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8 \*Seeking admission *pro hac vice*

9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF ARIZONA  
11 TUCSON DIVISION

12 **Center for Biological Diversity**, a non-  
13 profit organization; **Animal Welfare**  
14 **Institute**, a non-profit organization;

15 Plaintiffs,

16 v.

17 **Animal and Plant Health Inspection**  
18 **Service**, an administrative agency of the  
19 United States Department of Agriculture;  
20 **William Clay**, Deputy Administrator of  
21 APHIS-Wildlife Services; **David**  
22 **Bergman**, State Director  
23 Arizona APHIS-Wildlife Services; **U.S.**  
24 **Fish and Wildlife Service**; **Dan Ashe**,  
25 Director of the U.S. Fish and Wildlife  
26 Service;

27 Defendants.

Case No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

1 **INTRODUCTION**

2 1. Plaintiffs Center for Biological Diversity (“the Center”) and the  
3 Animal Welfare Institute (“AWI”) challenge the failure of defendants Animal and  
4 Plant Health Inspection Service; William Clay, Deputy Administrator of APHIS-  
5 Wildlife Services; and David Bergman, State Director Arizona APHIS-Wildlife  
6 Services (collectively, “APHIS-Wildlife Services”) and the U.S. Fish and Wildlife  
7 Service and its Director Dan Ashe (collectively, “FWS”) to comply with Section 7  
8 of the Endangered Species Act (“ESA”) and its implementing regulations. 16  
9 U.S.C. § 1536(a)(2); 50 C.F.R. Part 402. Specifically, APHIS-Wildlife Services  
10 and FWS have failed to reinitiate and complete consultation under Section 7 of the  
11 ESA on impacts of predator control and other activities of APHIS-Wildlife  
12 Services’ Wildlife Damage Management Program on endangered ocelots.  
13 Interagency consultation is a central feature of the ESA’s framework for  
14 protecting endangered and threatened species.

15 2. In addition, APHIS-Wildlife Services has never prepared an  
16 Environmental Impact Statement (“EIS”) to assess its wildlife damage  
17 management activities in Arizona, as required under the National Environmental  
18 Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, and the implementing Council  
19 on Environmental Quality (“CEQ”) regulations, 40 C.F.R. §§ 1500.1 *et seq.* It  
20 relies instead on outdated Environmental Assessments prepared in the 1990s that  
21 are contrary to modern science concerning the impacts of their practice of killing  
22 predators and other wildlife.

23 3. Through this Complaint, Plaintiffs seek injunctive and declaratory  
24 relief, including an order compelling completion of the required ESA consultation  
25 and NEPA analysis and placing restrictions on wildlife-harming activities of  
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1 APHIS-Wildlife Services' Wildlife Damage Management Program, until these  
2 violations of law are remedied.

### 3 JURISDICTION

4 4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal  
5 question jurisdiction), 16 U.S.C. § 1540(g)(1)(A) (ESA citizen suit provision) and  
6 5 U.S.C. § 702 (Administrative Procedure Act). The Court has authority to issue  
7 declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and 5 U.S.C.  
8 § 706(2).

9 5. The Center provided Defendants with at least 60 days notice of the  
10 ESA violations alleged herein as required by 16 U.S.C. § 1540(g)(2)(A).  
11 Defendants have not remedied the violations set out in that 60-day written notice.

12 6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16  
13 U.S.C. § 1540(g)(3)(A) because (1) a substantial part of the agencies' violations of  
14 law occurred and continue to occur in this district, (2) injury to Plaintiffs and their  
15 members occurred and continues to occur in this district, and (3) the Center  
16 maintains its principal place of business in Tucson, Arizona.

17 7. Pursuant to Local Civil Rules 5.1 and 77.1, the appropriate  
18 intradistrict assignment of this case is to the Tucson Division because a substantial  
19 part of the agency's violations of law occurred and continue to occur in the  
20 counties of Graham and Pima, which are within the range of the ocelot and where  
21 APHIS-Wildlife Service implements its Wildlife Damage Management Program.  
22 In addition, the Center maintains its principal place of business in Tucson,  
23 Arizona.

### 24 PARTIES

25 8. Plaintiff **Center for Biological Diversity** is a non-profit 501(c)(3)  
26 organization with more than 50,000 active members, with offices in Tucson,  
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1 Arizona, and elsewhere across the country. The Center and its members are  
2 concerned with the conservation of imperiled species, including the ocelot, and the  
3 effective implementation of the ESA and other environmental laws.

4 9. The Center's members include those who have visited areas where  
5 the ocelot is known to occur and where implementation of the Wildlife Damage  
6 Management Program occurs. They use these areas to try to observe the ocelot and  
7 other wildlife; for research; for photography; for aesthetic enjoyment; and for  
8 recreational and other activities. The opportunity to possibly view wildlife, or their  
9 signs, in these areas is of significant interest and value to the Center's members  
10 and staff, and it increases their use and enjoyment of public lands and ecosystems  
11 in Arizona. The Center's members derive professional, aesthetic, spiritual,  
12 recreational, economic, and educational benefits from the ocelot and other wildlife  
13 and their habitats. In furtherance of these interests, Plaintiffs' members, staff, and  
14 supporters have worked, and continue to work, to conserve wildlife in Arizona and  
15 throughout the United States. Those members have concrete plans to continue to  
16 travel to and recreate in areas in Arizona where implementation of the Wildlife  
17 Damage Management Program occurs and where they can try to observe the  
18 ocelot and other wildlife, including coyotes, foxes, mountain lions, birds, and  
19 other species that are the target of, or affected by, APHIS-Wildlife Services'  
20 wildlife-harming activities. In summary, the Center's members, staff, and  
21 supporters have engaged in these wildlife-focused activities in the past, and intend  
22 to do so again in the near future.

23 10. Plaintiff AWI is a national non-profit, public interest organization  
24 founded in 1951. It has approximately 40,000 members and supporters worldwide.  
25 AWI is dedicated to alleviating the suffering caused to animals by people and to  
26 protecting species threatened with extinction. AWI's activities focus on  
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1 minimizing impacts of human actions detrimental to endangered or threatened  
2 species, including harassment, habitat degradation, encroachment and destruction,  
3 and irresponsible hunting and trapping practices. Through advocacy, litigation,  
4 legislation, research, and education, AWI acts to safeguard endangered or  
5 threatened wild animals and their habitats and to implement humane solutions to  
6 human-wildlife conflicts. AWI works with national and local governments and  
7 other policymakers to protect animals, often by preventing actions damaging to  
8 species and by promoting effective and safe wildlife protection laws and  
9 regulations. AWI helped win passage of the federal ESA and continues to work  
10 with members of Congress to secure funding for FWS to enforce the ESA. AWI's  
11 members include those who have visited areas where the ocelot is known to occur  
12 and where implementation of the Wildlife Damage Management Program occurs.  
13 They use these areas to try to observe the ocelot and other wildlife; for research;  
14 for photography; for aesthetic enjoyment; and for recreational and other activities.  
15 The opportunity to possibly view wildlife, or their signs, in these areas is of  
16 significant interest and value to AWI's members and staff, and it increases their  
17 use and enjoyment of public lands and ecosystems in Arizona. AWI's members  
18 derive aesthetic, spiritual, recreational, and educational benefits from the ocelot  
19 and other wildlife and their habitats. Those members have concrete plans to  
20 continue to travel to and recreate in areas in Arizona where implementation of the  
21 Wildlife Damage Management Program occurs and where they can try to observe  
22 the ocelot and other wildlife, including coyotes, foxes, mountain lions, birds, and  
23 other species that are the target of, or affected by, APHIS-Wildlife Services'  
24 wildlife-harming activities. In September 2014, AWI and its members notified  
25 APHIS-Wildlife Services of their intent to sue over its failure to ensure the  
26 program is not harming ocelots, emphasizing that the potentially harmful effects of  
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1 APHIS-Wildlife Services' lethal wildlife management activities on the endangered  
2 ocelot triggered a requirement to consult with FWS. In summary, AWI's  
3 members, staff, and supporters have engaged in advocacy issues related to  
4 endangered species, ocelots, and wildlife harmed by APHIS-Wildlife Services,  
5 and they intend to continue doing so in the near future.

6 11. The above-described interests of Plaintiffs and their members have  
7 been and are being adversely affected by Defendants' failure to reinitiate and  
8 complete consultation on the impacts of APHIS-Wildlife Services' Wildlife  
9 Damage Management Program on the ocelot. APHIS-Wildlife Services has  
10 previously found that activities of its Wildlife Damage Management Program—  
11 including the use of M-44 devices, foot-hold traps, cage traps, foot and neck  
12 snares, ground shooting, and aerial operations—are likely to adversely affect  
13 ocelot populations in Texas and Arizona. If APHIS-Wildlife Services and FWS  
14 completed reinitiated consultation as required, FWS would detail how the Wildlife  
15 Damage Management Program affects the ocelot and its habitats, and if necessary,  
16 would suggest reasonable and prudent alternatives or measures to protect the  
17 species, likely mitigating the risk of harm. 16 U.S.C. § 1536(b)(3)-(4).

18 12. Implementation of APHIS-Wildlife Services' Wildlife Damage  
19 Management Program also adversely impacts Plaintiffs' interests in Arizona's  
20 other wildlife that could be killed by Wildlife Services. Plaintiffs and their  
21 members, supporters, and/or staff are also directly injured by APHIS-Wildlife  
22 Services' consistent refusal to fully disclose and evaluate the environmental  
23 impacts of its wildlife-killing activities in Arizona, as required by NEPA.

24 13. Unless the requested relief is granted, Plaintiffs' interests will  
25 continue to be adversely affected and injured by Defendants' failure to complete  
26 the reinitiated consultations or the NEPA analysis, as well as by the ongoing harm  
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1 to the ocelot and other wildlife as a result of ongoing activities of the Wildlife  
2 Damage Management Program. The injuries described above are actual, concrete  
3 injuries that are presently suffered by Plaintiffs and their members and will  
4 continue to occur unless relief is granted by this Court. These injuries are directly  
5 caused by the agencies' failure to complete reinitiated consultation to ensure that  
6 APHIS-Wildlife Services' Wildlife Damage Management Program does not affect  
7 this listed species and by APHIS-Wildlife Services' failure to complete the  
8 analysis required under NEPA.

9         14. The relief sought herein—an order compelling completion of  
10 reinitiated consultation and the NEPA analysis, and placing restrictions on  
11 wildlife-harming activities until Defendants bring themselves into compliance  
12 with law—would redress Plaintiffs' injuries. Plaintiffs' requested relief, if granted,  
13 would prevent APHIS-Wildlife Services from engaging in wildlife damage  
14 management activities in Arizona unless and until it complies with federal law.  
15 Plaintiffs' requested relief, if granted, could reduce the amount of lethal wildlife  
16 damage management activities conducted in Arizona or minimize harm from those  
17 activities through mitigation measures. Plaintiffs' requested relief, if granted,  
18 would make lethal animal damage management more expensive for the Arizona  
19 Game and Fish Department, Arizona Department of Agriculture, local  
20 municipalities, and private livestock producers because these entities would not be  
21 able to contract with APHIS-Wildlife Services to conduct lethal wildlife damage  
22 management activities on their behalf. These entities cannot and would not be able  
23 to completely replace APHIS-Wildlife Services' activities authorized under the  
24 2010 Biological Opinion or the Environmental Assessments drafted in the 1990s,  
25 and they would not be able to provide these services at the same cost as if APHIS-  
26 Wildlife Services provided those same services. These entities do not have the  
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1 equipment, such as fixed wing aircraft for aerial gunning operations, or the trained  
2 wildlife-killing personnel that APHIS-Wildlife Services has. Plaintiffs have no  
3 other adequate remedy at law.

4 15. Plaintiffs' members, staff, and supporters also have a procedural  
5 interest in ensuring that APHIS-Wildlife Services' activities comply with all  
6 applicable federal statutes and regulations. Plaintiffs have worked to reform  
7 APHIS-Wildlife Services' activities throughout the United States, including in  
8 Arizona. Plaintiffs and their members, staff, and supporters have an interest in  
9 preventing APHIS-Wildlife Services from being involved in lethal wildlife  
10 damage management, particularly predator control, and in promoting the use of  
11 more effective and proactive non-lethal alternatives that foster communities'  
12 coexistence with wildlife. The relief requested in this litigation would further that  
13 goal by requiring NEPA analysis and ESA consultation that considers the harm  
14 caused by APHIS-Wildlife Services. This would increase Plaintiffs' understanding  
15 of the impacts of the wildlife-killing activities that would aid in Plaintiffs' efforts  
16 to reform Wildlife Services.

17 16. Defendant **Animal and Plant Health Inspection Service** is a  
18 federal agency within the U.S. Department of Agriculture. Wildlife Services is a  
19 branch of APHIS that is charged with implementing the Wildlife Damage  
20 Management Program.

21 17. Defendant **William Clay** is the Deputy Administrator of APHIS-  
22 Wildlife Services. He is sued in his official capacity as APHIS-Wildlife Services  
23 Deputy Administrator.

24 18. **David Bergman** is the State Director of Arizona APHIS-Wildlife  
25 Services. He is sued in his official capacity as APHIS-Wildlife Services Arizona  
26 State Director.





1 work with expert federal wildlife agencies, including FWS, to ensure that their  
2 actions do not jeopardize the survival of threatened or endangered species.

3         25. An agency must initiate consultation under Section 7 whenever its  
4 action “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14(a).  
5 Conversely, an agency is relieved of the obligation to consult on its actions only  
6 where the action will have “no effect” on listed species or designated critical  
7 habitat. *Id.* § 402.14(b)(1). “Effects determinations” are based on the direct and  
8 indirect effects of the action when added to the environmental baseline and other  
9 interrelated and interdependent actions. *Id.* § 402.02 (definition of “effects of the  
10 action”).

11         26. The scope of agency actions subject to consultation is broadly  
12 defined to encompass “all activities or programs of any kind authorized, funded,  
13 or carried out, in whole or in part, by Federal agencies . . . .” *Id.* § 402.02  
14 (definition of “action”).

15         27. An agency is required to “review its actions at the earliest possible  
16 time to determine whether any action may affect listed species or critical habitat.”  
17 *Id.* § 402.14(a). To that end, FWS and APHIS-Wildlife Services are required to  
18 conclude consultations within 90 days. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §  
19 402.14(e).

20         28. Agencies must reinitiate consultation on agency actions over which  
21 the federal agency retains, or is authorized to exercise, discretionary involvement  
22 or control if: the amount or extent of taking specified in the incidental take  
23 statement is exceeded; new information reveals effects of the action that may  
24 affect listed species or critical habitat in a manner or to an extent not previously  
25 considered; the identified action is subsequently modified in a manner that causes  
26 an effect to the listed species or critical habitat that was not considered in the  
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1 biological opinion; or a new species is listed or critical habitat designated that  
2 may be affected by the identified action. 50 C.F.R. § 402.16 (reinitiation of  
3 consultation).

4         29. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a  
5 federal agency initiates consultation on an action under the ESA, the agency  
6 “shall not make any irreversible or irretrievable commitment of resources with  
7 respect to the agency action which has the effect of foreclosing the formulation or  
8 implementation of any reasonable and prudent alternative measures which would  
9 not violate subsection (a)(2) of this section.” The purpose of Section 7(d) is to  
10 maintain the environmental status quo pending the completion of consultation.  
11 Section 7(d) prohibitions remain in effect throughout the consultation period and  
12 until the federal agency has satisfied its obligations under Section 7(a)(2) to  
13 ensure the action will not result in jeopardy to the species or adverse modification  
14 of its critical habitat.

15         30. To initiate consultation, the action agency (here, APHIS-Wildlife  
16 Services) must assess the impacts of the action on listed species and their habitat  
17 and provide all relevant information about such impacts to the expert wildlife  
18 agency (here, FWS). 50 C.F.R. § 402.14(c). The action agency does not have to  
19 undergo formal consultation if it determines that an action “may affect” but is  
20 “not likely to adversely affect” a listed species or its critical habitat, if FWS  
21 concurs in writing with that determination. 50 C.F.R. §§ 402.13, 402.14(b)(1).

22         31. If FWS does not concur, or if the action agency has determined that  
23 the action is “likely to adversely affect” a listed species, the agencies must  
24 conduct a formal consultation. *Id.* § 402.14(a).

25         32. The end product of formal consultation is a biological opinion in  
26 which FWS determines whether the agency action will jeopardize the survival  
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1 and recovery of listed species or will destroy or adversely modify the species'  
2 critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.02 (definitions of  
3 “biological opinion” and “formal consultation”). To make this determination,  
4 FWS must review all relevant information and provide a detailed evaluation of  
5 the action’s effects, including the cumulative effects of federal and nonfederal  
6 activities in the area, on the listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §  
7 402.14(g)-(h). FWS has a statutory duty to use the best available scientific  
8 information in an ESA consultation. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §  
9 402.14(g)(8). If FWS determines that the action is likely to jeopardize the species,  
10 the biological opinion must specify “reasonable and prudent alternatives” that  
11 will avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). FWS  
12 must also formulate discretionary conservation recommendations to reduce or  
13 minimize the action’s impacts on listed species and critical habitat. 50 C.F.R. §  
14 402.14(g)(6).

15       33. “Reasonable and prudent alternatives” are alternative actions  
16 identified during formal consultation that (1) can be implemented in a manner  
17 consistent with the intended purpose of the action, (2) can be implemented  
18 consistent with the scope of the action agency’s legal authority, (3) are  
19 economically and technologically feasible, and (4) would avoid the likelihood of  
20 jeopardizing the continued existence of listed species and/or avert the destruction  
21 or adverse modification of critical habitat. 50 C.F.R. § 402.02.

22       34. Not only does a Section 7(a)(2) consultation assist the action agency  
23 in discharging its duty to avoid jeopardy, but the biological opinion also affects  
24 the agency’s obligation to avoid the “take” of listed species. Under ESA Section  
25 9, 16 U.S.C. § 1538(a)(1)(B), it is illegal for any person—whether a private or  
26 governmental entity—to “take” any endangered species of fish or wildlife listed  
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1 under the ESA. “Take” is defined to mean “harass, harm, pursue, hunt, shoot,  
2 wound, kill, trap, capture, or collect, or attempt to engage in such conduct.” *Id.* §  
3 1532(19). FWS defines “harm” to include “significant habitat modification or  
4 degradation which actually kills or injures fish or wildlife by significantly  
5 impairing essential behavioral patterns, including breeding, spawning, rearing,  
6 migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

7         35. As part of a consultation, FWS determines whether to authorize the  
8 take of listed species through the issuance of an incidental take statement. An  
9 incidental take statement may be issued only if the action can proceed without  
10 causing jeopardy. 16 U.S.C. § 1536(b)(4). An incidental take statement must: (1)  
11 specify the impact of the incidental take on the listed species; (2) specify  
12 “reasonable and prudent measures” FWS considers necessary to minimize that  
13 impact; and (3) set forth mandatory terms and conditions. *Id.*

14         36. Reasonable and prudent measures, along with terms and conditions,  
15 are nondiscretionary measures included in an incidental take statement that FWS  
16 considers necessary to minimize and reduce impacts to listed species and avoid  
17 jeopardy. *Id.*

18         37. An incidental take statement insulates the federal agency from  
19 liability for a take of an endangered or threatened species, provided the agency  
20 complies with the statement’s terms and conditions. This insulation extends  
21 further to any entity receiving a federal permit, license, authorization, or funding  
22 subject to, and in compliance with, the statement. *Id.* § 1536(o)(2).

### 23 **National Environmental Policy Act**

24         38. Under the National Environmental Policy Act (“NEPA”), a federal  
25 agency must prepare an Environmental Impact Statement (“EIS”) for “major  
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1 Federal actions significantly affecting the quality of the human environment . . .  
2 .” 42 U.S.C. § 4332(C).

3 39. Significance determinations are governed by CEQ regulations,  
4 which require agencies to consider both the context of the action and the intensity  
5 of the environmental impacts. 40 C.F.R. § 1508.27. The CEQ regulations list ten  
6 intensity factors agencies must consider:

7 (1) Impacts that may be both beneficial and adverse. A significant effect  
8 may exist even if the Federal agency believes that on balance the effect  
9 will be beneficial.

10 (2) The degree to which the proposed action affects public health or  
11 safety.

12 (3) Unique characteristics of the geographic area such as proximity to  
13 historic or cultural resources, park lands, prime farmlands, wetlands, wild  
14 and scenic rivers, or ecologically critical areas.

15 (4) The degree to which the effects on the quality of the human  
16 environment are likely to be highly controversial.

17 (5) The degree to which the possible effects on the human environment  
18 are highly uncertain or involve unique or unknown risks.

19 (6) The degree to which the action may establish a precedent for future  
20 actions with significant effects or represents a decision in principle about  
21 a future consideration.

22 (7) Whether the action is related to other actions with individually  
23 insignificant but cumulatively significant impacts. Significance exists if it  
24 is reasonable to anticipate a cumulatively significant impact on the  
25 environment. Significance cannot be avoided by terming an action  
26 temporary or by breaking it down into small component parts.

1 (8) The degree to which the action may adversely affect districts, sites,  
2 highways, structures, or objects listed in or eligible for listing in the  
3 National Register of Historic Places or may cause loss or destruction of  
4 significant scientific, cultural, or historical resources.

5 (9) The degree to which the action may adversely affect an endangered or  
6 threatened species or its habitat that has been determined to be critical  
7 under the Endangered Species Act of 1973.

8 (10) Whether the action threatens a violation of Federal, State, or local  
9 law or requirements imposed for the protection of the environment.

10 *Id.*

11 40. If the agency's action may be environmentally significant according  
12 to any of the criteria, the agency must prepare an EIS.

13 41. "The NEPA process is intended to help public officials make  
14 decisions that are based on understanding of environmental consequences, and  
15 take actions that protect, restore, and enhance the environment." 40 C.F.R. §  
16 1500.1(c). The CEQ regulations "provide the direction to achieve this purpose."  
17 *Id.* To that end, "NEPA procedures must insure that environmental information is  
18 available to public officials and citizens before decisions are made and before  
19 actions are taken. The information must be of high quality. Accurate scientific  
20 analysis, expert agency comments, and public scrutiny are essential to  
21 implementing NEPA." *Id.* § 1500.1(b).

22 42. Alternatively, to determine whether an action is significant—i.e.,  
23 whether an EIS is necessary for the proposed action—an agency may first prepare  
24 an Environmental Assessment ("EA"). 40 C.F.R. § 1501.4(b). After completion  
25 of the EA, if the agency determines that a full EIS is not necessary, the agency  
26 must prepare a finding of no significant impact ("FONSI"). *Id.* § 1501.4(c). A  
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1 FONSI is a “document . . . briefly presenting the reasons why [the proposed]  
2 action . . . will not have a significant effect on the human environment . . . .” 40  
3 C.F.R. § 1508.13.

4 43. The environmental analysis must disclose and analyze the direct,  
5 indirect, and cumulative effects of the proposed action on the environment. 40  
6 C.F.R. §§ 1502.16 (discussion of environmental consequences), 1508.7  
7 (cumulative impacts), 1508.8 (direct and indirect effects), 1508.25 (scope of  
8 impacts that must be considered). The agency must take a “hard look” at the  
9 consequences of its actions. *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241  
10 F.3d 722, 730 (9th Cir. 2001).

11 44. An agency has a continuing obligation to comply with NEPA and  
12 must prepare a supplemental NEPA analysis when “significant new  
13 circumstances or information relevant to environmental concerns and bearing on  
14 the proposed action or its impacts” emerge. 40 C.F.R. § 1502.9(c)(1)(ii)  
15 (applicable to APHIS-Wildlife Services as set forth in 7 C.F.R. § 372.1).

16 45. An agency cannot take any action or make any commitment of  
17 resources before making its final decision that would have an adverse  
18 environmental impact or prejudice or limit the choice of reasonable alternatives.  
19 40 C.F.R. §§ 1502.2(f), 1506.1(a).

#### 20 **Administrative Procedure Act**

21 46. The ESA and NEPA do not contain an internal standard of review,  
22 so judicial review of federal agency actions is therefore governed by the  
23 Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.* Under the APA,  
24 courts “shall hold unlawful and set aside” agency action, findings, or conclusions  
25 found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in  
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1 accordance with the law” or “without observance of procedure required by law.”  
2 5 U.S.C. § 706(2)(A), (D).

### 3 **FACTUAL BACKGROUND**

#### 4 **Endangered Ocelots**

5 47. The ocelot is an endangered wild cat. Weighing as much as 35  
6 pounds, ocelots have a graceful body that may be up to four feet long, including  
7 the tail. Its tawny coat has elongated brown spots with black borders. A photo of  
8 an ocelot spotted in Arizona in 2011 is included below.



18 Photo Credit: Tony Battiste, Portraits in Nature

19 48. Ocelots seem to prefer dense cover but can use a variety of habitats.  
20 Dens are in caves, hollow trees, thickets, spaces between the roots of large trees,  
21 dense grass, or other thick habitats.

22 49. Hunting mostly at night, ocelots eat rabbits, birds, fish, rodents,  
23 snakes, lizards, and other small- to medium-sized prey. Their primary way of  
24 hunting is extensive walking until prey is encountered. Ocelots are known to use  
25 game trails and ranch roads where a greater diversity of prey occurs.

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1           50.    The ocelot’s range includes Texas, Arizona, Mexico, Central  
2 America, and South America. Monitoring of collared individuals has shown that  
3 dispersing ocelots will move as much as 10 miles outside their home ranges.

4           51.    In the United States, likely fewer than 100 ocelots exist. It was listed  
5 as “endangered” in 1982 under the ESA. 47 Fed. Reg. 31,670 (July 21, 1982). The  
6 ocelot is also listed on Appendix I of the Convention on International Trade in  
7 Endangered Species of Wild Fauna and Flora (“CITES”)—a listing that strictly  
8 prohibits trade.

9           52.    Although never abundant and seldom intentionally trapped, ocelots  
10 were historically taken incidentally during the hunting, trapping, and poisoning of  
11 coyotes, bobcats, and other predators. Habitat loss also caused historical declines,  
12 and only a fraction of the less than five percent of original native vegetation  
13 remaining in the Lower Rio Grande Valley is optimal habitat for the cats. Now,  
14 continuing habitat loss, collisions with vehicles, and inbreeding resulting from  
15 small and isolated remnant populations are the primary causes of the species’ low  
16 numbers.

17 **APHIS-Wildlife Services’ Wildlife Damage Management Program**

18           53.    APHIS-Wildlife Services and its precursors have specialized in  
19 trapping and killing wildlife for more than 100 years, responsible for the  
20 eradication of wildlife like wolves, bears, and other animals from much of the  
21 United States, particularly in the West. APHIS-Wildlife Services contracts with  
22 other federal agencies, non-federal government agencies, and private landowners  
23 to fulfill its mission of resolving wildlife conflicts.

24           54.    Today, APHIS-Wildlife Services kills millions of native animals  
25 every year. For example, in fiscal year 2015, APHIS-Wildlife Services reports that  
26 it killed more than 3.2 million animals across the United States, including 68,905  
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1 coyotes, 450 black bears, 731 bobcats, 284 mountain lions, 3,437 foxes, 492 river  
2 otters, 16,907 mourning doves, and 385 gray wolves. APHIS-Wildlife Services  
3 also has unintentionally killed thousands of non-target species, undermining state  
4 and federal efforts to conserve and recover the affected species—which,  
5 oftentimes, need protection in part due to APHIS-Wildlife Services’ historic and  
6 ongoing practices.

7         55. Many of the methods used by APHIS-Wildlife Services—including  
8 foothold and body-gripping traps, snares, and M-44 gas cartridges—are  
9 fundamentally nonselective, environmentally destructive, inherently cruel, and  
10 often ineffective.

11         56. For example, leghold traps are internationally recognized as  
12 inhumane and have been banned in many countries. Mammals, upon being  
13 trapped, frantically struggle to free themselves both by attempting to pull the  
14 trapped limb out of the device and by chewing at the trap itself or even their own  
15 limbs. The force of the jaws clamping on the animal’s limb and the subsequent  
16 struggle can result in severe trauma including mangling of the limb, fractures,  
17 damage to muscles and tendons, lacerations, injury to the face and mouth, loss of  
18 one or more toes, broken teeth, loss of circulation, frostbite, and amputation.

19 **The Wildlife Damage Management Program Could Harm Ocelots**

20         57. The first biological opinion addressing the effects of APHIS-  
21 Wildlife Services’ activities on ocelots was completed on August 15, 1997, and  
22 only addressed south Texas. In 2007, APHIS-Wildlife Services prepared a  
23 Biological Assessment on the impacts of its Wildlife Damage Management  
24 Program on ocelots, analyzing both Texas and Arizona. In the Biological  
25 Assessment, APHIS-Wildlife Services concluded that its Wildlife Damage  
26 Management Program activities—including use of chemical drugs (oral rabies  
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1 vaccine), M-44 devices, foot-hold traps, cage traps, foot and neck snares, ground  
2 shooting, and aerial operations—are “likely to adversely affect ocelot populations  
3 in Texas and Arizona.” APHIS-Wildlife Services then engaged in formal  
4 consultation with FWS, which in 2010 prepared a Biological Opinion (“BiOp”) for  
5 impacts of the Wildlife Damage Management program on ocelots.

6 58. The 2010 BiOp provides that “two probable sightings [of ocelot]  
7 have been made recently in Arizona,” including near Globe in Gila County and in  
8 western Cochise County. BiOp at 4, 7-8. It defines “occupied ocelot habitat in  
9 Arizona” as “portions of Game Management Units (GMUs) within the San Pedro  
10 Watershed (308, 31, 32, 33, 34B, 35A, 35B) plus the following GMUs outside of  
11 the San Pedro Watershed (24A, 24B, and 37B).” BiOp at 5.

12 59. The BiOp explains that there have been “no reports of incidental  
13 take of ocelot by [APHIS-Wildlife Services] personnel using chemical medication  
14 drugs (oral rabies vaccine), M-44 devices, foot-hold traps, cage traps, foot, leg or  
15 neck snares, or ground shooting and aerial operations.” BiOp at 16. However,  
16 “[d]ue to the similarity in size between ocelot and other meso-carnivore species,  
17 some of which are felids, the FWS anticipate[d] that there is a slight potential for  
18 effects to ocelot . . . from the following [Wildlife Damage Management Program]  
19 activities: distribution of chemical medication drugs (oral rabies vaccine), use of  
20 M-44 devices, foot-hold traps, cage traps, ground shooting, and aerial operations.”  
21 BiOp at 16.

22 60. For example, FWS explains that bobcats, which are meso-carnivores  
23 of similar size to ocelots, have been known to activate M-44 devices. BiOp at 20.  
24 Use of foot-hold traps and snares may capture or injure ocelots, especially if the  
25 target species is of a similar weight to an ocelot. *Id.* Cage traps are used to capture  
26 meso-carnivores of similar size to the ocelot and the potential for incidental take  
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1 cannot be fully eliminated. *Id.* Furthermore, potential for misidentification of the  
2 target species exists during ground and aerial shooting. *Id.*

3 61. FWS concluded that APHIS-Wildlife Services' Wildlife Damage  
4 Management Program would not jeopardize the ocelot. BiOp at 17. The agency  
5 gave APHIS-Wildlife Services an Incidental Take Statement ("ITS") that exempts  
6 the take of one ocelot at some future time. BiOp at 19.

7 62. The ITS contains two reasonable and prudent measures ("RPMs")  
8 that are "non-discretionary," "binding conditions" that must be met for APHIS-  
9 Wildlife Services to receive take coverage. *Id.* The first RPM requires  
10 "maintaining interagency coordination and information exchange, through  
11 reporting occurrences, discussions about potential habitat, and incidental take of  
12 ocelot." BiOp at 21. The second RPM requires APHIS-Wildlife Services to  
13 "implement measures and adjust its normal [Wildlife Damage Management]  
14 Program activities in occupied ocelot habitat and in travel corridors identified by  
15 FWS to minimize incidental take of ocelot in accordance with the terms and  
16 conditions" provided in the BiOp. *Id.*

17 63. To implement the first RPM, FWS provides several mandatory terms  
18 and conditions. These include a requirement that APHIS-Wildlife Services "shall  
19 maintain regular (annual or more frequent) contact and coordination with the local  
20 FWS office" to have up-to-date records on ocelot occurrences and to coordinate  
21 Wildlife Damage Management program activities to reduce the likelihood of  
22 impacts to ocelots. BiOp at 21-22.

23 64. To implement the second RPM, APHIS-Wildlife Services "shall  
24 notify the local FWS office prior to conducting [Wildlife Damage Management]  
25 Program activities in areas within three miles or less (i.e., within 3-mile buffer) of  
26 occupied ocelot habitat, including ocelot travel corridors between occupied ocelot  
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1 habitat areas.” BiOp at 23. The terms and conditions also include restrictions on  
2 trap size and placement to reduce likelihood of impacts to ocelots. BiOp at 23.

3 **New Information on How Wildlife Damage Management Impacts Ocelots**

4 65. Since FWS prepared the 2010 BiOp on impacts to ocelots from  
5 APHIS-Wildlife Services’ Wildlife Damage Management Program, new  
6 information came to light on ocelot locations in Arizona, including five additional  
7 ocelot detections since 2009. As explained by a FWS biologist who works on  
8 ocelots, “we have much more information on ocelot detections and habitat  
9 associations on ocelots now than we did in 2010; for example, in 2010, the only  
10 recent ocelot detections were in the Whetstones and in Globe.”<sup>1</sup>

11 66. There is also evidence that APHIS-Wildlife Services has failed to  
12 fully comply with the “reasonable and prudent measures” provided in the 2010  
13 BiOp. An internal FWS email explains that defendant David Bergman, Arizona  
14 State Director for APHIS-Wildlife Services, “has not been in touch with our office  
15 about ocelot and jaguar detections,” concluding that APHIS-Wildlife Services  
16 “has not coordinated with our office per Term and Condition 1.1. of the 2010 BO .  
17 . . .”<sup>2</sup>

18 67. In addition, since the 2010 BiOp, significant new scientific  
19 information has emerged about the ocelot range and use of habitats, status of  
20 ocelots, threats to ocelots, and the importance of United States habitats to the  
21 conservation of ocelot. For example, Avila-Villegas and Lamberton-Moreno  
22

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23 <sup>1</sup> Email from Erin Fernandez, Fish and Wildlife Biologist/Mexico Program  
24 Coordinator, U.S. Fish and Wildlife Service, to Jean Calhoun, Assistant Field  
25 Supervisor, U.S. Fish and Wildlife Service (Oct. 9, 2014).

26 <sup>2</sup> *Id.*; Email from Erin Fernandez, Fish and Wildlife Biologist/Mexico Program  
27 Coordinator, U.S. Fish and Wildlife Service, to Jean Calhoun, Assistant Field  
28 Supervisor, U.S. Fish and Wildlife Service (Oct. 8, 2014).

1 (2013) discuss new detections of ocelot in Arizona using remote cameras. And  
2 Featherstone et al. (2013) discuss a road-killed ocelot observed near Superior,  
3 Arizona, in 2010 (Pinal County). Janecka et al. (2014) discuss the status of ocelot  
4 in Texas and explain that low levels of genetic diversity in Texas are related to  
5 human-induced population reductions. In July of 2016, the FWS released a revised  
6 recovery plan for ocelots that summarizes the most recent science on ocelots.

7 68. These changed circumstances, new facts, and new studies constitute  
8 “new information” triggering reinitiation of consultation. 50 C.F.R. § 402.16(b);  
9 *Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987) (county’s failures to  
10 implement reasonable and prudent measures from a prior Biological Opinion “are  
11 certainly ‘new information’ that neither the FWS nor the [U.S. Army Corps of  
12 Engineers] took into account during previous consultations,” and thus reinitiation  
13 was required). Indeed, the Assistant Field Supervisor for the FWS’s Arizona  
14 Ecological Services office concluded that “[i]t does seem that the ocelot BO  
15 [BiOp] should be updated and that at a minimum, the DC office should be  
16 informed of that need.”<sup>3</sup>

17 69. Despite this new information since the 2010 BiOp, APHIS-Wildlife  
18 Services continues to approve and allow projects and ongoing activities as part of  
19 its Wildlife Damage Management Program that may affect ocelots without further  
20 analysis under Section 7 of the ESA. For example, an ocelot was detected in the  
21 Huachuca Mountains in 2012. Under its contract with the U.S. Army, APHIS-  
22 Wildlife Services can use snares, padded steel-jaw leghold traps, and hounds to  
23 capture and kill wildlife at Fort Huachuca. Reinitiation of consultation with FWS  
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25 <sup>3</sup> Email from Jean Calhoun, Assistant Field Supervisor, U.S. Fish and Wildlife  
26 Service, to Erin Fernandez, Fish and Wildlife Biologist/Mexico Program  
27 Coordinator, U.S. Fish and Wildlife Service (Oct. 17, 2014).

1 would ensure the most recent information on ocelots could be used to minimize  
2 impacts from these activities on ocelots in the area.

3 **Inadequate NEPA Analysis of Wildlife Damage Management in Arizona**

4 70. In Arizona, APHIS-Wildlife Services targets and kills thousands of  
5 animals each year. In 2015, the program killed nearly 4,600 animals in the state. In  
6 addition, Wildlife Services has unintentionally trapped and sometimes killed  
7 several non-target animals in Arizona.

8 71. For example, APHIS-Wildlife Services in Arizona uses scent lures  
9 to attract coyotes to traps and snares set in locations where tracks indicate  
10 presence of the animals. Denning is the practice of locating coyote dens and  
11 killing the pups by filling the den with poisonous gas. Coyotes are also shot from  
12 airplanes. In 2015 in Arizona, 177 coyotes were shot by firearm, 348 were shot  
13 from airplanes, nine were killed in dens, and three by neck snares.

14 72. APHIS-Wildlife Services has never prepared an EIS describing its  
15 wildlife-killing and Wildlife Damage Management Program activities in Arizona  
16 and disclosing the resulting effects on wildlife and other resources. Instead, the  
17 agency in 1994 prepared (and in 1977 corrected) a Programmatic EIS (“PEIS”) to  
18 analyze its nationwide wildlife damage control program. These documents are  
19 sometimes collectively referred to as the “1994/1997 PEIS.”

20 73. The only Arizona-specific NEPA analysis was prepared in the  
21 1990s. Specifically, in 1996, following the preparation of an Environmental  
22 Assessment, APHIS-Wildlife Services issued a Decision and Finding of No  
23 Significant Impact for Predator Damage Management on nonfederal and tribal  
24 lands in Arizona. And in 1998, APHIS-Wildlife Services issued an Environmental  
25 Assessment for Predator Damage Management on federal public lands in Arizona.



1           74.     Since then, numerous studies have been published that demonstrate  
2 the harmful effects of removing predators from ecosystems. New information  
3 regarding the humaneness and cost-effectiveness of predator control methods has  
4 also emerged since the 1990s. For example, Rashford and Grant (2010) published  
5 a literature review of economic analyses of predator control. And Treves et al.  
6 (2016) found little or no scientific support that killing predators such as wolves,  
7 mountain lions, and bears to protect livestock actually reduces livestock losses.

8           75.     The 1996 and 1998 EAs for Arizona only considered impacts on  
9 predators, including coyotes, black bears, mountain lions, bobcats, foxes,  
10 raccoons, and skunks. Yet APHIS-Wildlife Services now kills hundreds of other  
11 kinds of animals each year as part of its Wildlife Damage Management Program.  
12 For example, in 2015 in Arizona, APHIS-Wildlife Services killed 718 American  
13 coots, 1,434 mourning doves, 233 great-tailed grackles, 100 horned larks, and 129  
14 desert cottontail rabbits.

15           76.     Additional species have been listed as threatened or endangered and  
16 additional species of special concern have been identified in Arizona since the  
17 1996 and 1998 EAs. These include: New Mexico meadow jumping mouse,  
18 yellow-billed cuckoo (Western U.S. DPS), Chiricahua leopard frog, narrow-  
19 headed and northern Mexican gartersnakes, and more.

20           77.     In 2014 the Environmental Protection Agency issued a proposed  
21 registration decision for sodium nitrate (used in gas cartridges), which includes  
22 proposed mitigations for two Arizona counties to protect endangered species that  
23 could be harmed by the use of gas cartridges for wildlife damage management.

24           78.     In addition, the new information that justifies reinitiation of  
25 consultation also demonstrates the need for supplemental NEPA analysis.  
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1           79.     Approximately 20 years have passed since preparation of the 1996  
2 and 1998 EAs and 1994/1997 PEIS. For all the reasons explained above, those  
3 analyses are now outdated and can no longer be reasonably relied upon without  
4 supplemental analysis.

5   **FIRST CAUSE OF ACTION**

6           **(Defendants’ Failure to Reinitiate and Complete Section 7 Consultation)**

7           80.     Plaintiffs incorporate by reference all preceding paragraphs.

8           81.     In 2007, APHIS-Wildlife Services initiated formal consultation with  
9 FWS by preparing a Biological Assessment regarding impacts of its Wildlife  
10 Damage Management Program on ocelots, and FWS issued a Biological Opinion  
11 in 2010.

12           82.     APHIS-Wildlife Services retains discretionary involvement and  
13 control over its Wildlife Damage Management Program, and this discretion can be  
14 used for the benefit of the ocelot.

15           83.     Several triggers for reinitiation of consultation have occurred  
16 regarding APHIS-Wildlife Services’ Wildlife Damage Management Program  
17 within ocelot range. These include new information on the presence of ocelots in  
18 or near the places where Wildlife Damage Management Program activities occur,  
19 APHIS-Wildlife Services’ failure to fully comply with the 2010 BiOp, and new  
20 science on ocelots. 50 C.F.R. § 402.16. For example, the 2010 BiOp only  
21 mentions two ocelot sightings near Globe in Gila County and in western Cochise  
22 County. Since then, five additional ocelots have been detected in Arizona,  
23 including in the Huachuca Mountains, where APHIS-Wildlife Services conducts  
24 wildlife damage management activities.

25           84.     Because APHIS-Wildlife Services retains discretionary involvement  
26 and control over its Wildlife Damage Management Program and because new  
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1 information has triggered the duty to reinitiate consultation, Defendants are  
2 required to reinitiate and complete formal consultation to determine whether these  
3 wildlife-harming activities would “appreciably reduce the likelihood of survival”  
4 or recovery of ocelots.

5 85. Defendants have not reinitiated consultation on the impacts of the  
6 Wildlife Damage Management Program to ocelots.

7 86. Defendants are therefore violating, and will continue to violate,  
8 Section 7(a)(2) of the ESA and its implementing regulations by failing to ensure  
9 through reinitiated consultation that APHIS-Wildlife Services’ Wildlife Damage  
10 Management Program does not jeopardize the continued existence of the ocelot.  
11 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 402.

12 87. The APA provides the standard of review for this claim. 5 U.S.C. §  
13 706(2)(A), (D). Defendants’ refusal to fulfill its mandatory consultation duty is  
14 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
15 law. *Id.*

## 16 **SECOND CAUSE OF ACTION**

### 17 **(APHIS-Wildlife Services’ Failure to Supplement Arizona EAs or PEIS)**

18 88. Plaintiffs reallege and incorporate by reference all preceding  
19 paragraphs.

20 89. This Second Cause of Action challenges APHIS-Wildlife Services’  
21 failure to supplement the EAs and FONSIIs for Arizona prepared in the 1990s, as  
22 well as its 20-year-old 1994/1997 PEIS. These outdated documents currently  
23 govern its wildlife damage management activities in Arizona.

24 90. Agencies must prepare a supplemental NEPA analysis when  
25 “significant new circumstances or information relevant to environmental concerns  
26  
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1 and bearing on the proposed action or its impacts” emerge. 40 C.F.R. §  
2 1502.9(c)(1)(ii).

3 91. Here, significant new circumstances and information relevant to  
4 environmental concerns and bearing on APHIS-Wildlife Services’ wildlife  
5 damage management activities in Arizona and its impacts have emerged since the  
6 preparation of the previous NEPA analyses from the 1990s. For example, recent  
7 studies demonstrate the harmful effects and cruelty of removing predators from  
8 ecosystems, and additional animals have been protected under the ESA and  
9 require analysis. The EAs from the 1990s did not consider impacts of killing non-  
10 predators, such as birds, which APHIS-Wildlife Services now kills in high  
11 numbers in Arizona.

12 92. Wildlife Services’ failure or refusal to supplement its existing NEPA  
13 documents, and its failure to halt or limit its ongoing activities while completing  
14 new analyses, as required by NEPA, is arbitrary, capricious, an abuse of  
15 discretion, not in accordance with law and/or constitutes agency action unlawfully  
16 withheld or unreasonably delayed under Section 706 of the APA, which has  
17 caused or threatens serious prejudice and injury to Plaintiffs’ rights and interests.

18 **REQUEST FOR RELIEF**

19 WHEREFORE, Plaintiffs respectfully request that this Court:

20 1. Declare that Defendants have violated and are violating Section  
21 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, 50  
22 C.F.R. Part 402, by failing to reinitiate and complete the consultation necessary to  
23 ensure that APHIS-Wildlife Services’ Wildlife Damage Management Program is  
24 not likely to jeopardize the continued existence of the ocelot;

25 2. Declare that APHIS-Wildlife Services has violated and is violating  
26 NEPA, 42 U.S.C. §§ 4321 *et seq.*, and the implementing CEQ regulations, 40  
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1 C.F.R. §§ 1500.1 *et seq.*, by failing to supplement the NEPA analyses it has  
2 prepared in the 1990s governing its wildlife damage management activities in  
3 Arizona;

4 3. Order Defendants to reinitiate and complete the required Section 7  
5 consultation under the ESA;

6 4. Order APHIS-Wildlife Services to complete the required NEPA  
7 analysis;

8 5. Enjoin Defendants and their agents from proceeding with  
9 implementing the challenged Wildlife Damage Management Program unless and  
10 until the violations of federal law set forth herein have been corrected to the  
11 satisfaction of this Court;

12 6. Award Plaintiffs their reasonable fees, costs, and expenses  
13 associated with this litigation under 16 U.S.C. § 1540(g)(4) and 28 U.S.C. § 2412;  
14 and

15 7. Grant Plaintiffs such other and further relief as the Court deems just  
16 and equitable.

17  
18 Respectfully submitted and dated this 4th day of October, 2016:

19 /s/ Collette L. Adkins

20 \_\_\_\_\_  
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