF ¶ 37; Rule Decl. Exh. 1 at*
19 *48.* The opinion also discussed in detail the harmful effects of snowmobiling, citing
20 to various studies showing that snowmobiles displace caribou from important habitat
21 or preclude their use of that habitat, affecting their reproduction and survival. *SOF ¶*
22 *38; Rule Decl. Exh. 1 at 48.* Further, the opinion noted that additional stress caused
23 by snowmobiles at a time when caribou have low nutrient intake can “significantly
24 affect their normal behavior, including feeding, breeding, and sheltering, and could
25

1 ultimately affect their survival capability.” *SOF ¶ 39; Rule Decl. Exh. 1 at 48.*

2 Then the IPNF Biop discussed the lack of any specific standards in the IPNF
3 Plan to restrict snowmobiling in caribou habitat, and the failure of the Forest Service
4 to implement even generic standards to insure protection of caribou habitat. *SOF ¶*
5 *41; Rule Decl. Exh. 1 at 53.* It noted that no regulatory mechanisms or strategies
6 were in place to address winter recreation as required by the Recovery Plan, other
7 than the one closure area from 1994. *SOF ¶ 40; Rule Decl. Exh. 1 at 49.* The Biop
8 concluded that the lack of clear direction and limits on recreational activities within
9 caribou habitat could cause increased risk of caribou displacement, harassment, or
10 potential mortality, which could ultimately affect the reproduction, numbers, and
11 distribution of caribou within the ecosystem. *SOF ¶ 42; Rule Decl. Exh. 1 at 53.*

13 Finally, the Biop also acknowledged that increasing recreational pressures on
14 state and private lands within the caribou recovery area could lead to “significant
15 impacts to caribou and their habitat,” but did not describe in detail these activities or
16 their impacts. *SOF ¶ 43; Rule Decl. Exh. 1 at 55-56.*

17 Despite recognizing the inadequacy of the IPNF Plan to restrict snowmobiling
18 and protect caribou, the Fish and Wildlife Service nevertheless concluded in its 2001
19 amended Biop that continued implementation of the Plan was “not likely to
20 jeopardize” the continued existence of the Selkirk Mountains woodland caribou.
21 *SOF ¶ 44; Rule Decl. Exh. 1 at 57.* To support this conclusion, the Biop simply
22 asserted that the IPNF Plan “provided flexibility and discretionary authority” to
23 implement actions for caribou. *SOF ¶ 45; Rule Decl. Exh. 1 at 57-58.*

24 Notably, the Service had originally concluded that implementation of the
25 IPNF Plan **would** jeopardize the caribou, and had formed a Reasonable and Prudent

1 Alternative (“RPA”) that would avoid jeopardizing the species. *SOF ¶ 46; Rule*
2 *Decl. Exh. 25*. But the Forest Service opposed the jeopardy determination, arguing
3 that it had discretion under its IPNF Plan to implement the measures from the RPA,
4 and promising to do so. *Id.* Apparently because of these assurances, the Service
5 agreed to reverse its position and issue the “no-jeopardy” opinion.

6 The 2001 amended IPNF Biop also contained an Incidental Take Statement
7 (“ITS”), which purported to authorize an “unquantifiable” amount of take that could
8 occur during implementation of the IPNF Plan due to harm caused by “reduced
9 habitat effectiveness resulting from the lack of . . . a comprehensive recreation
10 strategy,” or harassment “due to uncontrolled recreational activity within caribou
11 habitat.” *SOF ¶¶ 47-48; Rule Decl. Exh. 1 at 59*. The ITS concluded that the
12 authorized incidental take would not result in jeopardy to the woodland caribou; but
13 to minimize such take, it imposed a non-discretionary Term and Condition requiring
14 the Forest Service to develop by January 2003 – and implement by January 2004 – a
15 recreation strategy that identified standards and restrictions necessary to protect
16 caribou and their habitat. *SOF ¶¶ 49-51; Rule Decl. Exh. 1 at 61 & 68-69*.

18 **Current Snowmobile Situation.**

19 As of the filing of this Motion, the Forest Service has not developed the
20 required recreation strategy for the IPNF that contains standards and restrictions on
21 snowmobile use in caribou habitat, and has no imminent plans to adopt one, as
22 required by the Biop. *SOF ¶¶ 54-55; Rule Decl. Exhs. 27, 29*. At the same time, it
23 continues to authorize, fund, and carry out trail grooming across much of the IPNF,
24 under a “Challenge Cost-Share Agreement” with state and county agencies. *SOF ¶*
25 *60-70; Rule Decl., Exh. 34*. As addressed in the accompanying Motion For TRO

1 And/Or Preliminary Injunction, the Forest Service has **never** undertaken ESA
2 Section 7 consultation over this Agreement, even though it allows snowmobile
3 access into critical caribou winter habitat. *Id.*

4 In March 2004, the Forest Service issued a “Situation Summary and
5 Management Strategy for Mountain Caribou and Winter Recreation on the Idaho
6 Panhandle National Forest” (“Situation Summary”), describing areas of caribou use,
7 habitat, and travel corridors, as well as areas of snowmobile use. *Rule Decl. Exh. 10.*
8 But the Forest Service did not impose any standards or restrictions on snowmobile
9 use, or identify areas that were inappropriate for snowmobiling in this document.
10 Instead, it asserted that recreation would be addressed in the IPNF Plan revision,
11 which will take several years. *SOF ¶ 57; Rule Decl. Exh. 10 at 4.*

12 The Situation Summary did provide a portrait of the current snowmobile
13 situation on the IPNF, stating that 251 miles of snowmobile routes occur in the
14 caribou recovery area, of which 77 miles are groomed trails, authorized by the
15 Challenge Cost-Share Agreement. *SOF ¶ 60; Rule Decl. Exh. 10 at 12.* Over
16 50,000 acres of ungroomed “play areas” also exist in the caribou recovery zone on
17 the IPNF, where snowmobilers go off-trail and run unhindered in large open areas.
18 *SOF ¶ 62; Rule Decl. Exh. 10 at 12.* This trail and backcountry system is very
19 popular and receives heavy use in winter, including use within off-limit areas. *SOF*
20 *¶¶ 63-64; Rule Decl. Exh. 10 at 17; Sprengel Decl. ¶ 11.*

21 As explained below, given these undisputed facts, the Service’s no-jeopardy
22 determination in the IPNF Biop and its authorization of “unquantified” take in the
23 ITS were arbitrary, capricious, and contrary to the ESA. Further, Defendants’ failure
24 to reinitiate consultation when the IPNF did not meet the non-discretionary Terms
25

1 and Conditions within the ITS was unlawful; as is the Forest Service’s failure to
2 consult over the IPNF Challenge Cost-Share Agreement. Accordingly, the Court
3 should grant partial summary judgment to Plaintiffs on these claims; reverse and
4 remand the 2001 IPNF Biop and ITS; and order Defendants to undertake full
5 consultation as required by the ESA.

6 ARGUMENT

7 **I. STANDARDS OF REVIEW.**

8 Partial summary judgment is appropriate where no genuine issues of material
9 fact exist, and the moving party is entitled to judgment as a matter of law on one or
10 more issues or claims presented. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby,*
11 *Inc.*, 477 U.S. 242, 247 (1986).

12 Under the Administrative Procedure Act (“APA”), the Court must reverse and
13 set aside final agency actions that are “arbitrary, capricious, an abuse of discretion,
14 or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Biological
15 opinions, such as the 2001 Biop challenged here, are final agency actions subject to
16 the arbitrary and capricious standard. *Pacific Coast Federation of Fishermen’s*
17 *Ass’n v. NMFS*, 265 F.3d 1028, 1033-34 (9th Cir. 2001) (“PCFFA”).

18 Under this standard, the Court must look at whether the agency considered the
19 relevant factors and articulated a rational connection between the facts found and the
20 choice made. *Id.* at 1034. “A biological opinion may also be invalid if it fails to use
21 the best available scientific information as required by 16 U.S.C. § 1536(a)(2).” *Id.*
22

23 **II. THE IPNF BIOP VIOLATES THE APA AND ESA.**

24 The ESA requires the Forest Service to consult with the Service over any
25 action that may affect the endangered caribou, to ensure that the action is not likely

1 to jeopardize the continued existence of the species. 16 U.S.C. § 1536(a)(2). The
2 agencies must use the best scientific and commercial data available in carrying out
3 this consultation duty. *Id.* “Jeopardize” means to “reduce appreciably the likelihood
4 of both the survival and recovery of a listed species in the wild by reducing the
5 reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. If the
6 Service determines that an action will jeopardize the species, it shall suggest a
7 Reasonable and Prudent Alternative action (“RPA”) that would avoid jeopardizing
8 the species. 16 U.S.C. § 1536(b)(3).

9
10 **A. The Service failed to make a rational connection between the facts
and science in the IPNF Biop and its no-jeopardy conclusion.**

11 As stated above, this Court must look at whether the Service “considered the
12 relevant factors and articulated a rational connection between the facts found and the
13 choice made” when deciding if the IPNF Biop is arbitrary and capricious. *PCFFA*,
14 265 F.3d at 1034 (internal quotations omitted). The Ninth Circuit recently explained
15 that “internally contradictory agency reasoning renders resulting action ‘arbitrary and
16 capricious;’ such actions are not ‘founded on a reasoned evaluation of the relevant
17 factors.’” *Defenders of Wildlife v. EPA*, 420 F.3d 946, 959 (9th Cir. 2005), quoting
18 *Ariz. Cattle Growers’ Ass’n v. USFWS*, 273 F.3d 1229, 1236 (9th Cir. 2001).

19 Courts have overturned biological opinions that reached no-jeopardy
20 conclusions when those conclusions were not supported by the facts and science in
21 the record. *See e.g. PCFFA*, 265 F.3d at 1037-38 (finding no-jeopardy conclusion
22 arbitrary and capricious where agency disregarded site-specific and short-term
23 degradation to the habitat); *National Wildlife Federation v. Norton*, 332 F. Supp.2d
24 170, 176-77 (D.D.C. 2004) (finding no rational basis for no-jeopardy determination
25

1 when Service did not explain how the factors it relied on supported its conclusion);
2 *Northwest Environmental Advocates v. EPA*, 268 F. Supp.2d 1255, 1272 (D. Or.
3 2003) (finding no-jeopardy determination arbitrary and capricious where record was
4 filled with evidence and findings that new water quality standards did not protect
5 fish); *Greenpeace v. National Marine Fisheries Service*, 55 F. Supp.2d 1248, 1266-
6 67 (W.D. Wash. 1999) (determining that RPA was arbitrary and capricious when
7 Service did not provide a rational explanation to justify its conclusion that the
8 alternative action would not jeopardize the species).

9
10 Likewise, the Service's conclusion here that implementation of the IPNF Plan
11 would not jeopardize the caribou was arbitrary and capricious, in light of the facts
12 and science presented in the IPNF Biop which acknowledge the harm to caribou
13 from snowmobiling, and the lack of standards in the Plan to address those harms. As
14 discussed above and in Plaintiffs' Separate Statement of Facts, the IPNF Biop
15 recognized that the Selkirk Mountains population of woodland caribou was "in
16 decline and in danger of extirpation." It also explained that growing recreation
17 pressure was one of the major threats to caribou. Snowmobiling in particular was
18 expanding "exponentially" both in numbers of participants and geographic area.

19 When discussing the effects of snowmobiling on caribou, the IPNF Biop
20 stated that, "it is known that snowmobile use in winter habitats can displace caribou
21 from important habitats or preclude their use of such habitat." *Rule Decl. Exh. 1 at*
22 *48*. The opinion then cited a number of studies to support this statement and
23 explained in detail the harmful impacts from such displacement and added stress. *Id.*
24 And it cited no conflicting studies or contrary evidence.

25 Similarly, the Service did not equivocate in its analysis of the IPNF Plan,

1 explaining that the lack of any specific standards regulating recreation activities in
2 caribou habitat could have multiple harmful effects to caribou, which “could
3 ultimately affect the reproduction, numbers, and distribution of caribou within the
4 ecosystem.” *Id. at 53.*

5 The facts and science presented in the IPNF Biop, therefore, established that
6 snowmobiling is a serious threat to the Selkirk Mountains caribou, and that the IPNF
7 Plan does not have adequate standards to address the problem. Those facts wholly
8 undermine the Service’s conclusion that continued implementation of the Plan would
9 **not** reduce the reproduction, numbers, and distribution of the species, thereby
10 reducing the likelihood of its survival and recovery—i.e. jeopardize the species.
11 This “internally contradictory” reasoning failed to connect the facts with the
12 conclusion, and renders the IPNF Biop arbitrary and capricious. *Defenders of*
13 *Wildlife*, 420 F.3d at 959; *PCFFA*, 265 F.3d at 1034.

14 The Service tried to justify its conclusion by stating that the critical status of
15 the caribou was due largely to factors beyond the control of the IPNF; the IPNF Plan
16 provided “flexibility and discretionary authority” to implement measures to protect
17 caribou; and the IPNF “employs adaptive management” to update guidance as new
18 information becomes available. *Rule Decl. Exh. 1 at 57-58.* None of these reasons
19 are sufficient to justify the Service’s no-jeopardy conclusion.
20

21 First, the underlying reasons for the caribou’s critically endangered status do
22 not change the fact that **this** action—implementation of the IPNF Plan—might
23 jeopardize the species. The regulations require the Service to consider in the
24 consultation process only the current status of the species along with the effects of
25 the action and cumulative effects. 50 C.F.R. § 402.14(g).

1 Second, even if the IPNF has flexibility under its Plan and can use adaptive
2 management to take measures to protect caribou, the IPNF Biop did not include any
3 such measures as part of the proposed action or as an RPA. As courts have held, any
4 commitment to take future actions cannot be the basis of a no-jeopardy conclusion,
5 unless those commitments are reasonably certain to occur and enforceable.

6 For instance, in *Northwest Environmental Advocates*, the court ruled that a
7 commitment by Oregon to undertake conservation measures could not support a no-
8 jeopardy finding when there were no assurances in the biological opinion that the
9 measures were likely to occur. 268 F. Supp.2d at 1273. The “reliance on future
10 state commitments was arbitrary and capricious given the strong evidence in the
11 record counseling against a no-jeopardy finding and indicating that Oregon’s
12 commitments were largely speculative and unenforceable.” *Id.*

13 Likewise, in *Center for Biological Diversity v. Rumsfeld*, 198 F. Supp.2d
14 1139, 1154 (D.Ariz. 2002), the court ruled that the Service could not rely on
15 mitigation measures that were not incorporated into the biological opinion as part of
16 the proposed action or as an RPA. *Rumsfeld* noted that, to justify a no-jeopardy
17 opinion, mitigation measures must be certain to occur, enforceable, and address the
18 threats to the species. *Id.* at 1152 (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th
19 Cir. 1987)). *See also Defenders of Wildlife*, 420 F.3d at 974 (concluding that a
20 Memorandum of Agreement was not sufficient to assure against jeopardizing a
21 species because it relied on voluntary cooperation by a State agency and was not
22 enforceable by the Service); *compare to Selkirk Conservation Alliance v. Forsgren*,
23 336 F.3d 944, 964 (9th Cir. 2004) (holding that Service could reasonably rely on
24 Conservation Agreement that was incorporated into the biological opinion as part of
25

1 the proposed action and was enforceable).

2 Based on the above cases, the IPNF’s flexibility and “commitment” to
3 implement measures such as those proposed in the draft RPA, *see SOF ¶ 46; Rule*
4 *Decl. Exh 25*, were not adequate to support the no-jeopardy finding. No mitigation
5 measures were incorporated into the biological opinion and, based on the poor track
6 record of the IPNF with regard to development of a recreation strategy, such
7 measures were not certain to occur. Because the facts in the IPNF Biop warranted a
8 jeopardy finding—as the Service had previously concluded—and because any
9 commitment by the IPNF was unenforceable and uncertain to occur, the Service’s
10 no-jeopardy conclusion was irrational, and the IPNF Biop must be reversed.

11
12 **B. The Service did not rely on the best available science.**

13 The ESA requires agencies to use the best available science in issuing a
14 biological opinion and making jeopardy or no-jeopardy determinations. 16 U.S.C. §
15 1536(a)(2); *PCFFA*, 265 F.3d at 1034. “This standard requires far less than
16 conclusive proof.” *Greenpeace*, 55 F. Supp.2d at 1262. Decisions based on
17 uncertain science are valid as long as that science is the best available. *Greenpeace*
18 *Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir. 1993).

19 Here, the Service’s IPNF Biop employed the best science in analyzing the
20 perils facing the caribou and the adverse effects of snowmobiling. *See Simpson*
21 *Decl. ¶ 26*. Yet, it then ignored that science, in violation of the ESA, to reach its no-
22 jeopardy conclusion. *See Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988)
23 (“In light of the ESA requirement that the agencies use the best scientific and
24 commercial data available to insure that protected species are not jeopardized, 16
25 U.S.C. § 1536(a)(2), the [Service] cannot ignore available biological information.”);

1 *Resources Ltd v. Robertson*, 35 F.3d 1300, 1304-05 (9th Cir. 1994) (biological
2 opinion was not based on the best available science, where agency’s “own studies
3 raise serious questions” about effects on grizzly bear).

4 Accordingly, because the Service did not base its “no-jeopardy” determination
5 on the best available science, contrary to the requirements of the ESA, this Court
6 must reverse that determination.

7 **C. The Service failed to adequately consider cumulative effects.**

8 The Service must also consider cumulative effects when assessing whether a
9 proposed action will jeopardize a species. 50 C.F.R. § 402.14(g)(3). Cumulative
10 effects include effects of “future State or private activities, not involving Federal
11 activities, that are reasonably certain to occur within the action area of the Federal
12 action subject to consultation.” *Id.* § 402.02.

13 To fulfill this requirement, the IPNF Biop should have discussed future
14 activities that are likely to occur on nearby state and private lands, and assessed how
15 those activities would impact the woodland caribou, in order to determine whether
16 these cumulative effects along with the IPNF’s actions might jeopardize the
17 continued existence of the species. 40 C.F.R. § 402.14(g)(4); *Greenpeace v. NMFS*,
18 80 F. Supp.2d 1137, 1149 (W.D.Wash. 2000) (holding that mere listing of future
19 activities without any explanation or analysis of how those activities may affect the
20 listed species was not sufficient to consider cumulative effects); *National Wildlife*
21 *Federation*, 332 F. Supp.2d at 178-79 (finding cumulative effects analysis
22 inadequate where the Service did not adequately identify and discuss reasonably
23 certain future activities).

24 The Service failed to satisfy this requirement. The IPNF Biop contains
25

1 precious little information about effects of snowmobiling or other activities on near-
2 by state and private lands within the Selkirk caribou's winter habitat. The IPNF
3 Biop simply stated that "timber harvest on [state and private lands], and increasing
4 recreation pressures represent significant threats;" and "such activities are expected
5 to result in increased road densities, human access, and habitat fragmentation, which
6 could result in significant impacts to caribou and their habitat." *Rule Decl. Exh. 1 at*
7 *55-56*. This discussion did not provide any detail to identify the recreation activities
8 that were likely to occur on these lands or their extent, and how such activities would
9 impact caribou, other than to state that the impacts would be "significant."
10

11 Furthermore, the Service did not explain why the combination of these
12 "significant impacts" from cumulative effects and the harmful effects from
13 implementing the IPNF Plan would not jeopardize the caribou. Again, the Service's
14 findings did not support its conclusion, rendering the IPNF Biop arbitrary,
15 capricious, and contrary to the ESA.

16 **III. THE INCIDENTAL TAKE STATEMENT ALSO VIOLATES** 17 **THE APA AND ESA.**

18 The ESA prohibits unauthorized "take" of any endangered species, with
19 "take" defined to include not just killing or injuring the animals, but also harassing
20 or harming them. 16 U.S.C. §§ 1538, 1532(19). During the consultation process,
21 the Service must determine if any take will occur that is incidental to the proposed
22 action and, if so, issue an ITS to authorize such otherwise illegal take. *Id.* §
23 1536(b)(4); 50 C.F.R. § 402.14(i). The ITS must specify the amount or extent of
24 incidental take, reasonable and prudent measures necessary or appropriate to
25 minimize take, and terms and conditions to implement those measures. *Id.* The

1 Service must also insure that the action and resultant incidental take will not
2 jeopardize the species. *Id.*

3 The ITS here explained that implementation of the IPNF Plan may result in
4 incidental take of woodland caribou, due to reduced habitat effectiveness resulting
5 from the lack of management strategies, such as a recreation strategy; or due to
6 uncontrolled recreational activity. *Rule Decl. Exh. 1 at 59.* But the ITS did not
7 specify how much incidental take was likely to result, asserting instead that the
8 expected level of take is “unquantifiable.” *Id.* And yet the Service concluded that
9 “this level of anticipated take is not likely to result in jeopardy to the woodland
10 caribou.” *Id. at 61.* These conclusions are arbitrary, capricious, and violate the ESA
11 in several respects.
12

13 **A. The Service failed to quantify the amount or extent of take.**

14 First, the ITS failed to identify the level of incidental take that the Service
15 projected, and which it deemed would not cause jeopardy to the species. As the
16 Ninth Circuit recently emphasized, an ITS must express the amount or extent of take
17 in some form, either as a numeric value or as a surrogate ecological condition that
18 has some connection to the taking of the species. *Arizona Cattle Growers’ Ass’n v.*
19 *U.S. Fish and Wildlife*, 273 F.3d 1229, 1250-51 (9th Cir. 2001). “Incidental Take
20 Statements set forth a ‘trigger’ that, when reached, results in an unacceptable level of
21 incidental take, invalidating the safe harbor provision, and requiring the parties to
22 reinitiate consultation.” *Id.* at 1249. In other words, the ITS “serves as a check on
23 the agency’s original decision that the incidental take of listed species resulting from
24 the proposed action will not violate section 7(a)(2) of the ESA.” *Natural Resources*
25 *Defense Council v. Evans*, 364 F. Supp.2d 1083, 1133 (N.D.Cal. 2003).

1 By failing to identify the amount or extent of take of caribou here, through a
2 numeric value or surrogate habitat conditions, the ITS in the IPNF Biop provided no
3 “trigger” for the reinitiation of consultation. Instead, it stated that the level of take
4 was “unquantifiable.” Because an unquantified level of take can never be exceeded,
5 the Service will never have to reinitiate consultation to reevaluate whether the action
6 is causing jeopardy to the species. Like in *Arizona Cattle Growers*, the Service’s
7 “failure to properly specify the amount of anticipated take and to provide a clear
8 standard for determining when the authorized level of take has been exceeded is
9 arbitrary and capricious,” and violates the ESA. 273 F.3d at 1251.
10

11 **B. The Service’s conclusion that incidental take would not jeopardize
12 the species was unreasonable.**

13 Second, the Service’s conclusion that “this level of anticipated take” was not
14 likely to jeopardize the caribou was also unlawful and unreasonable, because the
15 Service had not estimated the level of authorized take. An “unquantifiable” amount
16 of take could result in any number of caribou being killed or injured; and given the
17 very small number of remaining Selkirk caribou, the Service could not rationally
18 conclude that no jeopardy would occur without knowing what that number was.

19 Indeed, the precarious status of the Selkirk Mountains population shows that
20 **any** take of the species would likely result in jeopardy. The remaining population
21 numbers only about 35 animals, and is “in decline and in danger of extirpation.”
22 *Rule Decl. Exh. 1 at 15*. The Recovery Plan similarly emphasized that this species is
23 one of the “most critically endangered mammals in the U.S. Additional losses could
24 be disastrous” *Rule Decl. Exh. 2 at 15*.

25 With such a small population, loss of even one individual would likely reduce

1 the chances of the species' survival and recovery. As explained by caribou expert
2 Keith Simpson, loss of one or more animals from this small population could
3 irreparably impair the population's ability to persist. *Simpson Decl.* ¶¶ 36-37. Thus,
4 the Service's conclusion that incidental take would not jeopardize the species was
5 arbitrary and capricious, and violates the ESA.

6 **IV. THE AGENCIES VIOLATED THE ESA BY FAILING TO** 7 **REINITIATE CONSULTATION OVER THE IPNF BIOP.**

8 Under the ESA regulations, reinitiation of consultation is required if "new
9 information reveals effects of the action that may affect listed species . . . in a
10 manner or to an extent not previously considered." 50 C.F.R. § 402.16.

11 As noted above, the IPNF Biop contained non-discretionary terms and
12 conditions to implement measures needed to minimize incidental take of caribou.
13 One of these terms required the IPNF to develop and implement a recreation strategy
14 with standards and restrictions necessary to protect caribou, including defining
15 where recreation was appropriate and inappropriate. *Rule Decl. Exh. 1 at 68.* This
16 strategy was to be developed by January 2003 and implemented by January 2004.
17 *Id. at 68-69.* But the Forest Service has completely failed to meet this requirement.

18 Such failure to meet the requirements of a biological opinion represents "new
19 information" that triggers the duty to reinitiate consultation. In *Sierra Club v.*
20 *Marsh*, 816 F.2d 1376 (9th Cir. 1987), an agency failed to insure the completion of
21 key mitigation measures that the biological opinion assumed would occur. Because
22 the agency's failure undermined the key assumptions concerning the impacts of the
23 action, the Court ordered the agency to reinitiate consultation. *Id.* at 1388-89.
24

25 Similarly, the Forest Service here has failed to implement a key measure—a

1 recreation strategy—that the Service assumed it would complete, when the Service
2 rendered its “no-jeopardy” opinion. Further, the agencies are aware that snowmobile
3 use continues to grow on the IPNF, and is occurring farther off-trail in previously
4 inaccessible caribou winter habitat. Some of this use has even occurred in areas
5 closed to snowmobiling, including the area closed since 1994 to protect caribou.
6 *Sprengel Decl.* ¶ 11. These circumstances present new information revealing greater
7 effects to the species than what was considered in the IPNF Biop, triggering the need
8 for reinitiation of consultation. The agencies’ failure to do so violates the ESA; and
9 accordingly, Plaintiffs are entitled to partial summary judgment on this issue.

11 **V. ESA VIOLATIONS OVER COST-SHARE AGREEMENT.**

12 Finally, the Forest Service is also violating ESA Section 7, because it has
13 never undertaken consultation over the IPNF Challenge Cost-Share Agreement, and
14 hence cannot meet its ESA duty to ensure that implementation of that Agreement
15 does not jeopardize the Selkirk caribou.

16 **A. The Forest Service Has Admittedly Failed To Consult Over the 17 Cost-Share Agreement.**

18 As explained in the accompanying Motion for TRO And/Or Preliminary
19 Injunction, there can be no dispute that the Forest Service’s IPNF Challenge Cost-
20 Share Agreement represents ongoing agency “action” over which it must conduct
21 ESA Section 7 consultation.

22 The ESA defines agency “action” under Section 7 as encompassing “all
23 activities or programs of any kind authorized, funded, or carried out, in whole or in
24 part, by Federal agencies in the United States or upon the high seas,” including “the
25 granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-

1 aid.” 40 C.F.R. § 402.02. “Section 7 and the requirements of this Part apply to all
2 actions in which there is discretionary Federal involvement or control.” *Id.* § 402.03.

3 The Ninth Circuit has “construed ‘agency action’ broadly,” *Pacific Rivers*
4 *Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994), and thus has determined that
5 logging projects, oil and gas leases, renewals of water contracts, fishing permits, and
6 the registration of pesticides all require Section 7 consultation. *Id.*; *Thomas v. Peterson*,
7 753 F.2d 754 (9th Cir. 1985); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988);
8 *NRDC v. Houston*, 146 F.3d 1118 (9th Cir. 1998); *Turtle Island Restoration v. NMFS*,
9 340 F.3d 969 (9th Cir. 2003); *Washington Toxics Coalition*, 413 F.3d 1024 (9th Cir.
10 2005).

11
12 The Cost-Share Agreement at issue here falls squarely within this definition of
13 “agency action,” requiring ESA Section 7 consultation. The Agreement expressly
14 authorizes the use of the IPNF lands for “snowmobiling and the grooming program.”
15 *Rule Decl. Exh. 31 at 3*. Further, it requires the Forest Service carry out various
16 activities related to the trail grooming program, including participating in the
17 development of the AOPs and Financial Plans, performing off-season maintenance
18 activities, and monitoring the snowmobile routes during the winter season. *Id. at 3-*
19 *4*. The Cost-Share Agreement also commits the Forest Service to help fund the trail-
20 grooming program, by “provid[ing] assistance, funds, and personnel to assist with
21 the snowmobile trail-grooming program.” *Id. at 4*. By way of example, the IPNF
22 committed expenses in the amount of \$8,100.00 to the program for fiscal year 2004.
23 *Rule Decl. Exh. 33*.

24 This and other Forest Service management actions have thus led to the
25 development of 251 miles of snowmobile trails in the caribou recovery area,

1 including the 77 miles that the agency and its Cost Share Agreement partners groom
2 on a regular basis. Just as oil and gas leases, water contract renewals, and fishing
3 permits authorize activities on federal lands or under federal management, the Cost-
4 Share Agreement authorizes snowmobiling and trail-grooming on federal lands, and
5 imposes requirements on the IPNF to participate in this program.

6 Moreover, this Agreement has ongoing and lasting effects as it continues to
7 govern the trail grooming program, and imposes continuing obligations to develop
8 AOPs and financial plans each year to implement snowmobile trail-grooming. The
9 Forest Service has discretion over this ongoing action to impose conditions to benefit
10 the woodland caribou. *See Rule Decl. Exh. 1 at 9 & 53* (noting that current Forest
11 Plan has generic standards that could be used to restrict motorized use and
12 implement seasonal closures where needed to protect caribou); *id.*, *Exhs. 15-16*
13 (describing closure of area to snowmobiling to protect woodland caribou).
14

15 In short, the Cost-Share Agreement is an ongoing agency action, over which
16 the Forest Service is obliged by ESA Section 7 to undertake consultation and ensure
17 it is not jeopardizing caribou. *Washington Toxics Coalition*, 413 F.3d at 1033;
18 *Turtle Island*, 340 F.3d at 974.

19 Yet the Forest Service **admits** that it has not consulted with the Service over
20 the impacts from this action on endangered woodland caribou. *SOF ¶ 70; Rule Decl.*
21 *Exh. 34; Def. Answer to Complaint ¶ 55*. Accordingly, the Forest Service is
22 violating ESA Section 7(a)(2) based on this ongoing failure to consult over the IPNF
23 Challenge Cost-Share Agreement.
24

25 **B. The Forest Service Is Failing To Ensure That Its Actions Are Not
Likely To Jeopardize The Woodland Caribou.**

1 Again, the ESA directs agencies to undertake the Section 7 consultation
2 process in order to fulfill the ESA's substantive requirement to avoid jeopardizing a
3 listed species. *Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987); *see also*
4 *Washington Toxics Coalition*, 413 F.3d at 1035 ("The purpose of the consultation
5 process . . . is to prevent later substantive violations of the ESA.").

6 Because the Forest Service has not undertaken Section 7 consultation over the
7 IPNF Challenge Cost-Share Agreement for the snowmobile trail-grooming program,
8 it thus cannot meet this substantive ESA duty to "ensure" that implementation of the
9 Agreement is not likely to jeopardize the caribou.

10 In fact, the evidence establishes that the continued implementation of the
11 Cost-Share Agreement will lead to – or contribute to – jeopardizing the continued
12 existence of the woodland caribou. As emphasized by the Service, the Caribou
13 Recovery Team, and the International Mountain Caribou Steering Committee, a
14 recreation strategy with standards and restrictions on snowmobile use in caribou
15 winter habitat is vital to protect these animals and their habitat. *SOF ¶¶ 25-31, 50-*
16 *53; Rule Decl. Exh. 1 at 50, Exh. 2 at 33, Exhs. 21, 22, 23, 26.* The Steering
17 Committee included objectives in both the 1999 and 2001 Emergency Action Plans
18 to create an "Emergency Snowmobile Strategy," including recommendations for
19 reducing or eliminating snowmobile conflicts with caribou. *Rule Decl. Exhs. 23, 26.*
20 And in the 2001 Plan, the Committee specifically noted that these tasks were "of the
21 highest priority to maintain the Selkirk Mountains Woodland Caribou population,"
22 and it was their "professional opinion that funding and implementing these tasks are
23 essential to conserve the Selkirk caribou population." *SOF ¶ 53; Rule Decl. Exh. 26.*

24 The Forest Service likewise recognizes the harmful effects to caribou from
25

1 snowmobiling, documenting these harms in its “Situation Summary and
2 Management Strategy For Mountain Caribou And Winter Recreation On The Idaho
3 Panhandle National Forests” (“Situation Summary”). This report describes impacts
4 such as displacement from and abandonment of preferred habitat, excess energy
5 expenditure to avoid the machines, and added stress, all resulting in reduced survival
6 and reproduction capability. *SOF ¶¶ 16-20; Rule Decl. Exh. 10 at 25-26*. It also
7 notes that “snowmobile use within caribou winter range increases caribou vigilance
8 and movements, thus potentially resulting in reduced survival. Winter recreation use
9 causes displacement in most cases and potentially avoidance of areas used by
10 snowmobiles. Long term effects of snowmobile use includes fragmentation and
11 isolation of local herd groups, disruption of winter movement patterns and reduction
12 of amount of area available to caribou.” *SOF ¶ 21; Rule Decl. Exh. 10 at 26-27*.
13 *See also Rule Decl. Exh. 1 at 48; Simpson Decl. ¶¶ 18-26, 31-32* (describing
14 adverse effects to caribou from snowmobile use).

15
16 The Forest Service further admits in its Situation Summary that an extensive
17 snowmobile trail system exists on its IPNF lands, including 251 miles of
18 snowmobile routes, 77 miles of groomed trails, and over 50,000 acres of play areas
19 within the caribou recovery zone on the IPNF. *SOF ¶¶ 60-62; Rule Decl. Exh. 10*
20 *at 12*. These trails and play areas overlap with important winter habitat and travel
21 corridors for caribou; and many of the snowmobile routes “impact capable and
22 suitable early and late winter habitat for caribou. And may provide a source of
23 displacement for caribou.” *Rule Decl. Exh. 10 at 30-31, 39, 47*. Snowmobile use of
24 these areas may not only displace and stress the caribou that are in Idaho, but may
25 also preclude the use of this habitat for the animals that are currently in Canada,

1 largely reducing the available habitat for this population. *See Rule Decl. Exh. 10 at*
2 *9* (table showing 31% of caribou recovery area contained within the IPNF); *Simpson*
3 *Decl. ¶¶ 31, 40.*

4 As explained in the accompanying Declaration of Keith Simpson, a leading
5 caribou expert and researcher, these combined effects could reduce the survival and
6 recovery of the Selkirk Mountains population by reducing the reproduction,
7 numbers, or distribution of the species. *See Simpson Decl. ¶ 32. See also Rule Decl.*
8 *Exh. 1 at 54* (explaining that unrestricted snowmobiling could cause displacement,
9 harassment, or potential mortality of caribou, and ultimately affect their
10 reproduction, numbers, and distribution within the ecosystem).

11 Yet the IPNF has not implemented any restrictions on snowmobile use nor
12 closed any areas to reduce conflicts with caribou since the limited initial closure in
13 1994/1995. Despite acknowledged harms to caribou, and repeated assertions by the
14 Service and other caribou experts of the need to impose restrictions on
15 snowmobiling, the Forest Service is continuing to authorize, and indeed promote,
16 unrestricted snowmobile use throughout caribou winter habitat.

17 In short, by developing and implementing the Cost-Share Agreement without
18 any standards or restrictions in place to protect caribou from snowmobiling, the
19 Forest Service has failed to ensure that its actions are not likely to jeopardize the
20 continued existence of the woodland caribou, in violation of the ESA, 16 U.S.C. §
21 1536(a)(2). Accordingly, Plaintiffs are entitled to partial summary judgment on this
22 issue, as well as the others discussed above.

23 **CONCLUSION**

24 For the foregoing reasons, Plaintiffs respectfully pray that the Court grant this
25

1 motion; enter partial summary judgment in their favor on the issues set forth above;
2 reverse and remand the IPNF Biop; and order Defendants to fully consult over all
3 IPNF actions that may affect caribou, including the Challenge Cost-Share
4 Agreement and the Forest Service's failure to implement terms and conditions
5 required by the Service. Plaintiffs also reserve the right to seek further injunctive or
6 remedial relief from this Court, while Defendants cure their violations of law set
7 forth herein.

8 Dated this 9th day of November 2005.

9
10 Respectfully submitted,

11
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