

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

DEFENDERS OF WILDLIFE, et al.	)	
	)	Civ. No. 04-1230(GK)
Plaintiffs,	)	
	)	
v.	)	
	)	
GALE NORTON, et al.,	)	
	)	
Defendants.	)	

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**DECLARATION OF**

I, Kenneth Stansell, declare as follows:

1. I am the Deputy Director for the U.S. Fish and Wildlife Service (Service), an agency of the U.S. Department of the Interior (DOI).
  
2. On September 29, 2006, this Court issued a memorandum opinion that, in part, remanded the July 3, 2003, listing determination for the contiguous United States distinct population segment (DPS) of the Canada Lynx (lynx) (68 Fed. Reg. 40,075) in order for the Service to clearly and specifically address the finding the Service had made with respect to the issue of the “significant portion of the range” of the lynx. In accordance with the Court’s order, on January 10, 2007, the Service published a clarification of the “significant portion of the range” for the contiguous United States DPS of the lynx (72 Fed. Reg. 1186). A copy is attached as Exhibit A.

3. The Court's order of August 6, 2007, stated that the hearing to be held on August 27, 2007, would address the "status of the Defendants' decision to reconsider 'the fate of the ... Canada lynx,' as reported in the Washington Post on July 21, 2007" (attached as Exhibit B). This declaration provides to the Court information on the issue raised in the Washington Post article.
4. As stated in the Washington Post article, on July 20, 2007, the Service announced plans to re-examine and take further action as appropriate with respect to eight ESA decisions. One of the eight decisions the Service will re-examine is the critical habitat designation for the Canada lynx DPS. The re-examination will not affect the status of the lynx as a threatened species. I explain in more detail below the context in which the Service decided to re-examine further the lynx critical habitat designation, the impact the re-examination will have on the lynx, and the Service's re-examination process.
5. Context of the Decision to Re-Examine the Lynx Critical Habitat Designation:  
In March of 2007, the DOI Inspector General issued an investigative report entitled *Investigative Report on Allegations against Julie MacDonald Deputy Assistant Secretary, Fish, Wildlife and Parks*.
6. In response to that report, the Service's Director, at the request of Deputy Secretary of the Interior Lynn Scarlett, began a process to determine whether any of its ESA decisions required any revisions based on the involvement of

Ms. MacDonald. He began by asking all of the Regional Directors to evaluate past Service decisions to determine if Ms. MacDonald, in her oversight capacity, influenced or modified the Service's position on the scientific basis for its final actions or decisions. He directed each Regional Director to involve their Field Office leadership to determine what, if any, ESA decisions had been modified or changed by Ms. MacDonald inappropriately. In doing so, he recognized 2 important points: (1) while there may have been inappropriate actions in her interface with career Service employees, the most important question rested with decisions that were changed and the health of the species that may have been undermined; and (2) the Office of the Assistant Secretary does have the authority, and it is appropriate for it, to be involved in policy interpretation and implementation. The Service's Regional Offices eventually identified eight<sup>1</sup> decisions that required further review.

7. On July 12, 2007, the Director sent a memo to Deputy Secretary Scarlett recommending that, in light of Ms. MacDonald's involvement, the Service re-examine ten (now eight) actions identified by the Regional Offices to determine for each action if the final decision reached is clear and comports with the best available science (July 12 Memo) (attached as Exhibit C).

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<sup>1</sup> The July 12 Memo actually listed ten actions, but in a subsequent memo dated July 20, 2007, the Director advised the Deputy Secretary that one Region had clarified that two of the actions they had identified should not have been included, because they involved policy decisions and not the inappropriate use of science.

8. The critical habitat designation for the lynx was one of the actions that Region 6 recommended be re-examined, and the Director concurred. The June 21, 2007, memorandum from the Regional Director to the Director (Regional Director's Memo) (attached as Exhibit D) described input from the Field Office suggesting that Ms. MacDonald had inappropriately influenced the scope of the critical habitat designation. The Service will further examine the critical habitat designation to determine whether the designation needs revision.
  
9. Impact of Re-Examining the Lynx Critical Habitat Designation: As explained below, re-examining the critical habitat designation for the lynx will in no way affect the actions the Service has taken with respect to the listing status of the lynx and the Service's compliance with the Court's orders of December 26, 2002, and September 29, 2006. Although the July 12 Memo and the Regional Director's Memo identified the lynx critical habitat determination as one of the actions that should be further examined, neither document identified the decision to list the DPS as a matter that required further re-examination. The Service does not intend to examine at this time the listing status of the lynx or the finding remanded by the Court in this case, which the Service further clarified in its January 10, 2007, Federal Register notice. The Service is, however, in the process of complying with ESA Section 4(c)(2)(A), which requires that it conduct a five-year review of the status of each listed species. The Service announced on April 18, 2007, that it was

initiating such a review (72 Fed. Reg. 19,549) for the lynx. Five-year reviews are funded by an appropriation for recovery matters.

10. The Service's failure to complete a timely designation of lynx critical habitat was addressed in a separate action before this Court, Defenders of Wildlife v. Kempthorne, Case No. 00-CV-2996. As we notified the Court in that case, the final critical habitat designation was submitted to the Federal Register on November 1, 2006, and was published November 9, 2006 (71 Fed. Reg. 66007). That designation will remain in place while we re-examine the critical habitat determination in light of the matters described above.
11. Process for Re-Examining the Critical Habitat Designation: The Service has begun to re-examine the lynx critical habitat designation to ensure that the decision reached comports with the best available science. Part of this process may entail a more focused review specifically on actions that Ms. MacDonald took with respect to the lynx critical habitat designation to determine whether changes in the final designation that may have resulted from her actions were both consistent with the best available science and supported by the administrative record.
12. During this re-examination of the issues surrounding lynx critical habitat, lynx habitat on U.S. Forest Service lands in the Northern Rocky Mountains and Minnesota will be managed for lynx in accordance with their Forest Plans,

which have been revised or amended to incorporate conservation specific to lynx, and the Service's biological opinions on these Forest Plans. On remaining National Forests that support lynx, the Forests abide by a conservation agreement between the Service and the Forest Service, which ensures that these National Forest lands will be managed consistent with the Lynx Conservation Agreement and Strategy (LCAS), as described in the final critical habitat rule and in the declaration of Anne Vandehey dated November 20, 2001, that was submitted to this Court in case No. 1:00cv2996 (Docket Entry 25).

13. In addition, conservation actions for lynx are being undertaken by private landowners, Tribes, and other governmental entities, as described in the final critical habitat rule. For example, the Washington Department of Natural Resources (WDNR) has a Habitat Management Plan (HMP) for State lands that creates and preserves lynx habitat through its forest management activities. This plan includes approximately 126,200 acres in north-central and northeastern Washington. The HMP was finalized in 2006 and is a revision of the lynx plan the WDNR has been implementing since 1996. The 1996 plan was developed as a substitute for a species-specific critical habitat designation required by Washington Forest Practices rules in response to the lynx being State-listed as threatened.

14. In addition, in the State of Maine, the U.S. Natural Resources Conservation Service is implementing a Healthy Forest Reserve Program for agreements with private landowners to develop and implement forest management plans for lynx on private lands; to date, landowners have agreed to develop and implement plans involving more than 650,000 acres, all of which was proposed for designation as lynx critical habitat.
  
15. These initiatives by private landowners, tribes, and other governmental entities will continue to offer protection to the lynx habitat by ensuring that habitat remains available both spatially and temporally to support snowshoe hare populations, which in turn will support lynx. Furthermore, on non-federal lands the lack of a critical habitat designation has limited impact for the lynx because of the limited occasions when there is a federal nexus that would trigger the Section 7 requirements pertaining to designated critical habitat.
  
16. In summary, in light of Ms. MacDonald's involvement in the designation process, the Service will complete a thorough re-examination of the lynx critical habitat rulemaking to determine if the rulemaking is consistent with the best available science. If it is determined that a revision is needed, the Service will also determine the scope of such revisions. This re-examination does not involve the issues which were the subject of the Court's September 29, 2006, remand in this case, and which were addressed by the January 7,

2007, clarification, nor will it affect the status of the lynx DPS as a threatened species under the ESA.

17. The Service has begun its further re-examination to determine if the final designation of lynx critical habitat comports with best available science, and intends to complete it by November 30, 2007. Following the re-examination, the Service will promptly and publicly announce its determination of whether revisions to the final designation are needed. If it is determined that revisions are needed, the Service would then begin the process to revise critical habitat, which would include providing notice of the proposed revisions and seeking public comment, as soon as funding is available.
  
18. We have sufficient resources to fund the re-examination of the lynx critical habitat designation by November 30, 2007, and publicly announce our determination following this re-examination. However, based on the currently pending FY 2008 DOI appropriations bills (H.R. 2643 and S. 1696) and the listing and critical habitat work that the Service has already planned for FY 2008, it does not appear that there will be funding available in FY 2008 to begin a critical habitat revision rulemaking process for the lynx, if the Service's re-examination results in a determination that revision is needed. The appropriations bills now pending from the House and Senate specify that the Service is not to exceed spending more than \$12,926,000 or \$13,026,000, respectively, on critical habitat activities.

19. The Service plans to undertake a substantial amount of listing<sup>2</sup> and critical habitat work in FY 2008, which will likely require all or nearly all of the expected appropriation for this purpose. The Service's plans are based on: (1) existing court orders and court-approved settlement agreements requiring the Service to complete 9 proposed critical habitat designations, 32 final critical habitat designations, and 15 economic analyses; (2) completion of 1 proposed critical habitat designation, 1 final critical habitat designation, and 3 final listing determinations with accompanying critical habitat determinations to meet statutory timelines related to current (FY 2007) preparation of high priority listing and critical habitat rules; (3) preparation of proposed rules to list eight candidate species with critical habitat, in order to continue making expeditious progress in listing actions consistent with ESA Section 4(b)(3)(B)(iii)(II); and (4) the estimated cost of completing the further re-examination of the lynx critical habitat designation discussed in this declaration and initiating the further re-examination of the remaining four of the eight decisions identified in the Director's memorandum (the work on further re-examining the other three decisions has already been funded). As a result it does not appear that funding would be available to conduct a

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<sup>2</sup> The Service's plans include using some of the funds from within the critical habitat spending limit to complete some very high-priority listing activities. The spending limit enacted by Congress requires only that the Service not exceed the spending limit, but does not require the Service to use all of those funds on critical habitat activities alone. When it became clear that some additional funding would be available from within the critical habitat spending limit even after completing critical habitat work required because of court orders, court-approved settlement agreements, and statutory deadlines, the Service selected a few very high-priority listing actions to fund (see points 2 and 3 in paragraph 19). Those listing actions, with associated critical habitat are a high-priority, because final listings extend the protections of the ESA to species that do not already have ESA protection, and there probably would not be sufficient funds to complete those listing actions in FY 2008 otherwise.

rulemaking to revise the critical habitat designation in 2008. Based on the Service's appropriations history and cost estimates of critical habitat activities planned for FY 2009, the Service believes it would have the funding necessary to begin the task in FY 2009 if revision is needed.

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed in Washington, D.C., on this 22<sup>nd</sup> day of August, 2007.

Kenneth Stansell

Deputy Director, U.S. Fish and Wildlife Service

Civil Action No. 04-1230 (GK)

Exhibit A: "Clarification of Significant Portion of the Range for the Contiguous United States Distinct Population Segment of the Canada Lynx," 72 Fed. Reg. 1186 (Jan. 10, 2007)

Exhibit B: "Fish and Wildlife to Review Eight Rulings on Endangered Species," Washington Post (July 21, 2007)

Exhibit C: Memorandum from Director, U.S. Fish and Wildlife Service, to Deputy Secretary, "Review of Documents Under the Endangered Species Act" (July 12, 2007)

Exhibit D: Memorandum from Regional Director, Region 6, to Director: "Region 6 Decisions Influenced by Julie MacDonald" (June 21, 2007)