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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Defenders of Wildlife; The Lands
Council; Selkirk Conservation Alliance;
and Center for Biological Diversity,
Plaintiffs,

vs.

Dirk Kempthorne, Secretary, U.S.
Department of the Interior; Dale Hall,
Director, U.S. Fish and Wildlife Service;
Robyn Thorson, Director, Pacific
Region (Region 1), U.S. Fish and
Wildlife Service; U.S. Department of the
Interior; U.S. Fish and Wildlife Service,

Defendants.

Case No: _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTORY STATEMENT

1. This case challenges the U.S. Department of the Interior's ("DOI") and U.S. Fish and Wildlife Service's ("FWS" or "Service") unreasonable delay in making a final decision to grant or deny a Rulemaking Petition by Plaintiffs Defenders of Wildlife, The Lands Council, Selkirk Conservation Alliance, and

1 Center for Biological Diversity (collectively “conservation organizations”) to
2 designate critical habitat for the endangered woodland caribou (*Rangifer tarandus*
3 *caribou*). Defendants’ failure to make a decision more than six years after the
4 conservation organizations submitted their Petition—even as threats to the caribou
5 and its habitat continue to intensify—constitutes agency action “unreasonably
6 delayed” in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §
7 706(1). Accordingly, conservation organizations are entitled to a decision on their
8 Petition, as required by the APA, 5 U.S.C. § 555(b).

9 JURISDICTION AND VENUE

10 2. The Court has jurisdiction over this action pursuant to 28 U.S.C. §
11 1331 (federal question).

12 3. Venue is properly vested in this Court under 28 U.S.C. § 1391(e)
13 because plaintiff The Lands Council as well as FWS reside in this district; and a
14 substantial part of the events or omissions at issue herein occurred in this district.

15 PARTIES

16 4. Plaintiff DEFENDERS OF WILDLIFE (“Defenders”) is a national
17 non-profit organization, incorporated under the laws of the District of Columbia.
18 Defenders has more than 500,000 members nationwide, including more than
19 18,000 in Washington and Idaho. Defenders is headquartered in Washington,
20 D.C., and maintains Field Offices throughout the western U.S., including offices in
21 Bozeman, Montana (the headquarters of its Rocky Mountain Field Program) and
22 Boise, Idaho. Defenders’ mission is to protect all native wild animals and plants in
23 their natural communities, and in order to fulfill this mission, the organization has
24 developed programs for combating species extinction, the loss of biological
25 diversity, and habitat alteration and destruction. Defenders, as an organization and
26 on behalf of itself and its members, has long been involved in seeking to promote
27 the protection and recovery of the woodland caribou in the United States as well as
28

1 Canada, including active efforts on both federal U.S. Forest Service and state
2 lands.

3 5. Plaintiff THE LANDS COUNCIL (“TLC”) is a Washington non-
4 profit organization dedicated to protecting and conserving the natural resources
5 and quality of life of the Inland Pacific Northwest. TLC’s principal office is
6 located in Spokane, Washington. TLC, as an organization and on behalf of its staff
7 and members, has been extensively involved in seeking to promote sound land
8 management practices, including protection and recovery of woodland caribou,
9 focusing on the Colville and Panhandle National Forests, as well as State lands in
10 Idaho.

11 6. Plaintiff SELKIRK CONSERVATION ALLIANCE (“SCA”) is a
12 non-profit membership organization dedicated to the protection, restoration, and
13 wise use and enjoyment of the Selkirk Mountain ecosystem of northern Idaho and
14 northeastern Washington. SCA, with its principal office in Priest River, Idaho, has
15 approximately 275 members who live primarily in eastern Washington and/or
16 northern Idaho. SCA seeks to protect the natural resources of the Selkirk
17 ecosystem through participation in agency proceedings, public outreach and
18 education, advocacy, and litigation. SCA, as an organization and on behalf of its
19 staff and members, is greatly concerned with and active in seeking to protect and
20 improve wildlife and wildlife habitat, including woodland caribou in the Selkirk
21 Mountains ecosystem.

22 7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“The Center”)
23 is a non-profit corporation dedicated to the preservation, protection and restoration
24 of biodiversity, native species, and ecosystems. The Center has more than
25 180,000 members and activists worldwide. The Center has offices in Tucson and
26 Phoenix, Arizona; New Mexico; Washington, D.C.; San Francisco, Los Angeles,
27 and San Diego, California; Vermont; Minnesota, Illinois and Oregon. Through
28 science, law and creative media, the Center advocates on behalf of all imperiled

1 species and their habitat, combating a range of threats to life on Earth including
2 habitat loss, global warming and toxics. The Center has worked on woodland
3 caribou conservation, including the Petition at issue in this action, for many years.
4 For instance, it has been involved in legal efforts under the ESA to limit damaging
5 snowmobile activity on National Forest lands in the panhandle of Idaho, which is
6 prime woodland caribou habitat, necessary for its conservation. The Center has
7 also sought to protect the woodland caribou from the damaging impacts of global
8 warming. The Center, its members and its mission is injured by defendants'
9 refusal to respond to the critical habitat Petition and protect the imperiled
10 woodland caribou to the fullest extent of the law.

11 8. All plaintiff conservation organizations have long-standing interests in
12 the preservation and recovery of woodland caribou, because they and their
13 members place great value on the species, and because the presence of woodland
14 caribou is essential to the healthy functioning of the Selkirk Mountains ecosystem
15 in which they evolved. Plaintiff conservation organizations have actively sought to
16 conserve and recover the species through a broad diversity of efforts including
17 public education, outreach to residents and elected officials, scientific analysis and
18 advocacy, and legal efforts. These interests are directly harmed by Defendants'
19 failure to respond to conservation organizations' Petition, and that harm would be
20 remedied by an Order of this Court compelling such response.

21 9. The members of each plaintiff conservation organization use public
22 land in the Selkirk Mountains ecosystem for a variety of pursuits. For example,
23 members of plaintiff groups have recreational interests in these public lands,
24 including hiking, camping, backpacking, cross-country skiing, birding, and other
25 wildlife viewing. Members of plaintiff groups also use the public lands for
26 scientific, educational, and professional purposes, and many of the groups'
27 members, as well as their organizational professional staff and volunteers, have
28 been involved in, and personally invested in, woodland caribou conservation and

1 recovery efforts. Staff and members of the plaintiff groups seek to view woodland
2 caribou and signs of caribou presence in the Selkirk Mountains ecosystem, and
3 defendants' challenged action has reduced their opportunities to do so. The legal
4 violation alleged in this complaint causes direct injury to the aesthetic,
5 conservation, recreational, scientific, educational, and wildlife preservation and
6 conservation interests of members of the plaintiff conservation organizations.

7 10. The above-described aesthetic, conservation, recreational, scientific,
8 and other interests of plaintiff conservation organizations and their staff, members,
9 and supporters have been, are being, and will continue to be irreparably harmed by
10 Defendants' violation of law. The harm to these interests would be remedied by
11 an Order of this Court compelling a response to conservation organizations'
12 Petition. Plaintiff conservation organizations have no adequate remedy at law, and
13 thus the requested relief is appropriate under the APA.

14 11. Defendant DIRK KEMPTHORNE is Secretary of DOI. In that
15 capacity, Secretary Kempthorne has supervisory responsibility over FWS.
16 Defendant Kempthorne is sued in his professional capacity.

17 12. Defendant DALE HALL is the Director of the U.S. Fish and Wildlife
18 Service. Defendant Hall is sued in this professional capacity.

19 13. Defendant ROBYN THORSON is the Regional Director for the
20 Pacific Region (Region 1) of FWS. Defendant Thorson's predecessor, Anne
21 Badgley, informed plaintiff conservation organizations by letter on February 10,
22 2003 that Defendants could not evaluate the Petition or make a decision on their
23 Petition at that time due to insufficient funding.

24 14. Defendant U.S. FISH AND WILDLIFE SERVICE, an agency of the
25 U.S. Department of the Interior, is responsible for managing and administering
26 various provisions of the ESA.

27 15. Defendant U.S. DEPARTMENT OF THE INTERIOR is a cabinet-
28 level agency responsible for managing and administering various provisions of the

1 ESA, including regulatory responsibility for responding to plaintiff conservation
2 organizations' Petition.

3 **STATUTORY AND REGULATORY BACKGROUND**

4 **A. The Endangered Species Act**

5 16. Finding that “fish, wildlife, and plants are of esthetic, ecological,
6 educational, historical, recreational, and scientific value to the Nation and its
7 people,” Congress enacted the ESA in order to “provide a program for the
8 conservation of ... endangered species and threatened species,” and to “provide a
9 means whereby the ecosystems upon which endangered species and threatened
10 species depend may be conserved.” 16 U.S.C. § 1531(a)(1), (b). “Conservation”
11 is defined, in turn, as “the use of all methods and procedures which are necessary
12 to bring any endangered species or threatened species to the point at which the
13 measures provided pursuant to this chapter are no longer necessary.” *Id.* §
14 1532(3). Accordingly, the primary purpose of the ESA is not simply to prevent the
15 extinction of imperiled species, but to recover them to the point where the
16 protections of the Act are no longer necessary. Under ESA regulations, FWS has
17 been delegated responsibility for administering the Act as it pertains to terrestrial
18 species such as the woodland caribou. 50 C.F.R. §402.01(b).

19 17. The ESA provides for the listing of imperiled species as “threatened”
20 or “endangered.” 16 U.S.C. § 1533. The Act defines an endangered species as
21 “any species which is in danger of extinction throughout all or a significant portion
22 of its range,” and a threatened species as “any species which is likely to become an
23 endangered species within the foreseeable future throughout all or a significant
24 portion of its range.” *Id.* § 1532(6), (20). In determining whether a species is
25 threatened or endangered, FWS is directed to list based on the presence of any one
26 of the following five factors: the present or threatened destruction, modification, or
27 curtailment of its habitat or range; overutilization for commercial, recreational,
28 scientific, or educational purposes; disease or predation; the inadequacy of existing

1 regulatory mechanisms; or other natural or manmade factors affecting its continued
2 existence. Id. § 1533(a)(1)(A)-(E).

3 18. Once a species is listed, the designation of critical habitat is one of the
4 ESA's primary mechanisms for achieving the statute's purpose of recovering that
5 species. The ESA requires FWS, with limited exceptions, to designate critical
6 habitat for all species concurrently with listing. Id. § 1533(a)(3)(A). Critical
7 habitat is defined to include "specific areas" both within and outside "the
8 geographical area occupied by the species" which are "essential to the conservation
9 [i.e. recovery] of the species," and in the case of currently occupied areas, which
10 "may require special management consideration or protection." Id. §
11 1532(5)(A)(i)-(ii).

12 19. In areas designated as critical habitat, the ESA requires that all
13 federal agencies must "insure that any action authorized, funded, or carried out by
14 such agency" will not result "in the destruction or adverse modification" of such
15 habitat. 16 U.S.C. § 1536(a)(2). The statutory protection provided by this
16 standard is often especially important within areas that are currently unoccupied by
17 the species, but which are needed for its recovery.

18 20. In order to determine what areas to designate as critical habitat, FWS
19 regulations require its biologists to consider the physical and biological features
20 needed for the species' life cycle and reproduction, including space for individual
21 and population growth and normal behavior; food, water, and other nutritional or
22 physiological requirements; cover or shelter; sites for breeding and rearing
23 offspring; and habitats that are protected from disturbance or are representative of
24 the historical geographical and ecological distributions of the species. 50 C.F.R. §
25 402.12(b)(1)-(5). Having made such consideration, FWS biologists are then
26 directed to focus" on "principal biological or physical constituent elements" in
27 designating a specific area, including but not limited to feeding sites, vegetation
28 type, and specific soil types. Id. § 424.12(b).

1 21. Although FWS, in limited circumstances, may decide not to designate
2 critical habitat where it determines such designation is “not prudent” or “not
3 determinable,” the agency may revisit this determination at any time, as its
4 regulations expressly contemplate that “[c]ritical habitat may be designated for
5 those species listed as threatened or endangered but for which no critical habitat
6 has been previously designated.” *Id.* § 424.12(a); § 424.13(f).

7 22. FWS regulations provide “any interested person” with the right to
8 “submit a written petition” to the DOI Secretary to designate critical habitat for
9 any listed species. *Id.* § 424.14(d). The regulations further specify that upon
10 receiving such Petition, the DOI Secretary shall “promptly conduct a review” in
11 accordance with the APA Rulemaking and Petition provisions, 5 U.S.C. § 553. *Id.*

12 **B. The Administrative Procedure Act**

13 23. The APA provides “interested person[s] the right to petition for the
14 issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). Upon receipt of
15 such Petition, the APA obligates federal agencies to “conclude [the] matter
16 presented to it” within a “reasonable time,” and in the event the agency denies the
17 Petition, “[p]rompt notice shall be given in whole or in part.” *Id.* § 555(b), (e).

18 24. In the event an agency fails to make a final agency action approving
19 or denying the Petition, the APA provides the Petitioner with the right to seek
20 judicial review in order to “compel agency action unlawfully withheld or
21 unreasonably delayed.” *Id.* § 704, § 706(1).

22 **FACTUAL ALLEGATIONS**

23 **A. The Woodland Caribou, Its Decline, and Listing Under the Endangered** 24 **Species Act**

25 25. The caribou of North America and the reindeer of Eurasia “belong to
26 a single species,” but are broken into numerous subspecies, including the
27 woodland caribou. Final Rule. Determination of Endangered Status for a
28 Population of Woodland Caribou Found in Washington, Idaho, and Southern

1 British Columbia. 49 Fed. Reg. 7,390 (Feb. 29, 1984) (“final listing rule”). The
2 woodland caribou once occupied a vast area stretching from southeastern Alaska
3 and British Columbia to Newfoundland and Nova Scotia, and extending south into
4 large areas of the coterminous United States, including Washington, Idaho, North
5 Dakota, Montana, Minnesota, Wisconsin, Michigan, Vermont, and Maine. Id.

6 26. Throughout the 20th century, habitat alteration and direct killing of
7 woodland caribou caused its population numbers and range to steadily and
8 dramatically shrink; by the 1980’s the “only caribou population [] known to
9 regularly occupy the conterminous United States [was] found in northern Idaho
10 and northeastern Washington.” Id. This population, called the southern Selkirk
11 Mountain herd, extends into southern British Columbia in Canada. Id.

12 27. Woodland caribou are medium-sized members of the deer family,
13 with males approaching 600 pounds and females averaging 300 pounds. Selkirk
14 Mountain Woodland Caribou Recovery Plan (March 1994) at 3 (“Recovery Plan”)
15 (http://ecos.fws.gov/tess_public/TESSWebpageRecovery?sort=1) (accessed 8
16 January 2009). Caribou are “distinguished from other members of the deer family
17 by their large hooves, broad muzzles, and the distinctive antlers that both species
18 develop annually.” Id. Caribou “generally have a low productive rate,” with
19 females generally living 10-15 years and males living 8-12 years. Id. at 10.

20 28. Woodland caribou consist of two “ecotypes” (i.e. a genetically unique
21 population adapted to a local environment): the northern ecotype (associated with
22 flat tundra habitat) and the mountain ecotype. The southern Selkirk Mountains herd
23 of caribou is a mountain ecotype, generally found above 4000 feet in elevation
24 within Englemann spruce/subalpine fir and western red cedar/western hemlock
25 forest types, but which “exhibit five distinct seasonal movements,” moving to
26 higher elevations during winter months. Id. at i, 5.

27 29. During all of these seasons, woodland caribou depend heavily on
28 arboreal lichens as a primary food source, which are primarily associated with old-

1 growth forests. Id. at 5-9. In the spring, fall, and summer, caribou are able to eat a
2 wider diversity of foods, including forbs and huckleberry, while relying more
3 heavily (and sometimes solely) on the lichen in the winter months, which they
4 access by standing on top of compacted snow. Id. In all, “Selkirk caribou
5 generally depend on arboreal lichen for up to 6 months of the year.” Id. at 14.

6 30. In 1980, FWS received Petitions from a private citizen and the Idaho
7 Department of Fish and Game requesting listing of the woodland caribou under the
8 ESA. In recognition of the overwhelming decline of the woodland caribou
9 population, on January 14, 1983 FWS listed the southern Selkirk Mountains
10 population of the species as endangered under an emergency rule. 48 Fed. Reg.
11 1,722. The rule expired on September 12, 1983, and FWS published a second
12 emergency listing rule on October 25, 1983. 48 Fed. Reg. 49,245.

13 31. On February 29, 1984, following notice and comment rulemaking,
14 FWS published a final rule listing the southern Selkirk Mountains population of
15 woodland caribou as endangered under the ESA, characterizing it as “one of the
16 most critically endangered mammals in the United States.” 49 Fed. Reg. 7,390. In
17 making the listing decision, the Service found four of five listing factors were met.
18 Id. Specific identified threats included habitat destruction caused by logging
19 practices and associated road construction, resulting in limited lichen availability
20 and production; human killing, both through legal hunting and poaching; the failure
21 of existing laws to prevent habitat disruption; and vehicle collisions, exacerbated
22 by increased construction of forest roads. Id. FWS declined to designate critical
23 habitat for the species, finding that it was “not prudent” due to the alleged “serious
24 risk of facilitating poaching.” Id. At the time of listing, it is believed that only
25 approximately 30 individual woodland caribou remained in the U.S. portion of the
26 southern Selkirk Mountains herd. “Most of the range of the population in the
27 United States is within national forests,” in particular the Idaho Panhandle and
28 Colville National Forests. 49 Fed. Reg. 7,390.

1 **B. Woodland Caribou Recovery Efforts**

2 32. Following listing, FWS took several actions in an effort to conserve
3 the woodland caribou, including increasing funding for caribou conservation,
4 research, information and education programs, and population augmentation.
5 Since 1987, “103 caribou have been transplanted to the region from other
6 populations in British Columbia to bolster numbers and help stabilize the
7 population.” Defenders of Wildlife v. Martin, 2007 U.S. Dist. LEXIS 13061 at *7
8 (E.D. Wash. Feb. 26, 2007). In addition, “a caribou recovery plan was developed
9 in 1985 and revised in 1994.” Id. at * 9.

10 33. The Recovery Plan established a designated Recovery Area for the
11 southern Selkirk Mountains woodland caribou population of approximately 2,200
12 square miles, approximately half of which is located in the United States. Within
13 this Recovery Area, the Recovery Plan establishes “interim objectives and criteria”
14 for woodland caribou recovery, including “securing and managing” at least
15 443,000 acres of habitat, “to support a self-sustaining caribou population.” Id. at
16 30.

17 34. National Forest lands on the Idaho Panhandle and Colville National
18 Forests comprise approximately 80% of the Recovery Area within the United
19 States. Accordingly, the protection and careful management of woodland caribou
20 on these public lands is integral to meeting the Recovery Plan’s objective of
21 “securing and managing” habitat, and essential to the eventual recovery of the
22 southern Selkirk Mountains population of the species. This goal remains unmet,
23 however, and as noted by the revised 1994 Recovery Plan, “caribou development
24 is becoming more restricted with continued land development.” Id. at 31.

25 35. Importantly, the Recovery Plan identified the designation of critical
26 habitat as one of the actions necessary to achieve the Plan’s objective of securing
27 443,000 acres of habitat, and in particular “secur[ing] essential habitat on public
28

lands.” *Id.* at 35. As stated by FWS, “[c]ritical habitat designation will improve habitat protection [] on Federal lands.” *Id.*

36. Despite the recovery efforts of FWS, state game agencies, and others, woodland caribou population numbers have failed to rebound, and “its remaining population numbers between 35 and 45 animals with most of the population located in southern British Columbia.” *Id.* at * 7. Thus, “although [the southern Selkirk Mountains woodland caribou population] has remained stable over the last several years, it is not large enough to guarantee the species’ survival.” *Id.* As recognized by FWS, the population is now “considered to be in decline and in danger of extirpation.” *Id.*

C. The Petition for Critical Habitat Rulemaking

37. After more than eight years had passed without FWS initiating a critical habitat designation rulemaking process as called for by its own 1994 revised Recovery Plan, conservation organizations submitted a “Petition for Rule Designating Critical Habitat for the Endangered Woodland Caribou” on December 6, 2002, pursuant to section 553(e) of the APA and ESA implementing regulations at 50 C.F.R. § 424.12. In their Petition, conservation organizations noted that augmentation efforts had suffered from high mortality rates and that caribou population levels remained dangerously low. The Petition addressed post-listing population modeling efforts that reached alarming conclusions—one predicting a likelihood of extinction of the southern Selkirk Mountains population in 20 years, the second predicting extinction within 50 years under several different modeling simulations.

38. Addressing FWS’s determination in the listing rule that designating critical habitat would not be prudent because it would increase the risk from illegal poaching, the Petition noted that subsequent to listing, extensive efforts had in fact been made to alert the public of the woodland caribou’s precarious status, and that federal and state agencies had erected signs identifying specific areas as woodland

1 caribou habitat. As argued in the Petition, because of these efforts, the potential
2 presence of woodland caribou within specific areas is quite well known to both the
3 general public and hunting community, and thus FWS's determination that critical
4 habitat designation would raise the risk of illegal poaching is not longer
5 supportable.

6 39. The Petition also referenced and incorporated several new scientific
7 studies and other analyses conducted since its 1984 listing and 1994 Recovery
8 Plan revision that provided updated information on the threats and status of the
9 species. For example, a 1997 study conducted for the British Columbia Ministry
10 of Environment, Land, and Parks identified four primary threats to the woodland
11 caribou (differing in some respects for the final listing rule): loss of arboreal
12 lichens; fragmentation of usable habitat areas; human access and associated
13 disturbance or mortality; and alternation of predator-prey relationships. Paquet.
14 Toward a Mountain Caribou Management Strategy for British Columbia (1997).
15 In another analysis, conducted by FWS pursuant to section 7 of the ESA in 2001,
16 the agency summarized the principal threats to woodland caribou as habitat loss
17 and fragmentation, excessive mortalities, and growing recreational pressure. FWS.
18 Amended Biological Opinion Addressing the Effects to Listed Threatened and
19 Endangered Species from the Continued Implementation of the Colville National
20 Forest Land and Resource Management Plan (2001) ("2001 Biological Opinion").

21 40. The Petition placed particular emphasis on the fact that new threats to
22 the woodland caribou and its habitat have emerged and greatly intensified since its
23 listing, and these threats are at least partially responsible for the continued failure
24 of efforts to recover the southern Selkirk Mountains woodland caribou or even to
25 move the population away from the brink of extinction. For example, winter
26 recreation use snowmobiling, which was not even addressed in the species' listing
27 rule, has increased exponentially within woodland caribou habitat, and is now the
28 primary threat to the species' late winter habitat; as snowmobile technology has

1 improved, and as the machines have become more sophisticated and powerful,
2 their riders are increasingly able to ride off of groomed trails into remote, steep,
3 and previously inaccessible woodland caribou winter habitat.

4 41. Because caribou are already highly vulnerable in winter months, due
5 to their limited nutritional intake and near exclusive reliance on arboreal lichens,
6 snowmobile riding in that habitat poses a dire threat to their continued existence
7 that could scarcely have been imagined when the species was listed in 1984. As
8 stated in the Petition, recent research demonstrates that “caribou do not use highly
9 suitable habitat when intensive snowmobiling activity occurs in high elevation
10 areas.” In a separate litigation effort by the Plaintiffs to this action challenging the
11 Forest Service’s failure to properly regulate and manage snowmobile use within
12 the Idaho Panhandle National Forests, the Court found that “[s]nowmobiles in this
13 proximity displace caribou in the same manner as predators, defeating in part the
14 purpose of the caribou’s choice of high elevations to survive,” and concluded that
15 the Forest Service had consequently violated sections 7 and 9 of the ESA.

16 Defenders of Wildlife v. Martin, 2007 U.S. Dist. LEXIS 13061, at *11, *31.

17 42. In addition, conservation organizations in their Petition addressed
18 proposed changes to Forest Service rules governing the process for developing,
19 revising, and amending land and resource management plans (“Forest Plans”)
20 under the National Forest Management Act (“NFMA”), 16 U.S.C. § 4321 et seq.
21 Specifically, the Petition noted that the forest planning rule proposed at that time
22 would remove or modify the agency’s duty to maintain viable populations of
23 wildlife and the diversity of plant and animal species found on National Forest
24 lands.

25 43. On April 21, 2008 the Forest Service finalized these regulations. See
26 73 Fed. Reg. 21,468 (Apr. 21, 2008). The final forest planning rule, like the draft
27 planning rule addressed in conservation organizations’ Petition, eliminated the
28 Forest Service’s prior regulatory duty to maintain viable populations of wildlife. In

1 addition, Forest Plan provisions, which were previously enforceable “standards
2 and guidelines,” have been replaced in the final planning rule by unenforceable
3 “objectives,” which under the rule’s definition, are “aspirations and are not
4 commitments or final decisions approving projects and activities.” 36 C.F.R. §
5 219.7(a)(2)(ii). Consequently, any protections or other habitat management
6 measures developed for the Idaho Panhandle and Colville National Forest Plans
7 under these new regulations are unenforceable, illustrating the more permanent
8 nature of protections provided by critical habitat designation. Such permanent
9 protection is especially important given the fact that future unforeseen risks and
10 threats can always arise (as evidenced by the fact that the risk from snowmobiling
11 was scarcely even considered when the species was listed in 1984) and critical
12 habitat is one of the most effective long-term measures for ensuring that those risks
13 and threats are properly addressed.

14 **D. Defendants’ Failure to Make a Decision on Conservation**
15 **Organizations’ Petition**

16 44. On February 10, 2003, FWS Pacific Regional Director Anne Badgley
17 wrote to Defenders of Wildlife, informing them that “we do not believe we will
18 have sufficient section 4 funding this fiscal year (FY) to evaluate your petition,”
19 and accordingly, that FWS was “not able to address your petition to designate
20 critical habitat for the woodland caribou at this time.”

21 45. On January 7, 2009, in response to an inquiry from Defenders of
22 Wildlife as to the status of the Petition, an official with the FWS Upper Columbia
23 Fish and Wildlife Office in Spokane, Washington stated that “[a]lthough its been 6
24 years since our response in 2003, our Regional Office staff indicated that our
25 response would remain the same today.” The January 7 facsimile thus concludes
26 that “[t]herefore, there remains insufficient funding to address the petition.”
27
28

PLAINTIFFS' CLAIM FOR RELIEF
(Violation of Administrative Procedure Act)

46. Paragraphs 1 through 45 are fully incorporated into this paragraph.

47. By failing to respond for more than six years to plaintiff conservation organizations' December 6, 2002 Petition for Rule Designating Critical Habitat for the Endangered Woodland Caribou, when, among other issues, the species' population has remained at dangerously low levels, and existing threats to its continued existence and eventual recovery have increased; while new threats, such as winter use recreational use snowmobiling, have arisen; when the agency has identified the designation of critical habitat as an advisable action in its own Recovery Plan; and the U.S. Forest Service has instituted new forest planning regulations that remove vital protections and enforceability for measures to protect the southern Selkirk Mountains woodland caribou population and its habitat, Defendants have "unreasonably delayed" agency action, in violation of Sections 555(b) and 706(1) of the APA.

48. Defendants' actions have injured and continue to injure plaintiff conservation organizations in the manner described in paragraphs 4-10.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

A. Declare that Defendants have violated Sections 555(b) and 706(1) of the Administrative Procedure Act by unreasonably delaying a decision on Plaintiffs' Rulemaking Petition;

B. Order Defendants to issue a final decision on Plaintiffs' Petition within 45 days;

C. Award Plaintiffs their costs and reasonable attorneys' fees in this action; and

D. Grant such further and other relief as the Court deems just and proper.

1 Respectfully submitted this 15th day of January, 2009,

2
3 s/ Karen Lindholdt

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