

Sarah McMillan (MT Bar. No. 3634)
WildEarth Guardians
P.O. Box 7516
Missoula, Montana 59807

Collette Adkins (MN Bar. No. 035059X)*
Center for Biological Diversity
P.O. Box 595
Circle Pines, Minnesota 55014-0595
651-955-3821
cadkins@biologicaldiversity.org

Attorneys for Plaintiffs

* Seeking *pro hac vice* admission

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CENTER FOR BIOLOGICAL)
DIVERSITY; WILDEARTH)
GUARDIANS; THE HUMANE)
SOCIETY OF THE UNITED STATES;)
and THE FUND FOR ANIMALS,)

Plaintiffs,

vs.

RYAN ZINKE, Secretary of the Interior,)
in his official capacity; UNITED)
STATES FISH AND WILDLIFE)
SERVICE; and JIM KURTH, U.S. Fish)
and Wildlife Service Acting Director, in)
his official capacity;)

Defendants.

CASE NO. _____

**COMPLAINT FOR
DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs Center for Biological Diversity, WildEarth Guardians, The Humane Society of the United States, and The Fund for Animals (collectively, Plaintiffs) bring this lawsuit against Defendants Ryan Zinke, Secretary of the Interior; the U.S. Fish and Wildlife Service; and Jim Kurth, Acting Director of the U.S. Fish and Wildlife Service (collectively Defendants or “FWS”) for “agency action unlawfully withheld or unreasonably delayed,” in violation of section 706(1) of the Administrative Procedure Act (“APA”). 5 U.S.C. § 706(1). Specifically, FWS has failed to complete reinitiated consultation with the U.S. Environmental Protection Agency (“EPA”) regarding the effects of two deadly predator poisons – sodium cyanide and Compound 1080 – on wildlife protected under the Endangered Species Act (“ESA”) within the timeline required under Section 7 of the ESA and its implementing regulations. 16 U.S.C. § 1536.

2. Interagency consultation is a central feature of the ESA’s framework for protecting endangered and threatened species. Through the Section 7 consultation process, federal agencies like EPA work with expert federal wildlife agencies, including FWS, to ensure that their actions – here, the registrations of deadly predator poisons – do not jeopardize the survival of species listed as threatened or endangered under the ESA (“listed species”) or adversely modify their habitats.

3. In 2011, EPA reinitiated consultation with FWS on the effects of both sodium cyanide and Compound 1080, which FWS has not analyzed since issuance of a biological opinion in 1993. EPA reinitiated consultation because the following threatened or endangered species were listed (or delisted and then relisted) *after* the issuance of the 1993 Biological Opinion: grizzly bear, gray wolf, Canada lynx, Mexican spotted owl and southwestern willow flycatcher. In addition, EPA explained that reinitiated consultation was needed because the ranges of listed species covered in the 1993 Biological Opinion had since likely changed.

4. More than six years have passed since EPA reinitiated consultation to ensure that the two predator poisons will not cause jeopardy to endangered wildlife or adversely modify their habitats. FWS has not completed either of the reinitiated consultations. The agency's delay in completing the required consultations allows deadly poisons to continue to harm protected wildlife and contaminate their habitats.

5. Through this Complaint, Plaintiffs seek injunctive and declaratory relief, including an order compelling FWS to complete the reinitiated consultations by a date certain and placing restrictions on use of the poisons at issue to prevent jeopardy to protected wildlife until consultation is completed.

JURISDICTION

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 702 (APA).

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to Plaintiffs' claim occurred and continue to occur in this district, including the registration and ongoing use of one of the poisons at issue, the presence of endangered and threatened species and their habitats and injury to Plaintiffs and their members.

8. This case is properly assigned to the Missoula Division because a substantial part of the events or omissions giving rise to Plaintiffs' claim occurred and continues to occur in the counties of Flathead, Granite, Lake, Lincoln, Mineral, Missoula, Ravalli and Sanders. These counties are within Canada lynx and grizzly bear range, which are threatened species that may be affected by sodium cyanide, which is registered for use in Montana. In addition, Plaintiffs have members who live in Missoula, and WildEarth Guardians maintains an office in Missoula.

PARTIES

9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3) organization with over 48,500 active members, with offices in Oakland, California and elsewhere across the country. The Center and its members are concerned with the conservation of imperiled species, including grizzly bear, gray

wolf, Canada lynx, Mexican spotted owl and southwestern willow flycatcher, and the effective implementation of the ESA. Recognizing that pesticides are one of the foremost threats to the earth's environment, biodiversity, and public health, the Center works to prevent and reduce the use of harmful pesticides and to promote sound conservation strategies.

10. Plaintiff WILDEARTH GUARDIANS is a nonprofit conservation organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. Guardians has over 207,000 members and supporters, many of whom have particular interests in imperiled species, such as Canada lynx, gray wolf, Mexican wolf, grizzly bear, Mexican spotted owl, and southwestern willow flycatcher. Guardians and its members are concerned about carnivores and other native species targeted by the U.S. Department of Agriculture, Animal Plant Health Inspection Service-Wildlife Services (hereafter, APHIS-Wildlife Services) which uses the predator poisons at issue here. Headquartered in Santa Fe, New Mexico, Guardians maintains several other offices around the West, including in Missoula, Denver, Portland, Seattle and Tucson.

11. Plaintiff THE HUMANE SOCIETY OF THE UNITED STATES ("The HSUS") is the nation's largest animal protection organization, headquartered in Washington, D.C. Since its establishment in 1954, The HSUS has worked to combat animal abuse and exploitation and promote animal welfare. To this end,

The HSUS strives to protect and improve the management of threatened and endangered species throughout the country and to eliminate inhumane and unsustainable methods of hunting and trapping. In particular, The HSUS works extensively to promote the conservation of native carnivores – including grizzly bears and wolves – through research, public outreach and education, advocacy and litigation. The HSUS also works to advocate against cruel killing techniques including leg-hold traps, snares and the use of poisons, and has campaigned to promote humane, non-lethal alternatives to sodium cyanide and Compound 1080.

12. Plaintiff THE FUND FOR ANIMALS (“The Fund”) was founded in 1967 and works to protect animals by employing national advocacy campaigns and rescue operations, and operating a network of animal-care facilities. The Fund has a long institutional history of work to protect native carnivores from cruel killing methods by trophy hunters and government agencies. For example, The Fund was a plaintiff in a 1992 lawsuit challenging the use of lethal poisons by Animal Damage Control (the precursor agency to APHIS-Wildlife Services). In 2000, the Fund founded a hotline to provide information and assistance for citizens seeking humane solutions to wildlife conflict. The Fund’s current advocacy programs focus on protecting wildlife from cruel and unsporting hunting and trapping practices, including canned hunts, the use of toxic lead shot and the commercial trade in wildlife parts and products. The Fund is headquartered in Washington, D.C.

13. Plaintiffs' members include those who have visited areas where the grizzly bear, gray wolf, Canada lynx, Mexican spotted owl, southwestern willow flycatcher and other listed species that may be impacted by predator poisons are known to occur. They use these areas for observation of these listed species and other wildlife; research; nature photography; aesthetic enjoyment; and recreational, educational, and other activities. Plaintiffs' members derive professional, aesthetic, spiritual, recreational, economic, and educational benefits from these listed species and their habitats. Those members have concrete plans to continue to travel to and recreate in areas where they can observe these species and will continue to maintain an interest in these species and their habitats in the future.

14. The above-described interests of Plaintiffs and their members have been and are being adversely affected by FWS's failure to complete reinitiated consultation on the impacts of the predator poisons on the grizzly bear, gray wolf, Canada lynx, Mexican spotted owl, southwestern willow flycatcher and other threatened or endangered wildlife. Once in the environment, pesticides impact listed species through acute and chronic effects and contamination of habitats. If FWS completed consultation as required, such consultation would detail how the predator poisons are affecting the listed species and their habitats and, if necessary, would suggest reasonable and prudent alternatives to protect the species. 16 U.S.C. § 1536(a)(3).

15. Unless the requested relief is granted, Plaintiffs' interests will continue to be adversely affected and injured by the FWS's failure to complete the consultations, as well as by the ongoing harm to the threatened or endangered wildlife and their habitats as a result of ongoing use of the poisons. The injuries described above are actual, concrete injuries that are presently suffered by Plaintiffs and their members and will continue to occur unless relief is granted by this Court. These injuries are directly caused by the FWS's failure to complete consultations to ensure that EPA's pesticide registrations do not affect listed species. The relief sought herein – an order compelling completion of consultation and placing restrictions on pesticide use in habitats of the affected threatened or endangered wildlife until the agency brings itself into compliance with law – would redress Plaintiffs' injuries. Plaintiffs have no other adequate remedy at law.

16. Defendant RYAN ZINKE is the Secretary of the Interior. He is sued in his official capacity as Interior Secretary.

17. Defendant FWS is a federal agency within the Department of the Interior. Under the ESA, FWS is responsible for consulting with federal agencies to ensure that agency actions do not jeopardize the survival and recovery of endangered wildlife or adversely affect their critical habitats. 16 U.S.C. § 1536(a)(2).

18. Defendant JIM KURTH is the Acting Director of FWS. He is sued in his official capacity as FWS Acting Director.

LEGAL BACKGROUND

I. Federal Insecticide, Rodenticide, and Fungicide Act

19. The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) provides for federal regulation of pesticide distribution, sale, and use. 7 U.S.C. § 136 *et seq.* Pursuant to FIFRA, all pesticides must be licensed (or “registered”) by EPA prior to sale or distribution.

II. Endangered Species Act

20. The ESA declares that endangered and threatened species are of “esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). Accordingly, the ESA establishes the “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “a program for the conservation of such endangered species and threatened species” *Id.* § 1531(b); *see id.* §§ 1531-1544.

21. The Secretaries of Commerce and Interior are charged with administering and enforcing the ESA, and have delegated this responsibility to the National Marine Fisheries Service (“NMFS”) and FWS, respectively. 50 C.F.R. § 402.01(b).

22. Section 2(c) of the ESA provides that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this [Act].” 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “the use of *all* methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.” *Id.* § 1532(3) (emphasis added).

23. To fulfill the substantive purposes of the ESA, federal agencies are required under Section 7(a)(2) to engage in consultation with FWS (and/or NMFS) before authorizing, funding, or engaging in any “action” that could “jeopardize the continued existence” of any listed species or “result in the destruction or adverse modification of habitat of such species ... determined ... to be critical.” *Id.* § 1536(a)(2). A federal agency is relieved of the obligation to consult only if its action will have “no effect” on any listed species or designated critical habitat. 50 C.F.R. § 402.14(a)-(b).

24. Through consultation, FWS details how the agency action affects the listed species and their habitats and, if necessary, suggests reasonable and prudent alternatives to protect the species. 16 U.S.C. § 1536(b)(3).

25. The ESA requires that consultation occur at the earliest possible time and be conducted according to a strict timeline in order to ensure that the agency action is not causing jeopardy to listed species and their critical habitat, or otherwise harming the species. *See* 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §§ 402.14(e), 402.46(c)(1). To that end, FWS and EPA are generally required to conclude consultations within 90 days. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §§ 402.14(e), 402.46(c)(1).

26. FWS and EPA may mutually agree, however, to extend the consultation for a specific time period. 50 C.F.R. § 402.14(e). If FWS determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that EPA obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. 50 C.F.R. § 402.14(f). If formal consultation is extended by mutual agreement as discussed, EPA must obtain, to the extent practicable, that data which can be developed within the scope of the extension. *Id.*

27. If no extension of formal consultation is agreed to, FWS must issue a biological opinion using the best scientific and commercial data available. *Id.* Disputes regarding what constitutes the best available data or what additional data

are required to complete consultations cannot be used as an excuse to indefinitely defer completion of the consultation process.

28. Agencies must reinitiate consultation on agency actions over which the federal agency retains, or is authorized to exercise, discretionary involvement or control if:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

29. Compliance with the Section 7 consultation process is integral to fulfillment of the substantive requirements of the Act, because it ensures that an agency's action will not jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat.

III. Administrative Procedure Act

30. The Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, dictates that "within a reasonable time, each agency shall proceed to conclude a

matter presented to it.” 5 U.S.C. § 555(b). APA Section 706(1) authorizes reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

31. The scope of review of a Section 706(1) claim challenging an agency’s failure to act is not limited to an administrative record. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

FACTUAL BACKGROUND

I. FWS Issues The 1993 Biological Opinion

32. On April 15, 1991, EPA initiated consultation with FWS for 16 “vertebrate control agents,” including sodium cyanide and Compound 1080, which are at issue in this Complaint.

33. In 1993, FWS completed consultation on these pesticides and issued the 1993 Biological Opinion.¹

II. Sodium Cyanide Used in M-44 Devices Harms Threatened and Endangered Wildlife

34. Sodium cyanide is a deadly poison used in M-44 devices to kill coyotes, gray foxes and red foxes, and feral dogs. It is a restricted use pesticide, and only APHIS-Wildlife Services and the following states are registered users:

¹ See generally U.S. Fish and Wildlife Service. 1993. Biological Opinion: Effects of 16 Vertebrate Control Agents on Endangered and Threatened Species (“1993 BiOp”).

² *Id.* at II-73.

³ *Id.* at II-73.

⁴ *Id.* at II-75.

⁵ In a March 3, 2017, decision, the D.C. Circuit Court of Appeals lifted ESA

South Dakota, Montana, Wyoming, New Mexico, and Texas.² APHIS-Wildlife Services uses M-44s in the following states (according to its 2015 and 2016 data): Colorado, Idaho, Montana, North Dakota, Nebraska, New Mexico, Nevada, Oklahoma, Oregon, Texas, Utah, Virginia, West Virginia and Wyoming.

35. An M-44 device ejects a cloud of powdered cyanide into the mouth of an animal that pulls on the baited or scented trigger. The sodium cyanide combines with available moisture including saliva to make hydrogen cyanide gas, which is readily absorbed by the lungs and poisons the animal by inactivating an enzyme essential to mammalian cellular respiration. That leads to central nervous system depression, cardiac arrest and respiratory failure. According to the EPA, sodium cyanide is a Category 1 toxicant: the most acute, due to the imminent harm it poses to the environment and to humans.

36. The 1993 Biological Opinion covers use of sodium cyanide in M-44s for control of coyotes, red foxes, gray foxes and wild dogs.³ It discusses the following listed species that may be harmed by M-44s: Hawaiian crow, California condor, Mariana crow, gray wolf, grizzly bear, Louisiana black bear (now delisted), Florida panther, ocelot, jaguarundi and San Joaquin kit fox.⁴ That Biological Opinion allowed for incidental takes of gray wolf in Montana (now

² *Id.* at II-73.

³ *Id.* at II-73.

⁴ *Id.* at II-75.

delisted), Wyoming (remains protected⁵), New Mexico (now separately listed as endangered Mexican gray wolf subspecies), Texas (same as New Mexico); for grizzly bear in Montana and Wyoming; and for Louisiana black bear (now delisted), jaguarundi and ocelot in Texas.⁶

37. After formal consultation with FWS on the impacts of sodium cyanide on listed species, which resulted in the 1993 Biological Opinion, EPA in 1994 issued a Reregistration Eligibility Decision (RED) pertaining to the use of sodium cyanide capsules in M-44 units.⁷ EPA concluded that the M-44 did not pose unreasonable risks to humans or the environment if used in accordance with the twenty-six use restrictions listed on the label in addition to the language determined necessary by FWS to protect endangered species likely to be jeopardized by such use.⁸

38. Any carrion-feeding animal able to activate the baited M-44 device is at risk of death from cyanide poisoning. The U.S. Department of Agriculture's Animal Damage Control program (predecessor to APHIS-Wildlife Services) recorded 103,255 animals killed by M-44's between 1976-1986, including 4,868

⁵ In a March 3, 2017, decision, the D.C. Circuit Court of Appeals lifted ESA protections for gray wolves in Wyoming, but that ruling has not yet gone into effect.

⁶ *Id.* at II-75 to II-78.

⁷ EPA. 1994b. Registration Eligibility Decision Sodium Cyanide, *available at* <https://archive.epa.gov/pesticides/reregistration/web/pdf/3086.pdf>.

⁸ 1993 BiOp at II-73.

non-target animals (approximately 5% of all animals killed). Non-target species identified as killed by M-44s included grizzly bear, black bear, mountain lion, badger, kit and swift fox, bobcat, ringtail cat, feral cat, skunk, opossum, raccoon, Russian boar, feral hog, javelina, beaver, porcupine, nutria, rabbit, vulture, raven, crow and hawk. In addition, a California condor was found dead near the vicinity of an M-44 in 1986.

39. At least an additional 45 terrestrial non-target animal incidents occurred from 1983 – 2009, resulting in the death of 26 birds, 15 dogs, ten wolves, three fox and two bear. According to APHIS-Wildlife Services' most recent available data, from 2010 – 2016, over 2600 animals were unintentionally killed by M-44s.

40. APHIS-Wildlife Services' data from 2016 shows that 321 animals were unintentionally killed by M-44 devices *in that year alone*, including companion animals, foxes, a black bear, a fisher, opossums, raccoons, ravens and skunks. Such verified deaths certainly underestimate the total number of non-target species impacted due to chronic underreporting and the unlikelihood of locating the carcasses of non-target species, especially small birds and small mammals.

41. Most recently, in February of 2017, an endangered wolf died in northeastern Oregon from a M-44 used by APHIS-Wildlife Services to target

coyotes. In March of 2017, in two separate incidents, M-44s temporarily blinded a child and killed three family dogs in Idaho and Wyoming.

III. Sodium Fluoroacetate (Compound 1080) Used in Livestock Protection Collars Harms Endangered Wildlife

42. Livestock protection collars strap bladders containing the liquid poison sodium fluoroacetate (commonly known as Compound 1080) onto the necks of sheep and goats to kill depredating coyotes.⁹ Compound 1080 is a restricted use pesticide, and only APHIS-Wildlife Services and the following states are registered users: Wyoming, New Mexico and Texas. APHIS-Wildlife Services uses Compound 1080 livestock protection collars in the following states (according to its 2015 and 2016 data): New Mexico, Texas and Virginia.

43. Compound 1080 is an inhibitor of the citric acid cycle that deprives cells of energy, with the central nervous system and heart most critically affected. Like sodium cyanide, Compound 1080 is classified by the EPA as a Category 1 toxicant – the most severe.

44. Sodium fluoroacetate is highly toxic to birds and mammals. For example, in a test of Compound 1080's secondary hazard (the harm caused to carnivores feeding on prey exposed to the toxin), European ferrets were fed mice that had been dosed with as little as 1 milligram of Compound 1080 per kilogram ferret body weight. All the ferrets died.

⁹ *Id.* at II-79.

45. Death by Compound 1080 is slow, and symptoms include convulsions, heart blockage, respiratory failure, hallucination, pain and deep nervous system depression.

46. The 1993 Biological Opinion found that the registration of Compound 1080 for use in livestock protection collars could affect the gray wolf and grizzly bear.¹⁰ FWS identified specific state and county areas where livestock protection collars with sodium fluoroacetate could not be used and concluded that implementation of such a restriction would preclude jeopardy to both the gray wolf and the grizzly bear.¹¹

47. Following the 1993 Biological Opinion, EPA in 1995 issued a RED reauthorizing the use of Compound 1080 in the livestock protection collar.¹²

48. The primary risk posed by Compound 1080 to listed species is through direct exposure by grizzly bears or wolves. Yet any carrion-feeding or predatory mammals and birds are at risk of exposure. In addition, livestock protection collars can be lost or the bladders containing the poison punctured by vegetation or barbed wire, causing spills that can pose a risk to wildlife and their habitats.

¹⁰ 1993 BiOp at II-79.

¹¹ *Id.*

¹² EPA 1995. R.E.D. Facts: Sodium Fluoroacetate,
<https://archive.epa.gov/pesticides/reregistration/web/pdf/3073fact.pdf>.

IV. EPA Reinitiates Consultation But FWS Does Not Act

49. On February 10, 2011, EPA identified mammals and birds that have been listed (or delisted and then relisted) since completion of the 1993 Biological Opinion and have habitats in areas with sodium cyanide and sodium fluoroacetate use. For both pesticides, these species include the grizzly bear, gray wolf, Canada lynx, Mexican spotted owl and southwestern willow flycatcher.¹³ The incidental take authorization contained in the 1993 Biological Opinion either incompletely covers or entirely fails to cover these species.

50. Other species have been listed as threatened or endangered since the issuance of the 1993 Biological Opinion and may be impacted by sodium cyanide and/or Compound 1080, including the Santa Catalina Island fox (*Urocyon littoralis catalinae*). As with the species identified by EPA in 2011, the potentially jeopardizing impact of the poisons on these additional species is not covered by the 1993 Biological Opinion.

51. Primarily because of the potential for harm to newly-listed species, EPA reinitiated consultation for both sodium cyanide and Compound 1080 on

¹³ Memorandum to Support Reinitiation of Consultation on Sodium Fluoroacetate (1080) dated February 10, 2011 from Valerie Wood, Biologist at the Environmental Fate and Effects Division of the EPA, to Arthur Williams, Associate Director of the Environmental Fate and Effects Division of the EPA; Memorandum to Support Reinitiation of Consultation on Sodium Cyanide (M-44) dated February 10, 2011 from Valerie Wood, Biologist at the Environmental Fate and Effects Division of the EPA, to Arthur Williams, Associate Director of the Environmental Fate and Effects Division of the EPA.

February 11, 2011. EPA explained that reinitiated consultation was also necessitated by new findings made during a series of registration reviews and eligibility decisions conducted by EPA during the course of the 18 years since FWS issued the 1993 Biological Opinion, as well as EPA's desire to develop "more focused mitigation" for species that *were* covered by the 1993 Biological Opinion.¹⁴ EPA also noted that the ranges of listed species may have changed since issuance of the 1993 Biological Opinion.

52. More than six years have passed since EPA initiated the consultations.¹⁵ In that time, FWS has not completed any consultation or recommended any mitigation measures necessary to ensure that the predator poisons will not harm the grizzly bear, gray wolf, Canada lynx, Mexican spotted owl, southwestern willow flycatcher or other impacted threatened or endangered wildlife, or adversely modify their critical habitat. The process has been stalled for years despite the mandatory deadlines in the ESA and its applicable regulations.

¹⁴ Letter Requesting Reinitiation of Consultation for Sodium Fluoroacetate from Arthur William, Associate Director of the Environmental Fate and Effects Division of the EPA, to Gary Frazer, Assistant Director for Endangered Species at FWS dated February 11, 2011; Letter Requesting Reinitiation of Consultation for Sodium Cyanide from Arthur William, Associate Director of the Environmental Fate and Effects Division of the EPA, to Gary Frazer, Assistant Director for Endangered Species at FWS dated February 11, 2011.

¹⁵ This Complaint is properly filed within the Administrative Procedure Act's six-year statute of limitations because the claims contained herein did not accrue upon initiation of consultation, but rather upon the expiry of FWS's statutory deadline for completing such consultation.

The agency's delay in completing the consultations and prescribing mitigation allows toxic pesticides to continue to harm wildlife species, in violation of law.

FIRST CAUSE OF ACTION

By Unlawfully Withholding or Unreasonably Delaying Completion of Formal Consultation, FWS is Violating Section 706(1) of the APA

53. All allegations set forth above in this Complaint are incorporated herein by reference.

54. The APA dictates that agencies must conclude a matter presented to it "within a reasonable time." 5 U.S.C. § 555(b). The ESA and Joint Regulations specify that consultations must be completed within 90 days. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §§ 402.14(e), 402.46(c)(1). APA section 706(1) authorizes reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

55. In February of 2011, EPA reinitiated Section 7 consultations with FWS regarding sodium cyanide and sodium fluoroacetate. More than six years later, FWS has not taken any steps to complete the consultations and has not completed a new biological opinion for either of these pesticides.

56. FWS's failure to complete the consultations within the 90-day timeframe mandated by statute constitutes agency action unlawfully withheld under Section 706(1) of the APA. In the alternative, FWS's failure to complete the

consultations constitutes agency action unreasonably delayed under Section 706(1) of the APA. *See* 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §§ 402.14(e), 402.46(c)(1).

PRAYER FOR RELIEF

WHEREFORE, the Center prays that the Court:

- (1) Declare that FWS is in violation of Section 706(1) of the APA by unlawfully withholding the completed consultations or failing to complete the consultations within a reasonable time;
- (2) Declare that FWS is in violation of section 7 of the ESA, 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. §§ 402.14(e), 402.46(c)(1), by failing to timely complete the consultations for sodium cyanide and Compound 1080, which EPA determined were likely to adversely affect the grizzly bear, gray wolf, Canada lynx, Mexican spotted owl and southwestern willow flycatcher;
- (3) Order FWS to complete the required consultations by a date certain;
- (4) Enjoin all use of, or otherwise restrict, sodium cyanide and Compound 1080 where they may affect endangered wildlife or their habitats, including requiring the removal, within 30 days of an order of any and all devices using sodium cyanide or Compound 1080 that are currently in use, until the consultation processes have been completed;
- (5) Award Plaintiff its attorneys' fees and costs in this action pursuant to 28 U.S.C. § 2412; and

- (6) Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 4th day of April, 2017.

/s/ Sarah McMillan

Sarah McMillan (MT Bar. No. 3634)
WildEarth Guardians
P.O. Box 7516
Missoula, Montana 59807

Collette Adkins (MN Bar. No. 035059X)*
Center for Biological Diversity
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