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17 and KRISTOFOR A. LEINASSAR

18 **UNITED STATES DISTRICT COURT**
19 **EASTERN DISTRICT OF CALIFORNIA**

20 F.I.M. CORP, a Nevada Corporation, FRED
21 FULSTONE, MARIANNE F. LEINASSAR,
22 KRISTOFOR A. LEINASSAR

23 Plaintiffs,

24 v.

25 KENNETH LEE SALAZAR, as Secretary of the
26 United States Department of the Interior;
27 UNITED STATES DEPARTMENT OF THE
28 INTERIOR; UNITED STATES FISH AND
WILDLIFE SERVICE; DANIEL ASHE, as
Director of the United States Fish and Wildlife
Service, United States Department of the Interior;
REN LOHOEFENER, as Regional Director of
the United States Fish and Wildlife Service,
Pacific Southwest Region, United States
Department of the Interior; RICHARD
COLEMAN, as Senior Science Advisor and
Scientific Integrity Officer of the United States
Fish and Wildlife Service, United States
Department of the Interior; TOM VILSACK, as
Secretary of the United States Department of
Agriculture; UNITED STATES DEPARTMENT

Case No.:

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

1 OF AGRICULTURE; WILLIAM H. CLAY, as
2 Deputy Administrator, ANIMAL AND PLANT
3 HEALTH INSPECTION SERVICES,
4 WILDLIFE SERVICES, United States
5 Department of Agriculture, et al.

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Defendants.

1 **I. INTRODUCTION**

2 1. Plaintiffs F.I.M. CORPORATION, FRED FULSTONE, MARIANNE F.
3 LEINASSAR, and KRISTOFOR A. LEINASSAR (“F.I.M.”) bring this action seeking declaratory and
4 injunctive relief to cure continuing and unlawful harm, injury and death to Sierra Nevada Bighorn
5 Sheep (*Ovis canadensis californiana* , now known as *Ovis canadensis sierrae*) (hereinafter “SNBS”)
6 due to the conduct of the Defendants KENNETH LEE SALAZAR, as Secretary of the United States
7 Department of the Interior; the UNITED STATES DEPARTMENT OF THE INTERIOR; the
8 UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL ASHE, as Director of the United
9 States Fish and Wildlife Service; REN LOHOEFENER, as Regional Director of the United States Fish
10 and Wildlife Service, Pacific Southwest Region; RICHARD COLEMAN, as Senior Science Advisor
11 and Scientific Integrity Officer of the United States Fish and Wildlife Service (hereinafter collectively
12 “FWS Defendants” or “FWS”); TOM VILSACK, as Secretary of the United States Department of
13 Agriculture; the UNITED STATES DEPARTMENT OF AGRICULTURE; and WILLIAM H. CLAY,
14 as Deputy Administrator, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, WILDLIFE
15 SERVICES, United States Department of Agriculture (hereinafter collectively “USDA Defendants” or
16 “USDA”). Specifically, Plaintiffs challenge: (1) FWS Defendants’ approval, authorization and/or
17 funding of the translocation of SNBS into an area within the Sierra Nevada Mountains north of
18 Mammoth Lakes, California identified by FWS as the “Northern Recovery Unit” (hereinafter “NRU”)
19 in the Final Rule regarding Designation of Critical Habitat for the Sierra Nevada Bighorn Sheep (*Ovis*
20 *canadensis sierra*); (2) FWS Defendants’ ongoing approval, authorization and/or funding of
21 translocations into the NRU, and failure to rescue the surviving SNBS from the NRU despite the
22 continuing population declines and deaths resulting from lack of suitable habitat; (3) FWS
23 Defendants’ approval, authorization and/or funding of a contract with the USDA Defendants for
24 wildlife damage management activities that failed to adequately control predation, particularly by
25 mountain lions, resulting in the deaths of SNBS; and (4) USDA Defendants’ failure to properly
26 implement predator control measures, all in violation of the federal Endangered Species Act
27 (hereinafter “ESA”), 16 U.S.C. §§ 1531, *et. seq.*, and in violation of the Administrative Procedure Act,
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1 5 U.S.C. §§ 701, *et. seq.*, (hereinafter “APA”) by failing to comply with legal obligations pursuant to
2 the ESA.

3 2. FWS Defendants in cooperation with the California Department of Fish and Wildlife
4 (hereinafter “CDFW”), have authorized “translocations” (used interchangeably in government agency
5 funded studies and reports with the terms “transplant” and “transplantations”) of the SNBS by CDFW,
6 which has included physically removing individual sheep from herds in other occupied areas and
7 placing them in the NRU. This conduct has followed the reintroduction of the NRU herds into places
8 these sheep had abandoned for generations. These NRU herds have been augmented by additional
9 translocations from other areas over the years to compensate for excessive losses of SNBS that have
10 been unable to survive in the NRU.

11 3. FWS Defendants, in cooperate
12 on with CDFW, have authorized, approved, monitored, and funded the translocation
13 operations placing SNBS in the NRU where they have insufficient habitat to support their normal
14 behavioral patterns, including, but not limited to, breeding, feeding or sheltering.

15 4. FWS Defendants are aware of the peril faced by the SNBS in the NRU and the
16 dangers associated with translocations to that area. Despite this knowledge and in the face of the best
17 available scientific data to the contrary, FWS Defendants continue to allow CDFW to send more
18 SNBS to their deaths and have continually failed to rescue the surviving SNBS.

19 5. USDA Defendants have failed to implement adequate predator control measures under
20 the Intergovernmental Agreement with FWS for tracking and lethal removal of mountain lions that kill
21 SNBS. USDA Defendants thus have contributed to the creation of an environment where SNBS have
22 been forced to flee to or overwinter in unsuitable habitat, thereby increasing their susceptibility to
23 weather related perils and resulting in their deaths.

24 **II. JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

25 6. Each and every allegation set forth in paragraphs 1 through 5 of this Complaint is
26 incorporated herein by reference.

27 7. Plaintiffs bring this action on their own behalf raising federal questions pursuant to 16
28 U.S.C. § 1533(a)(3)(A) (critical habitat designation), 16 U.S.C. § 1535(c)(1) (cooperative

1 agreements), and 16 U.S.C. § 1538(a)(1)(B) (prohibition on take) for actions arising under the ESA,
2 and 5 U.S.C. §§ 701, et seq., as an Administrative Procedure Act (hereinafter “APA”) action to
3 resolve ESA violations.

4 8. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C.
5 § 2201 (declaratory relief); 28 U.S.C. § 2202 (injunctive relief); 28 U.S.C. § 1361 (mandamus), and
6 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA citizen suit provision).

7 9. As required by the ESA's citizen suit provision, 16 USC. § 1540(g), F.I.M. has
8 provided the FWS, the Secretary of the Interior and USDA Defendants with written notice of intent to
9 sue for the violations of law alleged in this Complaint more than sixty days ago. *See Exhibit A*
10 attached hereto. Further, the FWS has not remedied these violations of law. The USDA also has not
11 remedied these violations of law. The Secretary of the Interior has not acted to enforce the ESA.

12 10. An actual justiciable controversy exists between the parties within the meaning of the
13 Declaratory Judgment Act, 28 USC § 2201. F.I.M. is adversely affected and aggrieved by FWS
14 Defendants' and USDA Defendants' conduct and is entitled to judicial review of such conduct within
15 the meaning of the ESA and the APA.

16 11. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) because the
17 translocations of SNBS in violation of the ESA have occurred in areas in and around Mono County,
18 California.

19 III. PARTIES

20 Plaintiffs

21 12. Plaintiff F.I.M. Corp. is a family owned and operated domestic sheep operation that is
22 incorporated in the State of Nevada with headquarters in Smith, Nevada, which is in Lyon County.
23 Lyon County, Nevada is adjacent to Mono County, California. F.I.M. Corp.'s current owners and
24 operators are Plaintiffs Fred Fulstone, his daughter, Marianne F. Leinassar, and his grandson,
25 Kristofor A. Leinassar (collectively “F.I.M.”). F.I.M. has deep roots in the areas where SNBS are
26 located, including ownership of extensive private lands in both Mono County, California and Lyon
27 County, Nevada. The first Fulstone homesteaded in 1854, and the first ranch in the Fulstone's
28 heritage was purchased in Smith Valley in 1903. The Fulstones began raising sheep and cattle in

1 1910. The Fulstone family formed F.I.M. Corp. on March 3, 1972. From the beginning, F.I.M. has
2 been a steward of the wildlife and other natural resources as the family's history, culture and way of
3 life are centered around healthy and productive rangelands that are essential for herding sheep on open
4 range as the major component of their ranching operations. F.I.M. relies on these agricultural
5 enterprises and the health of the surrounding environment for their income, survival, their way of life,
6 their ability to employ up to twenty people, and their ability to contribute to the customs and economy
7 of the community. The "take" of SNBS is threatening their livelihood and the future opportunity for
8 each generation to continue with their family traditions.

9 13. For years, F.I.M. has participated actively and extensively in the decision-making
10 processes related to the conservation and recovery of the SNBS. Beginning in the 1980s and
11 continuing to this day, F.I.M. has cooperated in the efforts to save the SNBS from extinction. F.I.M.
12 has voluntarily made substantial and costly changes to its sheep herding operation to ensure the
13 survival of the species. F.I.M. has been sufficiently involved with the conservation of SNBS to
14 achieve applicant status in several ESA consultations with federal agencies. F.I.M. currently
15 participates in the SNBS recovery process and advocates on behalf of this species for the FWS
16 Defendants to decide and act on the fact that the NRU is not suitable habitat for SNBS survival or
17 recovery and the translocations into that area should cease.

18 14. F.I.M. previously presented substantial comments regarding scientific data pertinent to
19 the critical habitat designation in the NRU showing that it does not provide suitable year-round habitat
20 for the SNBS.

21 15. In addition to careful stewardship of ranch operations and devoted participation in
22 community activities, F.I.M. enjoys the natural beauty and diverse wildlife of the Sierra Nevada
23 Mountains. Each member of the family corporation derives recreational, conservation, spiritual, and
24 aesthetic benefits from the presence of all forms of wildlife, including the preservation and protection
25 of threatened and endangered species under the ESA, such as the SNBS. F.I.M. is dedicated to
26 intensively managing its sheep herding operations, which includes daily concern for the health and
27 well-being of each individual sheep. Each member of the family corporation takes seriously the duty
28 to protect the domestic sheep herd, which further manifests as a natural concern for the SNBS that are

1 dead or dying in the hills surrounding the family home and ranch. Due to the location of F.I.M.'s
2 domestic sheep herding operations, and for personal and recreational purposes, each member of the
3 family corporation has spent and plans to continue to spend time in the habitat areas occupied by the
4 SNBS.

5 **FWS Defendants**

6 16. Defendant Kenneth Lee Salazar is the Secretary ("Secretary) of the United States
7 Department of the Interior ("DOI") and is the highest-ranking official within DOI. The Secretary has
8 the ultimate responsibility for the administration and implementation of the ESA. He is named in his
9 official capacity.

10 17. Defendant Daniel Ashe is Director ("Director") of the United States Fish and Wildlife
11 Service ("FWS"), the nation's principal federal agency responsible for conservation of fish and
12 wildlife and their habitats. The Secretary has delegated responsibility to the Director to ensure
13 compliance with the ESA. He is named in his official capacity.

14 18. Defendant Ren Lohofener is the Regional Director of the FWS Pacific Southwest
15 Region and oversees FWS programs in California and Nevada. He is responsible for implementation
16 of the ESA. He is named in his official capacity.

17 19. Defendant Richard Coleman is the Senior Science Advisor and Scientific Integrity
18 Officer for FWS programs and oversees the development of biological data under standards set for
19 DOI and guidelines for the implementation of the Information Quality Act, among other science
20 policies. He is named in his official capacity.

21 **USDA Defendants**

22 20. Defendant Tom Vilsack is Secretary of the United States Department of Agriculture
23 ("USDA") and is responsible for providing leadership on food, agriculture, natural resources, and
24 related issues based on sound public policy, the best available science and efficient management. He
25 is sued in his official capacity.

26 21. Defendant William H. Clay is the Deputy Administrator, Animal and Plant Health
27 Inspection Service ("APHIS"), Wildlife Services ("WS"), USDA, and has been delegated the
28 responsibility for overall planning, coordination, and direction of the national WS operational and

1 research programs. APHIS provides federal expertise in controlling predator populations and assisting
2 in the recovery of species listed under the ESA. He is sued in his official capacity.

3 **IV. LEGAL BACKGROUND**

4 **ESA Section 4 Critical Habitat**

5 22. Congress enacted the ESA in order to “conserve to the extent practicable the various
6 species facing extinction” (16 U.S.C. § 1531(a)(4)) and to protect species that “have been so depleted
7 in numbers that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(2).
8

9 23. The ESA was enacted in recognition of the fact that endangered and threatened species
10 provide “aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation
11 and its people.” 16 U.S.C. § 1531(a)(3).

12 24. The ESA is designed to "provide a means whereby the ecosystems upon which
13 endangered species and threatened species depend may be conserved, [and] to provide a program for
14 the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). The ESA
15 provides protection for endangered and threatened species and their habitats, including the SNBS. 16
16 U.S.C. §§ 1531, *et. seq.*

17 25. Section 4 of the ESA requires the Secretary, concurrent with the listing of the species
18 under the ESA, to designate any habitat of such species which is then considered to be critical habitat
19 on the basis of the best scientific and commercial data available and, after taking into consideration
20 the economic impact, the impact on national security, and any other relevant impact of specifying any
21 particular area as critical habitat. 16 U.S.C § 1533(a)(3)(A)(i); 16 U.S.C. § 1533(b)(2).

22 26. Critical habitat includes those “areas within the geographical area occupied by the
23 species, at the time it is listed ... on which are found those physical or biological features (I) essential
24 to the conservation of the species and (II) which may require special management considerations or
25 protection.” 16 U.S.C. § 1532(5)(A)(i). Unoccupied areas may also be included if they are deemed
26 essential to the species' conservation. 16 U.S.C. § 1532(5)(A)(ii).

27 27. FWS regulations provide criteria for designating critical habitat which requires the
28 Secretary to focus on the principal biological or physical constituent elements within the defined area

1 that are essential to the conservation of the species, also known as primary constituent elements
2 (“PCEs”). These PCEs must be listed with the critical habitat description. Primary constituent
3 elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning
4 sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant
5 pollinator, geological formation, vegetation type, tide, and specific soil types. 50 C.F.R. § 424.12.

6 28. Section 4 of the ESA further requires the Secretary to develop and implement
7 “recovery plans” for the conservation and survival of each protected species. 16 U.S.C. § 1533(f).

8 29. “Conservation” means “the use of all methods and procedures which are necessary to
9 bring any endangered species or threatened species to the point at which the measures provided
10 pursuant to [the ESA] are no longer necessary.” 16 U.S.C. § 1532(3).

11 **ESA Section 6 Cooperative Agreement**

12 30. The Secretary may enter into cooperative agreements pursuant to section 6 of the ESA
13 with “any State for the administration and management of any area established for the conservation of
14 endangered species or threatened species”. 16 U.S.C. § 1535(b).

15 31. A cooperative agreement authorized pursuant to Section 6 of the ESA is one which
16 “establishes and maintains an adequate and active program for the conservation of endangered species
17 and threatened species”. 16 U.S.C. § 1535(c)(1).

18 32. A state program may only be considered “an adequate and active program for the
19 conservation of endangered species and threatened species” if the Secretary finds such a program
20 exists and reconfirms it annually thereafter. 16 U.S.C. § 1535 (c)(1).

21 33. The Secretary is authorized to provide financial assistance to “any State, through its
22 respective State agency, which has entered into a cooperative agreement” to assist in the development
23 of conservation programs. 16 U.S.C. § 1535(d).

24 **ESA Section 9 Take Prohibition**

25 34. Principal among the ESA's system of species protection is the Section 9 prohibition
26 rendering it illegal for any “person” to “take” any species listed as endangered. 16 U.S.C. §
27 1538(a)(1)(B). This Section 9 prohibition against taking applies equally to species listed as
28 threatened. 50 C.F.R. § 17.31.

1 35. The ESA defines the term “take” broadly, as meaning to “harass, harm, pursue, hunt,
2 shoot, wound kill, trap, capture, or collect, or to attempt to engage in any such conduct”. 16 U.S.C. §
3 1532(19) (1982); *See, e.g., Bensman v. U.S. Forest Service*, 984 F. Supp. 1242 (W.D. Mo. 1997)
4 [stating that this prohibition against taking is broadly construed to prohibit nearly any activity which
5 might adversely affect protected species].

6 36. The broadest term in this definition is “harm,” which the Secretary has defined as “an
7 act which actually kills or injures wildlife. Such act may include significant habitat modification or
8 degradation where it actually kills or injures wildlife by significantly impairing essential behavioral
9 patterns, including breeding, feeding [sic] or sheltering.” 50 C.F.R. § 17.3; *See, e.g., Sweet Home*
10 *Chapter of Communities for a Great Oregon v. Babbitt*, 515 U.S. 687 (1995). The regulations define
11 “harass,” as well, to mean “an intentional or negligent act or omission which creates the likelihood of
12 injury to wildlife by annoying to such an extent as to significantly disrupt normal behavioral patterns
13 which include, but are not limited to, breeding, feeding [sic] or sheltering”. 50 C.F.R. § 17.3.

14 37. The term “person” with respect to those liable for “take” includes “any officer,
15 employee, agent, department, or instrumentality ... of any State, municipality, or political subdivision
16 of a State ... [or] any State, municipality, or political subdivision of a State” 16 U.S.C. § 1532(13).

17 38. The take prohibitions specifically apply to employees or agents of the FWS or a state
18 conservation agency operating under a cooperative agreement. 50 C.F.R. § 17.31(b).

19 39. The ESA prohibits not only direct take of endangered and threatened wildlife, but also
20 prohibits any person from attempting to commit, soliciting another to commit, or causing to be
21 committed an unauthorized take. 16 U.S.C. § 1538(g). “[A] governmental third party pursuant to
22 whose authority an actor directly exacts a taking of an endangered species may be deemed to have
23 violated the provisions of the ESA.” *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997).

24 40. The ESA provides for limited exceptions to the prohibition against take pursuant to:
25 (1) section 7 governing the issuance of biological opinions on actions “authorized, funded, or carried
26 out” by a federal agency where “the taking of an endangered species or a threatened species is
27 incidental to the agency action and will not violate” the ESA, subject to a written statement by the
28 Secretary verifying the impacts, terms and conditions of the take (incidental take statement or

1 “ITS”)(16 U.S.C. § 1536(a)(2); 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i); and (2) section 10
2 governing the issuance of permits to private parties where the “taking will be incidental to and not the
3 purpose of” a habitat conservation plan (incidental take permit or “ITP”) (16 U.S.C. § 1539(a)(1)(B));
4 16 U.S.C. § 1539(a)(2)(A)-(C)), or to others “for scientific purposes or to enhance the propagation or
5 survival of the affected species” (16 U.S.C. § 1539(a)(1)(A)), or for enumerated exemptions (*See e.g.*,
6 16 U.S.C. §§ 1539(b), (e), (f), (h), and (j)).

7 41. The exceptions under section 10(a)(1)(A) and (b) do not apply where the activities
8 have operated to the disadvantage of the endangered species and are inconsistent with the purposes
9 and policy of the ESA as set forth in 16 U.S.C. §§ 1531(b) and (c).

10 42. Any person claiming the benefit of any permit or exemption from the section 9
11 prohibition against take pursuant to the exceptions authorized under section 10 “shall have the burden
12 of proving that the exemption or permit is applicable, has been granted, and was valid and in force at
13 the time of the alleged violation.” 16 U.S.C. § 1539(g).

14 **Administrative Procedure Act**

15 43. The APA provides for judicial review of final agency action by persons “aggrieved”
16 by such action. 5 U.S.C. § 702. An action is reviewable under the APA for an agency’s failure to
17 comply with the ESA’s requirement for use of the best scientific and commercial data available. *See*
18 *Bennett v. Spear*, 520 U.S. 154(1997).

19 44. Under the APA, a reviewing court shall “hold unlawful and set aside agency action,
20 findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not
21 in accordance with law.” 5 U.S.C. § 706(2)(A). A reviewing court shall also “hold unlawful and set
22 aside agency action, findings and conclusions found to be...without observance of procedure required
23 by law.” 5 U.S.C. § 706(2)(D).

24 **V. FACTUAL BACKGROUND**

25 **The Sierra Nevada Mountains and Recovery Units**

26 45. The Sierra Nevada is named “snowy mountain range. The areas identified as “critical
27 habitat” for the SNBS span the Sierra Nevada Mountain Range from the Twin Lakes area west of
28 Bridgeport, California and north of Mammoth Lakes to the Kern River.

1 46. Currently, five subpopulations of SNBS are reported by FWS Defendants to occur at
2 Lee Vining Canyon, Wheeler Crest, Mount Baxter, Mount Williamson, and Mount Langley in Mono
3 and Inyo Counties, three of which have been reintroduced using sheep obtained from the Mount
4 Baxter subpopulation beginning in 1979. 73 Fed. Reg. 45539 (August 5, 2008). The translocated Lee
5 Vining Canyon herds currently occupy habitat on Mount Warren, elevation 12,327 ft., and Mount
6 Gibbs, elevation 12,773 ft., at some of the higher points along the Sierra Nevada Mountain Range.

7 47. FWS Defendants' rely on reports which state that most SNBS live between elevations
8 of 3,050 and 4,270 m (10,000 and 14,000 ft.) in summer. In winter, they occupy high, windswept
9 ridges, or migrate to the lower elevation sagebrush-steppe habitat as low as 1,460 m (4,800 ft.) to
10 escape deep winter snows and find more nutritious forage. John David Wehausen, Sierra Nevada
11 Bighorn Sheep History and Population Ecology (A dissertation submitted in partial fulfillment of the
12 requirements for the degree of Doctor of Philosophy (Natural Resources) in The University of
13 Michigan (1980). Lambing areas are on safe, precipitous rocky slopes. They prefer open terrain where
14 they are better able to see predators. For these reasons, forests and thick brush usually are avoided if
15 possible (J. Wehausen, pers. Comm. 1999).

16 48. FWS Defendants have identified areas known as "Recovery Units" which include the
17 Northern Recovery Unit or NRU (*e.g.*, Lee Vining Canyon, Lundy Canyon, Mount Warren, and
18 Mount Gibbs), the Central Recovery Unit and the Southern Recovery Unit. The only naturally
19 occurring populations of SNBS are in the Southern Recovery Unit (*e.g.*, Mount Baxter), and artificial
20 populations that were translocated from other areas are found in the Central Recovery Unit (*e.g.*,
21 Wheeler Ridge) and the NRU. Due to the FWS Defendants' authorized translocations, SNBS are now
22 found in several areas throughout the Sierras, including the NRU.

23 49. The original SNBS populations translocated into the NRU were placed in Lee Vining
24 Canyon, an area located between Mount Warren and Mount Gibbs, and have over the last 20 years
25 wandered into other areas of the NRU in an effort to survive.

26 50. Lundy Canyon is located north of Mount Warren in the NRU and is similar to Lee
27 Vining Canyon, except the area designated by FWS Defendants as SNBS winter range is higher in
28 elevation.

1 abundance of SNBS and that, to the contrary, the NRU has always presented an inhospitable winter
2 climate where survival was difficult.

3 56. From 1900 to 1960, a naturally occurring herd of BHS living on Mount Baxter (in the
4 Southern Recovery Unit) steadily increased in number to a total of 350 to 400. BHS have not been
5 known to naturally move to locations north of Mammoth Lakes, California.

6 57. Surviving native herds in the Sierra Nevada were listed as rare under the 1970
7 California Endangered Species Act, Fish and Game Code §§ 2050, *et. seq* (hereinafter “CESA”). In
8 1984, this listing status was changed to threatened.

9 58. By the 1970s, BHS persisted in only two areas in the Sierra Nevadas, the Mount
10 Baxter and Sawmill Canyon herds. Together these herds contained at least 220 sheep in 1978.

11 SNBS History

12 59. Beginning in 1979, the Mount Baxter and Sawmill Canyon herds were used by the
13 CDFW as sources of stock for translocations, with subsequent removals in 1980, 1982, 1986, 1987,
14 and 1988, totaling 103 individuals. These sheep were translocated to Wheeler Ridge (in the Central
15 Unit) (1979, 1980, 1982, 1986), Mount Langley (in the Southern Unit) (1980, 1982, 1987), Lee
16 Vining Canyon (in the NRU) (1986, 1988), and the south Warner Mountains in northeastern
17 California.

18 60. In 1979 and 1980, biologist, John Wehausen, stated there was support for the
19 contention that, in areas north of the Owens Valley, “snow conditions there are too severe for
20 bighorn.” Dr. Wehausen is considered the senior biologist responsible for writing the SNBS 2007
21 Recovery Plan and prescribing the recovery efforts. *See* Wehausen, J.D., *Sierra Nevada Bighorn*
22 *Sheep: An Analysis of Management Alternatives* (Winter 1979); *See also* Wehausen, J.D., *Sierra*
23 *Nevada Bighorn Sheep: History and Population Ecology* (1980) (unpublished Ph.D dissertation,
24 University of Michigan).

1 61. In September of 1984, a group of federal and state agency officials that included
2 Wehausen and other biologists convened as the Sierra Bighorn Interagency Advisory Group
3 (hereinafter "Advisory Group") and wrote the 1984 *Sierra Nevada Bighorn Sheep Recovery and*
4 *Conservation Plan* (hereinafter "1984 Recovery Plan"). The Advisory Group describes Lee Vining
5 Canyon after a year of less than average snowpack and concludes that, during years of extreme
6 snowpack, "winter lamb survival and spring lamb production may be reduced."

7
8 62. In 1986, FWS Defendants cooperated with CDFW in the decision to reintroduce the
9 SNBS into Lee Vining Canyon, which lies within the Inyo National Forest. Inyo National Forest
10 officials issued an Environmental Assessment (hereinafter "EA") evaluating this project in compliance
11 with the National Environmental Policy Act (hereinafter "NEPA"). 42 U.S.C. §§ 4321, *et. seq.* The
12 EA referred to the severity of the winter weather in these areas and the potential need to feed hay to
13 the SNBS to allow them to survive the winter. The decision-making agencies also stated plainly that
14 they planned to rescue any survivors if the herds suffered a winter kill.

15
16 63. At least one-third of the SNBS translocated into the NRU in 1986 died during the
17 following winter and yet more were transplanted in 1988. By 1989, twenty of the original thirty-
18 eight sheep transplanted to Lee Vining Canyon were dead.

19 64. On August 28, 1991, FWS entered into an agreement with CDFW pursuant to Section
20 6 of the ESA, 16 U.S.C. § 1535(c), for the management and recovery of threatened or endangered fish,
21 wildlife, or plants, which now includes the SNBS (hereinafter "Cooperative Agreement"). As
22 provided in the Cooperative Agreement and subsequent renewals, CDFW is the state agency which,
23 with partial funding provided by the FWS under the auspices of the ESA, manages and funds the
24 translocation operation that has resulted in SNBS deaths.

25
26 65. Conclusions regarding the lack of dependable winter habitat and the danger to the
27 SNBS were also described by Les Chow in: Chow, L. S. 1991. "Population dynamics and movement
28

1 patterns of bighorn sheep reintroduced in the Sierra Nevada, California.” M.S. Thesis, University of
2 California, Berkeley.

3 66. During the winter of 1995, the herd translocated into the NRU suffered in excess of a
4 65% mortality rate in one year, dropping from more than eighty-five SNBS to just twenty-nine
5 survivors. Additional catastrophic death losses occurred in the winters of 1998, 2005, 2008, and
6 2010-2011. In each of these years, the SNBS suffered from malnutrition and died because of
7 starvation and other weather related causes, yet FWS Defendants failed to initiate a rescue effort.
8

9 67. Between 1995 and 2000, the NRU population declines continued. Winter death losses
10 in 1998 led to the emergency listing of the SNBS as endangered in 1999.

11 68. In 1997, FWS Defendants updated the 1984 Recovery Plan in the document titled *A*
12 *Conservation Strategy for Sierra Nevada Bighorn Sheep* (hereinafter “1997 Recovery Plan”). This
13 document includes similar descriptions of elevation as a limiting factor in the suitability of SNBS
14 winter habitat. These same conclusions were included in various publications available to FWS
15 Defendants regarding translocations of the SNBS in the Sierra Nevada Mountains of California.
16

17 69. In 1999, the California Fish and Game Commission upgraded the status of the SNBS
18 under CESA to endangered. By 2000, a meager total of twenty-one SNBS remained in the NRU.
19 Only four SNBS were found in Lee Vining Canyon.

20 70. On April 20, 1999, FWS Defendants granted emergency endangered status to bighorn
21 sheep inhabiting the Sierra Nevada Mountains of California as a distinct population segment (“DPS”)
22 of Sierra Nevada bighorn sheep. Simultaneously, the FWS Defendants published a proposed rule to
23 list the species as endangered. 64 Fed. Reg. 19300-19309 (April 20, 1999).
24

25 71. On December 1, 1999, FWS Defendants and USDA Defendants completed the Final
26 Environmental Assessment for approval of predator control specifically to protect the SNBS. *See*
27 U.S. Department of Agriculture, Wildlife Services. *Predator Damage Management to Protect The*
28 *Federally Endangered Sierra Nevada Bighorn Sheep*. Final Environmental Assessment (1999).

1 72. On January 3, 2000, FWS Defendants published the final rule granting endangered
2 status to the SNBS population. 65 Fed. Reg. 20-30 (January 3, 2000).

3 73. In May 2003, FWS Defendants released the draft SNBS Recovery Plan. F.I.M.
4 submitted timely written comments to FWS Defendants stating that the draft Recovery Plan failed to
5 include technical or objective evaluations of seasonal habitats or the lack of dependable winter
6 habitat in the NRU. U.S. Fish and Wildlife Service. Draft recovery plan for the Sierra Nevada
7 bighorn sheep (*Ovis canadensis californiana*). U.S. Fish and Wildlife Service, Portland, OR.
8 pp. xiii - 147 (2003).

9
10 74. In February 2006, FWS Defendants released the draft Final SNBS Recovery Plan. On
11 October 9, 2006 F.I.M. submitted extensive and timely written comments regarding the agencies'
12 failure to use technically sound descriptions of habitat features, both as they exist and as they are
13 required by SNBS. U.S. Fish and Wildlife Service, *Draft Final Recovery Plan for the Sierra Nevada*
14 *Bighorn Sheep (Ovis canadensis californiana)* (February 2006).

15
16 75. On July 25, 2007, FWS Defendants published the Proposed Rule for *Designation of*
17 *Critical Habitat for the Sierra Nevada Bighorn Sheep (Ovis canadensis californiana) and Proposed*
18 *Taxonomic Revision*. 72 Fed. Reg. 40956-41008 (July 25, 2007). F.I.M. cooperated with FWS
19 Defendants by supplying data extracted from business records for the FWS Defendants to use in the
20 economic analysis of critical habitat designation. F.I.M. also submitted timely written comments to
21 FWS Defendants objecting to the incorrect identification of critical habitat in the NRU.

22
23 76. On September 24, 2007, FWS Defendants and CDFW jointly issued a document titled
24 *Recovery Plan for Sierra Nevada Bighorn Sheep* (hereinafter "2007 Recovery Plan"), a recovery plan
25 used by FWS Defendants to delineate reasonable actions that they believe to be required to recover
26 and/or protect listed species. F.I.M. submitted timely written and oral comments objecting to the use
27 of subjective statements and conclusions that were not supported by factual data regarding
28 sustainability of translocations into the NRU.

1 77. On August 5, 2008, FWS Defendants published the Final Rule for the *Designation of*
2 *Critical Habitat for the Sierra Nevada Bighorn Sheep (Ovis canadensis sierrae) and Taxonomic*
3 *Revision* (hereinafter “2008 CHD”). 73 Fed. Reg. 45534-45604 (August 5, 2008). Again, F.I.M.
4 submitted timely written comments to FWS objecting to the incorrect identification of critical habitat
5 in the NRU.

6 78. In a letter dated June 21, 2012, the Acting Administrator of USDA’s APHIS wrote
7 identical individual letters to Mr. Fred Fulstone, Mrs. Marianne F. Leinassar and Mr. Kristofor A.
8 Leinassar in response to F.I.M.’s 60-Day notice of intent to sue for violations of section 9 of the ESA
9 regarding take of SNBS. According to the June 21, 2012 letter, APHIS “provided compensated
10 services to FWS through an interagency agreement” with respect to predator control and the SNBS
11 located in the NRU. This letter offered no relief from the harm being suffered by the SNBS.

12 79. In a letter dated August 17, 2012, the Acting Regional Director of the FWS, Pacific
13 Southwest Region, wrote to Mr. Fred Fulstone of F.I.M. and acknowledged receipt of F.I.M.’s 60-day
14 notice of intent to sue for violations of section 9 of the ESA regarding take of SNBS. This letter
15 offered no relief from the harm being suffered by the SNBS.

16 **Habitat Requirements**

17 80. The population size of the SNBS is dependent upon the ability of a herd to do several
18 things: to survive year round and successfully reproduce; to find adequate low-elevation winter
19 forage in order to meet the nutritional requirements that will result in their survival through the winter
20 as well as the production of healthy lambs; to migrate to suitable seasonal habitat, especially that
21 needed for the winter; and to avoid or escape predators.

22 81. Despite numerous years of heavy winter kills, FWS Defendants have never required
23 that feed be placed in the NRU, nor have they demanded that CDFW rescue the few animals still
24 clinging to survival.

25 82. This calamity has occurred during each heavy winter, and FWS Defendants have
26 failed to heed the best available science in conducting their activities, thus further endangering the
27 remaining SNBS.

28

1 83. Despite the initial NRU die-off, additional SNBS have been transplanted to the NRU
2 and continue to die. In 2002, FWS Defendants approved translocations of SNBS into Lundy Canyon
3 within the NRU. In the spring of 2008, only sixteen SNBS had survived, but FWS Defendants still
4 approved the translocation of additional sheep in 2009.

5 84. The 2007 Recovery Plan outlined the conservation program designed by the FWS
6 Defendants and the CDFW as parties to the Cooperative Agreement for recovery of the SNBS. All
7 translocation and recovery operations within the State of California must be conducted in accordance
8 with the Cooperative Agreement and the 2007 Recovery Plan.

9 85. Between 2000 and 2011, the NRU herd populations fluctuated, but continued to show
10 an overall decline. From 2008 to 2011, the NRU population decreased despite the translocation of
11 six pregnant ewes, an effective increase of twelve, in 2009. Numbers dropped from a maximum of
12 forty-one SNBS to twenty-six, with only eleven ewes remaining in the entire NRU.

13 86. NRU and Central Recovery Unit reports listed weather related conditions, primarily
14 avalanches, as a large limiting factor for populations as well as malnutrition that was the result of
15 forage not being available in deep snow. In the Southern Recovery Unit, where the SNBS faced
16 primarily competition and predation as limiting factors, the population increased and continued to
17 provide translocation stock for the other units.

18 87. In the 2008 CHD, and in every year since then, FWS Defendants have ignored the best
19 available science and clear empirical evidence indicating that the translocations into the NRU north
20 of Mammoth Lakes have resulted in catastrophic losses during heavy and/or late winters, low adult
21 survival rates and low reproductive success. FWS Defendants instead still erroneously identify the
22 NRU as possessing the Primary Constituent Elements (“PCEs”) necessary for SNBS survival.
23 Habitat must provide those elements necessary for the annual cycle of foraging within each season,
24 breeding, lambing, movement to seasonal habitats, and predator avoidance. PCEs must be available
25 every year or population losses will occur and herds will fail to thrive.

26 88. Translocations of the SNBS into the NRU have continued to the present. The herds in
27 the NRU continue to struggle, continue to suffer a high rate of winter kills, and continue to receive
28 translocated SNBS. Despite the regular augmentation of the herds in the NRU, these herds barely

1 survive or they decline, displaying no signs of the recovery demonstrated by the herds living within
2 suitable habitat.

3 89. Population statistics reported by CDFW support the conclusion that the NRU does not
4 contain the appropriate PCEs.

5 90. The SNBS have distinct requirements for winter and summer range. SNBS cannot
6 move or forage in deep snow due to their small stature so they display substantial altitudinal
7 migration of 3,000 to 5,000 feet or more.

8 91. The PCEs of preferred habitat for SNBS, in addition to unique winter and summer
9 range requirements, include visual openness and close proximity to steep, rocky terrain used to
10 escape from predators.

11 **Elevation In Relation To Predator Avoidance**

12 92. The SNBS typically will range in weight from 100-220 pounds and are agile and built
13 for moving short distances rapidly, over steep, rocky terrain, which is their means of escaping
14 predators. Since the SNBS are built for short distances, they rely on keen eyesight to detect
15 predators.

16 93. According to the 1997 Recovery Plan, during the periods of increasing mountain lion
17 predation, SNBS have been found to cease regular use of low elevation winter ranges as they attempt
18 to avoid predation. 1997 Recovery Plan *Overview* at p. 3.

19 94. Despite clear warnings by experts, the FWS Defendants failed to require that CDFW
20 and USDA take adequate and appropriate steps, as required by the terms of the Cooperative
21 Agreement and the Interagency Agreement, to ensure that mountain lion predation would not cause
22 further damage to the SNBS populations. This failure to implement an effective predator
23 management plan, in conjunction with translocating SNBS into the NRU in harm's way, induced
24 predation avoidance behaviors causing SNBS to stay at high elevations despite the obvious harm to
25 themselves.

26 **Elevation in Relation to Nutrient Quality**

27 95. According to the 2007 Recovery Plan, "low elevation winter ranges provide an
28 important source of high quality forage early in the growing season" for the SNBS. This document

1 also identifies the elevation of areas characterized as low elevation winter range. *Executive Summary,*
2 *Habitat Requirements and Limiting Factors* 2007 Recovery Plan at p. v.

3 96. The use by the SNBS of low elevation winter range is impossible if they have been cut
4 off from the low elevations by late or heavy snows that last into the “spring months”, resulting in
5 starvation of the SNBS trapped at higher elevations. The phrase low elevation winter habitat
6 describes potential winter habitat that is lower in elevation than the summer habitat, but does not
7 indicate that the elevation of winter habitat is physically low enough to remain free of deep snow
8 during severe winters. Winter habitat must provide nutritious forages through the winter months; if,
9 for example, the forage plants are covered by snow, the SNBS will starve to death.

10 97. The nutrient quality of SNBS forage varies greatly throughout the year according to
11 the season and elevation, and both the quality and quantity are limited primarily by effects of
12 temperature and soil moisture on plant growth and population density.

13 98. The FWS Defendants have placed the SNBS in harm’s way by allowing their
14 placement in the NRU where access to forage of sufficient nutrient quality has been and will continue
15 to be too limited, thus increasing their mortality.

16 **Elevation in Relation to Reproduction**

17 99. The availability of and access to sufficient nutrients to provide for the survival of each
18 animal as well as normal fetal development, the birth of healthy lambs and the production of milk by
19 the female sheep (“ewes”) is of critical importance to the SNBS inhabiting the NRU.

20 100. During the late fall and winter, the SNBS of all ages, including ewes and male sheep
21 (“rams”), which have migrated from summer habitats gather in groups in suitable winter habitat.
22 SNBS breed almost entirely within the month of November. Most lambs in the Sierra Nevada are
23 born in May after ewes have moved from low elevation winter range to higher elevation habitats that
24 are selected as lambing locations. Typically, SNBS ewes will give birth to one lamb per year. Since
25 one ram is capable of breeding with multiple ewes, ewes and lambs are used as the primary indicators
26 of survival and reproduction of SNBS and viability of SNBS herds.

27 101. It has been shown that inadequate nutrition might delay or prevent estrus and
28 ovulation in many mammals, but SNBS breeding is generally completed before severe winter

1 nutritional shortages occur. Deficient winter habitats with inadequate nutrition will be detrimental to
2 fetal development, interfere with lactation, and likely reduce the survival of young.

3 102. The link between the availability of quality forage in sufficient quantity is critical, not
4 only to adult survivorship, particularly during severe winters, but also to lamb production and
5 survivorship as well.

6 **Redress of Plaintiffs' Injuries**

7 103. FWS Defendants, in cooperation with CDFW, have authorized, approved, monitored,
8 and funded the translocation operations that have placed the SNBS in peril in the NRU, and FWS
9 Defendants have failed to remedy the resulting deaths in violation of the ESA.

10 104. FWS Defendants, in cooperation with the CDFW and the USDA Defendants, have
11 authorized, approved, monitored and funded activities for control of predation that have resulted and
12 will continue to result in the take of many SNBS in violation of the ESA.

13 105. The interests of F.I.M. in the protection of the SNBS and their habitat are adversely
14 affected by FWS Defendants' policies and regulations which have authorized and are causing take of
15 SNBS. The translocation of the SNBS into the NRU in areas adjacent to F.I.M.'s sheep herding
16 operations has resulted and will continue to result in deaths of individual SNBS as well as stagnant or
17 declining population numbers.

18 106. F.I.M. has been and is being harmed, and, unless the requested relief is granted, will
19 continue to be adversely affected and injured by FWS Defendants' failure to comply with the ESA.

20 107. F.I.M. has been and is being harmed, and, unless the requested relief is granted, will
21 continue to be adversely affected and injured by USDA Defendants' failure to comply with the ESA.

22 108. It is illegal to take SNBS. 16 U.S.C. § 1538 (a)(1)(B).

23 109. If the relief requested herein is granted, the translocations of the SNBS into the NRU
24 will cease.

25 110. If the translocations of the SNBS into the NRU cease, there will be fewer dead or
26 dying SNBS in the area north of Mammoth Lakes, California.

27 111. If the SNBS that became trapped at high winter elevations in the NRU are rescued,
28 there will be fewer dead or dying SNBS in the area north of Mammoth Lakes, California.

1 112. If the SNBS are rescued and relocated to suitable habitat, there will be less predation
2 because the SNBS will have better means of escaping predators.

3 113. If the USDA Defendants improve their predator control efforts, there will be less
4 reason for the SNBS to refrain from the use of low elevation winter habitat in the NRU.

5 114. If the SNBS resume use of low elevation winter range in the NRU, they are still likely
6 to perish after winters of heavy snowfall.

7 115. If the relief requested herein is granted, then the harm to the aesthetic, conservation
8 and recreational interests of F.I.M. will be eliminated or significantly reduced because there will be
9 fewer dead or dying SNBS in the NRU, and the remaining survivors will enjoy improved health when
10 relocated to suitable habitat.

11 116. If the relief requested herein is granted, then the economic and environmental harm to
12 F.I.M. will be eliminated or significantly reduced as there will be thriving herds of SNBS located
13 within suitable habitat in the Sierra Nevada Mountains that are farther away from F.I.M.'s sheep
14 herding operations.

15 117. If the relief requested herein is granted, then the economic and environmental harm to
16 F.I.M. will be eliminated or significantly reduced as there will be less reason for reductions in the
17 areas where F.I.M. is allowed to graze its sheep.

18 **FIRST CLAIM FOR RELIEF**

19 **(Violation of Section 9 of the ESA-Failure to Ensure Availability of Suitable Habitat for**
20 **Transplants)**

21 118. Each and every allegation set forth in paragraphs 1 through 117 of this Complaint is
22 incorporated herein by reference.

23 119. The ESA prohibits all take of a species, even of a single individual of the species.
24 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995);
25 16 U.S.C. § 1538 (a)(1)(B).

26 120. FWS Defendants as governmental entities can be held liable for illegal take of
27 protected species in violation of Section 9 of the ESA where such take springs from the exercise of
28

1 their regulatory authority. *See, e.g., Strahan v Coxe*, 127 F. 3d 155, 163 (1st Cir. 1997); *Palila v.*
2 *Hawaii Dept. of Land and Natural Resources*, 639 F. 2d 495, 498 (9th Cir. 1981).

3 121. FWS Defendants violated the ESA, specifically the take prohibition in 16 U.S.C. §
4 1538 (a)(1)(B), by approving, authorizing and/or funding the translocations of SNBS into Lee Vining
5 Canyon, resulting in harm to the species due to the high mortality and low growth rates of herds in
6 the NRU. Because that location lacks suitable habitat or the required PCEs, large die-offs have
7 occurred after heavy winters. The current imperilment of the SNBS in the NRU is a direct result of
8 the actions taken by FWS and its partners in the Cooperative Agreement with CDFW and the
9 Intergovernmental Agreement with USDA to manage the translocation, predator control and other
10 SNBS programs.

11 122. FWS Defendants' approval, authorization and/or funding of translocations of the
12 SNBS into the NRU, and failure to rescue those animals when their imminent death was indicated,
13 have caused and will continue to cause take of SNBS in violation of Section 9 of the ESA and its
14 implementing regulations. 16 U.S.C. § 1538; 50 C.F.R. § 17.31.

15 123. Plaintiff is injured by FWS Defendants' ongoing violations of the ESA.

16 124. Plaintiff is authorized by the citizen suit provision of the ESA to bring this action and
17 obtain injunctive relief to remedy ongoing violations of law by FWS Defendants. 16 U.S.C.
18 § 1540(g)(1).

19 **SECOND CLAIM FOR RELIEF**

20 **(Violation of Section 9 of the ESA-Failure to Require Appropriate Conservation Measures)**

21 125 Each and every allegation set forth in paragraphs 1 through 124 of this Complaint is
22 incorporated herein by reference.

23 126. The ESA prohibits all take of a species, even of a single individual of the species.
24 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995);
25 16 U.S.C. § 1538.

26 127. FWS Defendants as governmental entities can be held liable for illegal take of
27 protected species in violation of Section 9 of the ESA where such take springs from the exercise of
28

1 their regulatory authority. *See, e.g., Strahan v Coxe*, 127 F. 3d 155, 163 (1st Cir. 1997); *Palila v.*
2 *Hawaii Dept. of Land and Natural Resources*, 639 F. 2d 495, 498 (9th Cir. 1981).

3 128. FWS Defendants' failure to ensure implementation of appropriate measures identified
4 for the necessary survival of the transplanted populations in the NRU has caused and will continue to
5 cause "take" of SNBS in violation of Section 9 of the ESA and its implementing regulations. 16
6 U.S.C. § 1538; 50 C.F.R. § 17.31. Despite numerous years of heavy winter kills, FWS Defendants
7 have never required that feed be placed in the NRU or demanded that CDFW rescue the few animals
8 still clinging to survival.

9 129. Despite predation accounting for as much as 40% of SNBS deaths with NRU, FWS
10 Defendants have not required implementation of more stringent measures for predation control.

11 130. Plaintiffs are injured by FWS Defendants' ongoing violations of the ESA.

12 131. Plaintiffs are authorized by the citizen suit provision of the ESA to bring this action
13 and obtain injunctive relief to remedy ongoing violations of law by FWS Defendants. 16 U.S.C § 1
14 540(g)(1).

15 THIRD CLAIM FOR RELIEF

16 **(Violation of the APA-Arbitrary and Capricious, Abuse of Discretion, Not in Accordance with**
17 **Law)**

18 132. Each and every allegation set forth in paragraphs 1 through 131 of this Complaint is
19 incorporated herein by reference.

20 133. The ESA prohibits all take of a species, even of a single individual of the species.
21 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995);
22 16 U.S.C. § 1538.

23 134. FWS Defendants as governmental entities can be held liable for illegal take of
24 protected species in violation of Section 9 of the ESA where such take springs from the exercise of
25 their regulatory authority. *See, e.g., Strahan v Coxe*, 127 F. 3d 155, 163 (1st Cir. 1997); *Palila v.*
26 *Hawaii Dept. of Land and Natural Resources*, 639 F. 2d 495, 498 (9th Cir. 1981).

27 135. FWS Defendants' failure to properly consider and act upon the best scientific and
28 commercial data available and presented by biologists which cautioned against translocating the

1 SNBS into the NRU and suggested that such translocations would result in the death of the species
2 has caused and will continue to cause take of SNBS in violation of Section 9 of the ESA and its
3 implementing regulations. 16 U.S.C. § 1538; 50 C.F.R. § 17.31.

4 136. Plaintiffs are injured by FWS Defendants' ongoing violations of the ESA.

5 137. Plaintiffs are authorized by the citizen suit provision of the ESA to bring this action
6 and obtain injunctive relief to remedy ongoing violations of law by Defendants. 16 U.S.C § 1
7 540(g)(1).

8 138. These violations of the ESA, 16 U.S.C. § 1538, and its implementing regulations are
9 arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law, 5 U.S.C. §
10 706(2)(A), and without observance of procedure required by law, 5 U.S.C. § 706(2)(D), and are
11 reviewable under the APA. F.I.M. is aggrieved by the final agency action that has and will continue
12 to result in placement of SNBS in harm's way and failure to rescue them from peril when death is
13 imminent and is therefore entitled to the relief requested below.

14 **FOURTH CLAIM FOR RELIEF**

15 **(Violation of Section 9 of the ESA-Failure to Adequately Address Predation as a Major Threat)**

16 139. Each and every allegation set forth in paragraphs 1 through 138 of this Complaint is
17 incorporated herein by reference.

18 140. The ESA prohibits all take of a species, even of a single individual of the species.
19 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995);
20 16 U.S.C. § 1538.

21 141. USDA Defendants as governmental entities can be held liable for illegal take of
22 protected species in violation of Section 9 of the ESA where such take springs from the exercise of
23 their regulatory authority. *See, e.g., Strahan v Coxe*, 127 F. 3d 155, 163 (1st Cir. 1997); *Palila v.*
24 *Hawaii Dept. of Land and Natural Resources*, 639 F. 2d 495, 498 (9th Cir. 1981).

25 142. USDA Defendants' failure to ensure implementation of appropriate measures
26 identified for reduction of the SNBS predation by Mountain lions has caused and will continue to
27 cause take of the SNBS and result in placement of the SNBS in harm's way.

28

1 143. Despite predation being identified as a cause of as much as 40% of the deaths of the
2 SNBS in the NRU, USDA Defendants have not increased their efforts at trapping, removing or
3 lethally disposing of these predators.

4 144. Plaintiffs are injured by USDA Defendants' ongoing violations of the ESA.

5 145. Plaintiffs are authorized by the citizen suit provision of the ESA to bring this action
6 and obtain injunctive relief to remedy ongoing violations of law by USDA Defendants. 16 U.S.C § 1
7 540(g)(l).

8 **FIFTH CLAIM FOR RELIEF**

9 **(Violation of the APA-Arbitrary and Capricious, Abuse of Discretion, Not in Accordance with**
10 **Law)**

11 146. Each and every allegation set forth in paragraphs 1 through 145 of this Complaint is
12 incorporated herein by reference.

13 147. The ESA prohibits all take of a species, even of a single individual of the species.
14 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995);
15 16 U.S.C. § 1538.

16 148. USDA Defendants as governmental entities can be held liable for illegal take of
17 protected species in violation of Section 9 of the ESA where such take springs from the exercise of
18 their regulatory authority. *See, e.g., Strahan v Coxe*, 127 F. 3d 155, 163 (1st Cir. 1997); *Palila v.*
19 *Hawaii Dept. of Land and Natural Resources*, 639 F. 2d 495, 498 (9th Cir. 1981).

20 149. USDA Defendants' failure to properly consider and act upon the best scientific and
21 commercial data available and presented by biologists which cautioned against translocating the
22 SNBS into the NRU and suggested that such translocations would result in the death of the species
23 has caused and will continue to cause take of SNBS in violation of Section 9 of the ESA and its
24 implementing regulations. 16 U.S.C. § 1538; 50 C.F.R. § 17.31.

25 150. USDA Defendants thus have contributed to the creation of an environment where the
26 SNBS have been forced to flee to or overwinter in unsuitable habitat to escape predation, thereby
27 increasing their susceptibility to weather related perils and resulting in their deaths.

28 151. Plaintiffs are injured by USDA Defendants' ongoing violations of the ESA.

1 152. Plaintiffs are authorized by the citizen suit provision of the ESA to bring this action
2 and obtain injunctive relief to remedy ongoing violations of law by USDA Defendants. 16 U.S.C § 1
3 540(g)(1).

4 153. These violations of the ESA, 16 U.S.C. § 1538, and its implementing regulations are
5 arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law, 5 U.S.C. §
6 706(2)(A), and without observance of procedure required by law, 5 U.S.C. § 706(2)(D), and are
7 reviewable under the APA. F.I.M. is aggrieved by the final agency action that has and will continue
8 to result in the failure to control predation as a major threat to the survival of the SNBS in the NRU,
9 resulting in death of the SNBS and is, therefore, entitled to the relief requested below.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiffs respectfully request that this Court enter judgment providing the
12 following relief:

13 1. Declare that the FWS Defendants are violating Section 9 of the ESA by authorizing,
14 administering, and/or funding translocation activities in the NRU that take SNBS, which includes the
15 death of numerous individuals;

16 2. Declare that the FWS Defendants are violating Section 9 of the ESA by authorizing,
17 administering, and/or funding activities contrary to the best scientific data available which recognizes
18 the deficiencies and, in many years, the absence of suitable winter habitat in the NRU; that these
19 deficiencies can best be resolved by capturing and removing the surviving SNBS; and that failure to
20 rescue the surviving SNBS before they die of starvation or other weather related causes results in take
21 of SNBS, which includes the unnecessary deaths of individual SNBS;

22 3. Declare that FWS Defendants' actions, as set forth above, were arbitrary and
23 capricious, an abuse of discretion, not in accordance with law, and without observance of procedures
24 required by law;

25 4. Declare that the USDA Defendants are violating Section 9 of the ESA by failing to
26 ensure adequate predator control, thereby allowing take of SNBS;

27
28

EXHIBIT "A"

May 4, 2012

VIA CERTIFIED MAIL & EMAIL

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RE: 60 Day Notice of Intent to Sue for Violations of Section 9 of the Federal Endangered Species Act and Taking of Endangered Sierra Nevada Bighorn Sheep

This letter serves as a sixty (60) day notice by Fred Fulstone, Marianne F. Leinassar, Kristofor A. Leinassar, and F.I.M. Corporation (hereinafter collectively "F.I.M.") of our intent to sue the Secretary of the U.S. Department of the Interior ("Secretary") and the U. S. Fish and Wildlife Service (hereinafter collectively "FWS"), as the agency that wields the Secretary's delegated authority over threatened and endangered species, and its officers and officials regarding violations of Section 9 of the federal Endangered Species Act ("ESA") (16 U.S.C. §§ 1531, *et seq.*). These ESA violations are the result of agency actions and omissions with respect to the transplantation of Sierra Nevada Bighorn Sheep ("SNBS") in the area north of Mammoth Lakes, California, which is erroneously designated as suitable SNBS habitat and is identified as the "Northern Recovery Unit" ("NRU") in the Final Rule for SNBS Critical Habitat as published on August 5, 2008. These transplantations have resulted in deaths that continue to the present time.

Further, this letter serves as a 60 day notice of intent to sue the Secretary and the FWS acting in concert with the Secretary of the U.S. Department of Agriculture and the Animal and Plant Health Inspection Service (hereinafter collectively "USDA") as the agency carrying out wildlife damage management activities, and its officers and officials regarding violations of Section 9 of the federal Endangered Species Act for actions taken pursuant to the FWS and

This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA (Section 11(g) of the ESA, 16 U.S.C. §1540(g)), should legal action be necessary to enjoin and remedy these violations of the ESA.

Summary of Agency Violations

On April 20, 1999, the SNBS was listed as endangered under the ESA. On August 5, 2008, the FWS designated critical habitat for the SNBS. Under Section 9 of the ESA, it is illegal for any "person"¹ to "take"² any species listed as endangered, 16 U.S.C. § 1538(a)(1)(B). This Section 9 prohibition against taking applies equally to species listed as threatened, 50 C.F.R. § 17.31.

Since 1999, the FWS has been violating Section 9 of the ESA and continues these violations by failing to remove the few remaining animals from the NRU despite large numbers of deaths. These deaths have exceeded authorized take numbers in *every* Incidental Take Permit ("ITP") issued for SNBS, and have been exacerbated by the transplantation of SNBS to the NRU despite the known risk of death for each transplanted animal. These ESA violations continue to occur as a result of placement of SNBS in habitat that is inadequate to meet their biological needs. FWS has failed to take corrective steps to curtail take that exceeds the ITP limits and has, in some instances, retroactively increased the ITP limits to provide for additional take of SNBS. The failure to remove the SNBS from unsuitable habitat, despite scientific recommendations to that effect and the FWS's own statements that it would take action if the remaining NRU herd became imperiled, is contrary to the best available scientific data and has resulted in continuing take of SNBS. The FWS has failed to correct this situation by following the long existing strategy of removing the SNBS to a captive breeding program or to suitable habitat to ensure the continued survival of the species.

Further, the FWS and USDA are violating Section 9 of the ESA by knowingly failing to ensure adequate predator control measures, resulting in the continuing take of SNBS.

I. ESA SECTION 9—"TAKE"

Congress enacted the ESA in order to "conserve to the extent practicable the various species facing extinction", 16 U.S.C. § 1531(a)(4), and to protect species that "have been so depleted in numbers that they are in danger of or threatened with extinction." 16 U.S.C. § 1531(a)(2).³ The ESA provides protection for endangered and threatened species and their habitats, including the SNBS. 16 U.S.C. §§ 1536 and 1538.

¹The term "person" includes "any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State ... [or] any State, municipality, or political subdivision of a State...." 16 U.S.C. § 1532(13).

²The ESA defines the term "take" broadly, as meaning to "harass, harm, pursue, hunt, shoot, wound kill, trap, capture, or collect, or to attempt to engage in any such conduct". 16 U.S.C. § 1532(19) (1982); *See, e.g., Bensman v. U.S. Forest Service*, 984 F. Supp. 1242 (W.D. Mo. 1997) (stating that this prohibition against taking is broadly construed to prohibit nearly any activity which might adversely affect protected species).

³The ESA is designed to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and

Principal among the ESA's system of species protection is the Section 9 prohibition rendering it illegal for any "person"⁴ to "take"⁵ any species listed as endangered, 16 U.S.C. § 1538(a)(1)(B). This Section 9 prohibition against taking applies equally to species listed as threatened. 50 C.F.R. § 17.31. The broadest term in this definition is "harm," which the Secretary has defined as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding [sic] or sheltering." 50 C.F.R. § 17.3 (1994); *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687(1995). The regulations define "harass," as well, to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding [sic] or sheltering".⁶

The FWS, in cooperation with the California Department of Fish and Game ("CDFG"),⁷ has authorized, approved, monitored, and funded the transplantation operations placing SNBS in the NRU where they have insufficient habitat to meet their normal behavioral patterns, including, but not limited to, breeding, feeding or sheltering.

II. POPULATION TRENDS IN NORTHERN AND SOUTHERN RECOVERY UNITS

The population size of the SNBS is dependent upon the ability of a herd to survive year round and successfully reproduce, to find adequate low-elevation winter forage in order to meet the nutritional requirements that will result in their survival through the winter and production of healthy lambs, as well as the herd's ability to migrate to suitable seasonal habitat, especially that needed for the winter.

threatened species." 16 U.S.C. § 1531(b); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007).

⁴The term "person" includes "any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State ... [or] any State, municipality, or political subdivision of a State...." 16 U.S.C. § 1532(13).

⁵The ESA defines the term "take" broadly, as meaning to "harass, harm, pursue, hunt, shoot, wound kill, trap, capture, or collect, or to attempt to engage in any such conduct". 16 U.S.C. § 1532(19) (1982); *See, e.g., Benman v. U.S. Forest Service*, 984 F. Supp. 1242 (W.D. Mo. 1997) (stating that this prohibition against taking is broadly construed to prohibit nearly any activity which might adversely affect protected species).

⁶50 C.F.R. § 17.3 (1998) (amended as applied to captive wildlife to exclude generally accepted animal husbandry practices, breeding procedures, and provisions of veterinary care that are not likely to result in injury to the animal). *See, e.g., Loggerhead Turtle v. County Council of Volusia County, Fla.*, 148 F.3d 1231 (11th Cir. 1998); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991) (holding that the term "take" is more broadly defined in the ESA than in the Migratory Bird Treaty Act (MBTA), so that habitat destruction causes harm, and therefore is a taking, of protected owls under the ESA, but does not cause a taking under the MBTA).

⁷The CDFG is a state agency which, in exchange for money provided in accordance with the ESA and under a Cooperative Agreement ("1991 Cooperative Agreement"), cooperates with the FWS in the management and funding of the transplantation operation described in the September 24, 2007 Recovery Plan⁷ for the SNBS (hereinafter "2007 Recovery Plan").

As a result of the lack of the Primary Constituent Elements ("PCEs") required for critical habitat designations⁸ in the NRU and the failure of the FWS and the CDFG to implement adequate programs and remove the SNBS to ensure their survival, the transplantation of the SNBS into the NRU has resulted in the population's: (1) inability to obtain sufficient and suitable forage for individual SNBS survival; (2) inability to obtain sufficient forage to meet their essential biological requirements, which has resulted in the delay or failure of their normal breeding, fetal development, birthing of healthy full sized lambs, and lactation; (3) inability to obtain sufficient or suitable forage to meet their biological requirements for feeding and protecting their young; (4) the failure to conceive SNBS lambs; (5) inability to attain sufficient population size due to inaccessible forage or a lack of forage; (6) inability to successfully escape from predators; and (7) inability to develop a viable herd with biologically necessary genetic diversity.

The conclusion that the NRU does not contain the appropriate PCEs, and consequently, that their transplantation to an area that cannot support them has resulted in take, is supported by the population statistics reported by the CDFG. In areas where the PCEs are present (e.g., the Central and Southern Recovery Units), population trends have been positive. Specifically, due to the large sizes of herds and productivity of animals in the Southern Unit, specifically the Mount Baxter and Sawmill Canyon herds, these populations were used by the CDFG (and by FWS pursuant to the 1991 Cooperative Agreement and funding or other approvals that predate the 1999 listing of SNBS) as sources of stock for transplanting beginning in 1979, with subsequent removals in 1980, 1982, 1986, 1987, and 1988, totaling 103 individuals. These sheep were transplanted to Wheeler Ridge (1979, 1980, 1982, 1986), Mount Langley (1980, 1982, 1987), Lee Vining Canyon (1986, 1988), and the south Warner Mountains in northeastern California. One third of the SNBS transplanted to Lee Vining Canyon (NRU) in 1986 died during winter storms and all suffered from malnutrition. By 1989, twenty of the original thirty-eight sheep transplanted to Lee Vining Canyon had died. Those herds on Mount Langley (Southern Unit) and Wheeler Ridge (Central Unit) have persisted without further transplantation. Additional translocations of SNBS into Lundy Canyon within the NRU were approved by the FWS in 2002 and 2009. Two adult males were transplanted in 2002, and both were struck by automobiles on the highway. With just sixteen (16) surviving SNBS in the Mt Warren Herd in the spring of 2008, the FWS still transplanted six pregnant females into Lundy Canyon in 2009.

Between 1980 and 2008, the Central and Southern Unit populations increased from a combined total of 250 SNBS to 410 SNBS—a 60% gain in 28 years. In contrast, data for the NRU, with its hostile winter climate, showed the herd decreased between 1993 and 2008 from a population of 86-93 SNBS to 27 SNBS—a 76% loss in 16 years. The NRU populations have continued to barely cling to survival during normal years while suffering extreme losses during years with heavy and/or late winters, as shown in Attachment 2.

Over the years, the populations in the NRU have either shown much slower rates of increase than their counterparts to the south, or shown declining population levels. It is clear that the presence of SNBS in the NRU is dependent upon the continuing translocations of individuals from other populations. However, even with these supplements to the population, the trends are

⁸16 U.S.C. § 1532(5)(A); 50 C.F.R. § 424.12; 73 FR 45534-45604 August 5, 2008

clear based upon annual population statistics: The SNBS in the NRU are unable to survive on their own.

III. SCIENTIFIC DATA DEMONSTRATING THE UNSUITABILITY OF NRU HABITAT FOR SNBS

The areas identified as "critical habitat" for the SNBS span the Sierra Nevada Mountain Range from the Twin Lakes area west of Bridgeport and north of Mammoth Lakes to the Kern River in California. Due to the FWS/CDFG transplantation of SNBS they are now found in several areas throughout the Sierras. The only naturally occurring populations of SNBS are in the Southern Recovery Units, and artificial populations that were transplanted are found in the Central Recovery Unit (e.g., Wheeler Ridge) and the NRU (e.g., Mount Warren and Mount Gibbs).

Lee Vining Canyon, located in the NRU between Mount Warren and Mount Gibbs, cuts deep into the granite peaks of the Sierra Nevadas, formed by ice age glaciers. Bare granite cliffs and slopes of broken rock cover the canyon walls. Lundy Canyon is located north of Mt Warren and is similar to Lee Vining Canyon except the designated SNBS winter range is higher in elevation. Snow depth within the Sierras varies with elevations. Snow accumulates from November through June of each year, reaching depths of well over ten feet at elevations above 7,000 feet as a result of winter storms. Winter snow accumulations vary from year to year, with the most severe recent winters, in terms of SNBS mortality, having occurred in 1995, 1998, 2005, 2008, and 2010. Mount Warren, for example, from November through June, is usually covered with up to 10 feet of snow.⁹The *lowest elevations* occur within the NRU at the surface of Mono Lake at 6,400 ft. and in the Central Unit in the Owens River Valley at elevations below 4,500 feet. However, in these locations conditions are unsuitable, inaccessible, or the other PCE components are lacking, including the requirement for steep rocky areas used by bighorn sheep to escape predators.

As listed in the Final Rule for SNBS Critical Habitat, the lowest elevation of suitable, available and accessible "low elevation winter range" in the NRU is 2,300 m (7,546 ft.) above sea level; the lowest elevation winter range that is suitable, available and accessible in the Central Unit is 1,700 m (5,578 ft.); and in the Southern Unit,¹⁰ the lowest elevation winter range that is suitable, available and accessible is 1450 m (4756 ft.). This is a difference in the lowest elevation winter range between the Northern and Southern Units of over 2,800 ft. This drastic difference in the availability of suitable, available and accessible low elevation winter range means the difference between extreme numbers of SNBS deaths during heavy winters and survival of the individual bighorns. These winter related deaths exceed the allowable take in all ITPs issued by FWS related to SNBS.

As indicated in the 2007 Recovery Plan, the year 1878 was the last sighting of live bighorn sheep in the Sierras north of Mammoth Lakes until transplanting was initiated. From

⁹<http://www.summitpost.org/mount-warren/339640>

¹⁰The unit with the only naturally occurring and largest population.

1900 to 1960, a herd of SNBS on Mt Baxter, south of Mammoth Lakes, steadily increased in number to a total of 350 to 400 in the presence of thousands of domestic sheep, but no bighorn sheep were known to naturally move to locations north of Mammoth Lakes. Some biologists have assumed that SNBS were numerous prior to 1860 and that little is known about the disappearance of the SNBS from this northern area. However, there is empirical evidence to the contrary.¹¹

In 1980, biologist, John Wehausen, stated that there was support for the contention that, north of the Owens Valley “, snow conditions... are too severe for bighorn”.¹² Dr. Wehausen is considered the senior biologist responsible for writing the SNBS 2007 Recovery Plan and prescribing the recovery efforts. He owns and operates the tax exempt organization known as the Sierra Nevada Bighorn Sheep Foundation and is regularly employed as a contractor by the National Park Service, the U.S. Forest Service, and CDFG, Dr. Wehausen also is cited frequently as an expert on SNBS and one of the scientists considered preeminent in this field.

In 1984, the SNBS Strategy was published wherein biologists determined that the mountains north of Mammoth Lakes, California lacked dependable winter habitat for SNBS. In September of 1984, a group of agency officials including biologists formed the SNBS Interagency Advisory Group which wrote the “Sierra Nevada Bighorn Sheep Recovery and Conservation Plan” (hereinafter “1984 Recovery Plan”). The 1984 Recovery Plan states that, in judging the status of a transplanted herd, success will be determined if the herd “increases to 100 animals and appears to be capable of sustaining itself”. Also in this document, the advisory group describes the Lee Vining Canyon as a potential threat during years of heavy snowfall due to low “winter lamb survival” and introduced the possibility that, in this area, “spring lamb production may be reduced” (e.g., lambs will not survive heavy snowfall). The advisory group goes on to describe the suitable winter range for SNBS as being *below* 5,000 ft. in elevation and the entire area from Mammoth Lakes to the north as being substantially higher than the suitable elevations for dependable winter range.

This 1984 Recovery Plan was updated in 1997 in the document titled “A Conservation Strategy for Sierra Nevada Bighorn Sheep” (hereinafter “1997 Recovery Plan”), which included similar descriptions of elevations limiting suitability of bighorn sheep winter habitat. These same conclusions were stated in various publications, including: Chow, L. S. 1991, *Population dynamics and movement patterns of bighorn sheep reintroduced in the Sierra Nevada, California*.¹³ Each of these documents is cited as authoritative in the SNBS Recovery Plan and, in spite of the stated limitations of habitats north of Mammoth Lakes, these documents have been used as justification for the continuation of transplantation activities.

In 1986, when the CDFG, in consultation with the FWS, made the decision to transplant the SNBS into the Lee Vining Canyon (between Mount Warren and Mount Gibbs), an Environmental Assessment (“EA”) was completed by the Inyo National Forest, in compliance with the National Environmental Policy Act (hereinafter “NEPA”). The EA referred to the

¹¹ Early explorer Zenas Leonard reported, as a member of the Walker Party in 1833, that the entire party nearly starved to death crossing the Sierra Nevada near the present day Tioga Pass. This party of explorers was comprised completely of 1 trappers and experienced hunters, but could not find any game for sustenance.

¹²Wehausen, 1980

¹³M.S. Thesis, University of California, Berkeley.

severity of the winter weather in these areas and the potential need to feed hay to SNBS. The decision-making agencies also stated plainly that they planned to rescue any survivors if the animals suffered a winter kill.

Despite numerous years of heavy winter kills, no feed has ever been placed, and the few animals clinging to survival have not been rescued. For example, at least one-third of the SNBS transplanted in 1986 died during the following winter and yet more were transplanted in 1988.

Again during the winter of 1995, the herd transplanted to the NRU suffered in excess of a 65% mortality rate in one year, dropping from more than 85 SNBS to just 29 survivors.

The concerns voiced in the EA and the interagency reports regarding heavy snowfall were echoed by the authors of the 1997 Recovery Plan wherein the authors state that the use of Lee Vining bighorn sheep as transplant stock should be initiated before the herd reaches the 100 total because of the lesson learned in the winter of 1995. The authors then go on to provide that, "should an unforeseen calamity occur to the Lee Vining Canyon population that threatens the ability of this population to reach 25 ewes and thereby provide reintroduction stock, immediate capture of some of the remaining sheep should be implemented to place them in a captive breeding facility in order to preserve this gene pool." This calamity has occurred during each heavy winter, and the FWS has failed to heed the best available scientific data in its practices, thus further endangering the remaining SNBS.

Between 2000 and 2011, the NRU herd populations fluctuated, but showed an overall decline.¹⁴ From 2008 to 2011, the NRU population decreased (despite the transplantation of 6 pregnant ewes—an effective increase of 12) from a maximum number of 41 SNBS to 26, with only 11 ewes remaining in the entire NRU. During the 2000 to 2011 period, the Southern and Central Units increased populations by approximately 131% and 22%, respectively. Importantly, only the NRU and the Central Unit listed weather related conditions, primarily avalanches, as a large limiting factor for populations, while in the Southern Unit, where the animals faced primarily competition and predation as limiting factors, the SNBS population increased and continued to provide "transplantation stock" for the other units.

¹⁴ On July 25, 2007, the FWS published the "Designation of Critical Habitat for the Sierra Nevada Bighorn Sheep (*Ovis canadensis californiana*) and Proposed Taxonomic Revision" (72 Fed. Reg. 40956 41008 (July 25, 2007)). The FWS published the Final Rule for SNBS Critical Habitat on August 5, 2008. The FWS ignored the extensive public comments submitted by F.I.M. objecting to the critical habitat designation in the NRU, as an area that is not suitable habitat, does not provide year round habitat and, during years of heavy snowfall, leads to massive reductions in the population. F.I.M. is a participant in the ESA Section 7 consultation between FWS and the Humboldt-Toiyabe National Forest (hereinafter "HTNF") as a result of its status as a federal permit applicant. F.I.M. provided an abundance of scientific references and factual details in response to agency Biological Opinions and Biological Assessments. Each formal statement to the FWS and HTNF regarding the contents of the SNBS Recovery Plan and Critical Habitat designation included clear explanations that what is now the NRU is not suitable for SNBS habitat and is in fact dangerous for bighorn sheep.

IV. FAILURE OF PREDATION CONTROLS RESULTING IN TAKE OF SNBS

Relevant authority cited by FWS has indicated that SNBS, in an effort to escape predation, will move to higher elevations and attempt to survive by overwintering on high windswept ridges. During heavy winter years in particular, this leads to malnutrition, increased mortality of adult bighorn sheep due to accidents, such as avalanches or falls, and starvation, as well as greatly reduced rates of reproduction. CDFG's reports to FWS provide empirical evidence that in the Central Recovery Unit, during winters when FWS implemented adequate predation control measures, SNBS migrated to overwinter at lower elevations (below 6,000 ft.) which provided all of the necessary PCEs, including nutritious forage, shelter from winter weather and escape terrain.

In the Southern Recovery Unit ("SRU"), mountain lion predation increased as a result of changes in the implementation of the predator control policies and programs by the USDA and FWS. These changes have resulted in increased predation of SNBS in the SRU. Mountain lion predation has been listed as a primary limiting factor to the increase in population size in the SRU.¹⁵

V. CONCLUSION

Since the transplantation of the SNBS into the NRU, the unavailability of sufficient low elevation winter range and other suitable habitat in that area has resulted in high mortality and low growth rates of those herds, thus clearly demonstrating the peril in which the FWS has placed these animals.

The FWS has authorized activities and cooperated with the CDFG in starving these protected animals to death within areas clearly lacking in the PCEs necessary for their survival. As a result of the transplanting actions taken, despite the best available scientific data to the contrary, the FWS, in cooperation with the CDFG, has engaged in activities that resulted in the take of many SNBS. The FWS's present and continued actions have and will result in the further take of the SNBS in violation of Section 9 of the ESA. The FWS has acted in a manner that has harmed and continues to harm this species, despite the significant scientific advice of its own biologists that suggested transplantation to the NRU would result in the death of SNBS.

Further, the actions of FWS and USDA programs have continued to result in the take of SNBS by failing, despite evidence demonstrating the dire need, to properly implement and continue adequate predator control.

If the Secretary, the FWS and the USDA do not act within 60 days to correct these ongoing violations of Section 9 of the ESA, F.I.M. will pursue litigation in federal court against the agencies and the officers and officials addressed in this letter. We will seek declaratory and injunctive relief and legal fees and costs regarding these violations.

¹⁵2010-2011 Annual Report of the Sierra Nevada Bighorn Sheep Recovery Program: A Decade in Review

Kenneth L. Salazar, Secretary, U.S. Department of the Interior
60 Day Notice of Intent to Sue Re: Taking of SNBS
May 4, 2012
Page 9 of 9

If you have any questions, or wish to meet with us to discuss this matter, or feel this notice is in error, please contact my attorney, Brenda W. Davis at (916) 341-7400.

Respectfully,

Dated: May 7th, 2012


Fred Fulstone

Dated: May 7th, 2012


Marianne F. Leinassar


Dated: May 7th, 2012


Kristofor Leinassar

ATTACHMENT 1

**U.S. FISH & WILDLIFE SERVICE
INTRAGOVERNMENTAL AGREEMENT FORM**

ATTACHMENT A

 <p align="center">U.S. Department of the Interior U.S. Fish & Wildlife Service</p>	1. FWS AGREEMENT #:		F11R000472	
	2. OTHER AGENCY AGREEMENT #:		11-73-95-5440-1A 173-7355-155	
	3. TOTAL AGREEMENT AMOUNT:		\$99,000.00	
	4. EFFECTIVE DATE:		September 1, 2011	
5a. FWS ORGANIZATIONAL DATA (ADDRESS, OFFICE)		6a. OTHER AGENCY DATA (ADDRESS, OFFICE)		
U.S. Fish and Wildlife Service Ventura Fish and Wildlife Office 2493 Portola Road, Suite B Ventura, CA 93005		U.S. Department of Agriculture Animal and Plant Health Inspection Service Wildlife Services 3418A Arden Way Sacramento, CA 95825		
5b. Select One: <input checked="" type="checkbox"/> Buyer <input type="checkbox"/> Seller		6b. Select One: <input type="checkbox"/> Buyer <input checked="" type="checkbox"/> Seller		
5c. DUNS #:	151157950	6c. DUNS #:	929332490	
		Tax ID #:	41-0698271	
5d. ALC:	14-18-0006	6d. ALC:	12-40-8400	
7. PROJECT TITLE: Mountain Lion Monitoring and Management				
8. SCOPE OF WORK (DETAIL THE SPECIFIC OBLIGATIONS OF EACH PARTY - USE ADDITIONAL PAGE(S) IF NECESSARY)				
<p>In 2007, the Sierra Nevada Bighorn Sheep Recovery Plan identified predation, specifically by mountain lions, as one of the primary threats to the recovery of the federally endangered Sierra Nevada bighorn sheep (<i>Ovis canadensis sierrae</i>). Until recently, the California Department of Fish and Game (CDFG) has contracted with the U.S. Department of Agriculture, Wildlife Services (Wildlife Services) to reduce predation. However, due to recent budget cuts, CDFG has had to terminate its contract with Wildlife Services. The Service is providing funds to Wildlife Services to cover mountain lion monitoring and management activities over at least a period between September 2011 and January 2012. The project will follow the guidelines outlined in the California Department of Fish and Game's Predator Management Protocol and in accordance with Federal, State, and local laws and regulations.</p> <p>Wildlife Services will provide two qualified Wildlife Services Specialists, trained dogs, vehicles, and other equipment necessary to assist in capturing and collaring mountain lions. Wildlife Services Specialists will capture mountain lions using some or all of the following techniques, methods, or tools: tracking dogs, cage traps, softcatch leghold traps, and leg snares. After capturing a mountain lion, Wildlife Service Specialists will attach a GPS or radio collar. During captures, Wildlife Service Specialists will also collect and archive samples of DNA (tissue or blood) to use for future identification of DNA left at Sierra Nevada bighorn sheep kill sites. The collars will download information that will be used to track the mountain lion's movement and identify clusters of activity, which could indicate a potential Sierra Nevada bighorn kill site. Wildlife Service Specialists will document all kill site investigations on data sheets and enter the data into a predator database.</p> <p>Wildlife Services Specialists will investigate potential Sierra Nevada bighorn sheep kill sites, and confirm whether there has been a kill. If there is a confirmed Sierra Nevada bighorn sheep kill site, Wildlife Service Specialists will collect mountain lion fecal samples and later archive the samples for DNA analysis. Samples collected at a kill site can be compared to samples collected from mountain lions to determine if a specific individual has killed a Sierra Nevada bighorn sheep. If Wildlife Services Specialists can confirm that a specific mountain lion killed a Sierra Nevada bighorn sheep, then they will target that animal for lethal removal. Using trained dogs, Wildlife Service Specialists will track the mountain lion, and shoot it. If a female mountain lion with dependent young is removed, every effort will be made to locate the juveniles. Juveniles may be humanely dispatched, or orphaned kittens of appropriate age may be candidates for rehabilitation upon consensus between Department personnel in the region and the Wildlife Investigations Lab Supervisor.</p> <p>Upon completion of this project, Wildlife Services will provide a written report to the Service documenting all their activities and indicate if any mountain lions were lethally removed. A copy of this report will also be made available to the California Department of Fish and Game.</p>				

**U.S. FISH & WILDLIFE SERVICE
INTRAGOVERNMENTAL AGREEMENT FORM**

ATTACHMENT A

9. SPECIAL PROVISIONS: (1) THIS AGREEMENT MAY BE MODIFIED BY MUTUAL CONSENT OF BOTH PARTIES. (2) IT MAY BE TERMINATED BY 30-DAY PRIOR WRITTEN NOTICE BY EITHER PARTY. ALLOWABLE COSTS INCURRED THROUGH DATE OF TERMINATION SHALL BE REIMBURSED UNDER THIS AGREEMENT. (REPEAT ANY ADDITIONAL PROVISIONS)

Should disagreement arise on the interpretation of the provisions of this agreement, or amendments and/or revisions thereto, that cannot be resolved at the operational level, the area(s) of disagreement shall be stated in writing by each party and presented to the other party for consideration. If agreement on interpretation is not reached within thirty (30) days, the parties shall forward the written presentation of the disagreement to respective higher officials for appropriate resolution.

10. FWS PROJECT OFFICER (NAME, OFFICE, ADDRESS, PHONE, FAX, E-MAIL)

Erin Nordin
Ventura Fish and Wildlife Office
802 South Tippecanoe
San Bernardino, California 92408
(909) 382-2959; Erin_Nordin@fws.gov

11. OTHER AGENCY PROJECT OFFICER (NAME, OFFICE, ADDRESS, PHONE, FAX, E-MAIL)

Steven Wade Carlson
USDA Wildlife Services, Central District
5151 Pentacost Drive #H
Modesto, CA 95356
(209) 545-4699; Steven.W.Carlson@aphis.usda.gov

12. PERIOD OF PERFORMANCE: September 1, 2011 to September 1, 2012

13. ESTIMATED PRICE/COSTS: (EITHER STATE "SEE BLOCK 12" OR SPECIFY INDIVIDUAL LINE ITEMS IF APPROPRIATE)

Funds in the amount of \$93,000.00 are available to complete the work as identified in the Scope of Work (Block 8) and for the period specified in Blocks 4 and 12 above. Expenditures in excess of this amount will not be reimbursed without a fully signed modification to this agreement.

14a. METHOD OF PAYMENT AND BILLING INSTRUCTIONS

Payment will be in accordance with the Intra-Governmental Payment and Collection (IPAC) System and OMB Business Rules for Intragovernmental Transactions dated October 4, 2002.

- A. Reference FWS Agreement Number, Cost Structure, and Agency Locator Code (ALC), and DUNS number on all billings, and provide the name and phone number of the FWS Project Officer (Block 10).
- B. Reference Other Agency Agreement Number and DUNS number on all billing.
- C. All IPAC billings must be made prior to the last three (3) business days of the month.
- D. All billings must be made within 90 days of completion of the job.

IPAC Billing will be promptly reversed if required information is not included or if inaccurate/conflicting billing data is provided.

When transfer requests are submitted via IPAC, a copy of the request document noting the IPAC transaction number, or copy of the IPAC transaction, should be sent to the address in Block 9a, ATTN: Carmen Unchangco.

Cooperator will be responsible to provide year-end accrual information on the outstanding agreement balance in September of each year. The Service will provide to Cooperator the format and information required via formal correspondence.

14b. BILLING SCHEDULE: (SELECT ONE) ___ MONTHLY, ___ QUARTERLY, ___ SEM-ANNUALLY, X OTHER (SPECIFY)
Wildlife Services will bill the Service at the end of the project.

14c. FWS BILLING CONTACT (NAME, OFFICE, ADDRESS, PHONE, FAX, E-MAIL)

Carmen Unchangco
2483 Portola Road, Suite B
Ventura, CA 93003
(805) 644-1786, ext. 239

14d. OTHER AGENCY BILLING CONTACT (IF DIFFERENT THAN BOX 14c, PROVIDE NAME, OFFICE, ADDRESS, PHONE, FAX, E-MAIL)

Valerie Putman
USDA APHIS, Wildlife Services
3419A Arden Way
Sacramento, CA 95826
Phone: (916) 979-2875 Fax: (916)

IF NOT SPECIFIED, CONTACT THE COST ACCOUNTING SECTION, DENVER FINANCE CENTER AT 800-852-4662 OR THE APPROPRIATE REGIONAL FINANCE OFFICE

15. CAPITALIZED ASSET(S) INCLUDED IN ORDER: WILL THE ITEM(S) PURCHASED BE CAPITALIZED BY THE ORDERING AGENCY IN ACCORDANCE WITH THEIR POLICY AND RECORDED AS AN ASSET IN THEIR FINANCIAL SYSTEM?


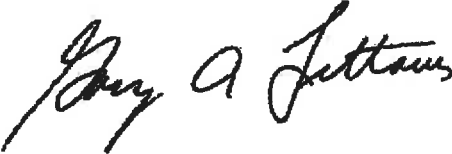
___ YES ___ X NO

16. ACCOUNTING DATA: (ENTER COMPLETE ACCOUNTING DATA INCLUDING BUYER AND SELLER AGENCY NUMBER, FY, OIGL CODE, SOG AND PROJECT DATA)
BFY2011, 81440-1113-0000 ABC: D2, BOC: 269H, TAS #: 141/21811

17. AUTHORITY: (CITE APPLICABLE AUTHORITY TO ENTER INTO THIS AGREEMENT, I.E. ECONOMIC ACT OF 1950 (51 USC 1585))
Economy Act of 1952 (51 USC 1585)

U.S. FISH & WILDLIFE SERVICE
INTRAGOVERNMENTAL AGREEMENT FORM

ATTACHMENT A

18a. CONTRACTING OFFICER FOR PWS <small>(NAME, RESUME, ADDRESS, PHONE, FAX, E-MAIL)</small> Barry Shaw U.S. Fish and Wildlife Service Contracting and General Services 911 NE 11 th Ave Portland, OR 97232-4181 Phone: 503-231-3029 Barry_shaw@fws.gov	18b. CONTRACTING OFFICER SIGNATURE 	18c. DATE 9-1-11
19a. AUTHORIZING OFFICIAL FOR OTHER AGENCY <small>(NAME, TITLE, ADDRESS, PHONE, FAX, E-MAIL)</small> Jeffrey Green Western Regional Director 2150 Centre Avenue Building B, MS-SWB Fort Collins, Colorado 80526 Jeffrey.S.Green@aphis.usda.gov Fax: (916) 979-2680	19b. AUTHORIZING OFFICIAL SIGNATURE 	19c. DATE 9/1/11

ATTACHMENT 2

During January 1999 to June 2011, we deployed a total of 212 GPS collars and 239 VHF collars from 258 captures, representing 180 individual animals; a VHF and a GPS collar are deployed on most captured bighorn. To date, no more than 79 females and 47 males have carried collars at any one time (Figure 3). We take great care during captures to minimize the risk of injury and mortality to Sierra bighorn. During 258 captures of which 249 were by helicopter net-gun, 8 direct mortalities occurred over an 11 year period; 2 additional animals died of unknown causes and were scavenged within 2 weeks of moving away from their release site. Thus far, we have retrieved GPS data from 159 collar deployments on 124 different animals. Additional GPS collars remain deployed. Efforts are currently underway to use these data to understand habitat selection, identify the disease risk posed by adjacent domestic sheep allotments, and determine optimal locations for future reintroductions and augmentations.

Following listing, most captures focused on collaring bighorn sheep in herd units adjacent to active domestic sheep allotments in an effort to assess the risk of disease transmission. Consequently, Wheeler Ridge and Mount Warren were the focus of collaring efforts during 1999–2005 with most captures occurring on lower-elevation winter ranges. Beginning in 2005, most captures occurred during autumn on alpine ranges to avoid disturbing bighorn on their winter ranges. Collars are currently deployed in all occupied herd units except the newly colonized Convict Creek herd.

Bighorn Sheep Population Dynamics

Populations change over time due to the difference between gains from successful reproduction (recruitment) and immigration and losses due to mortality and emigration.

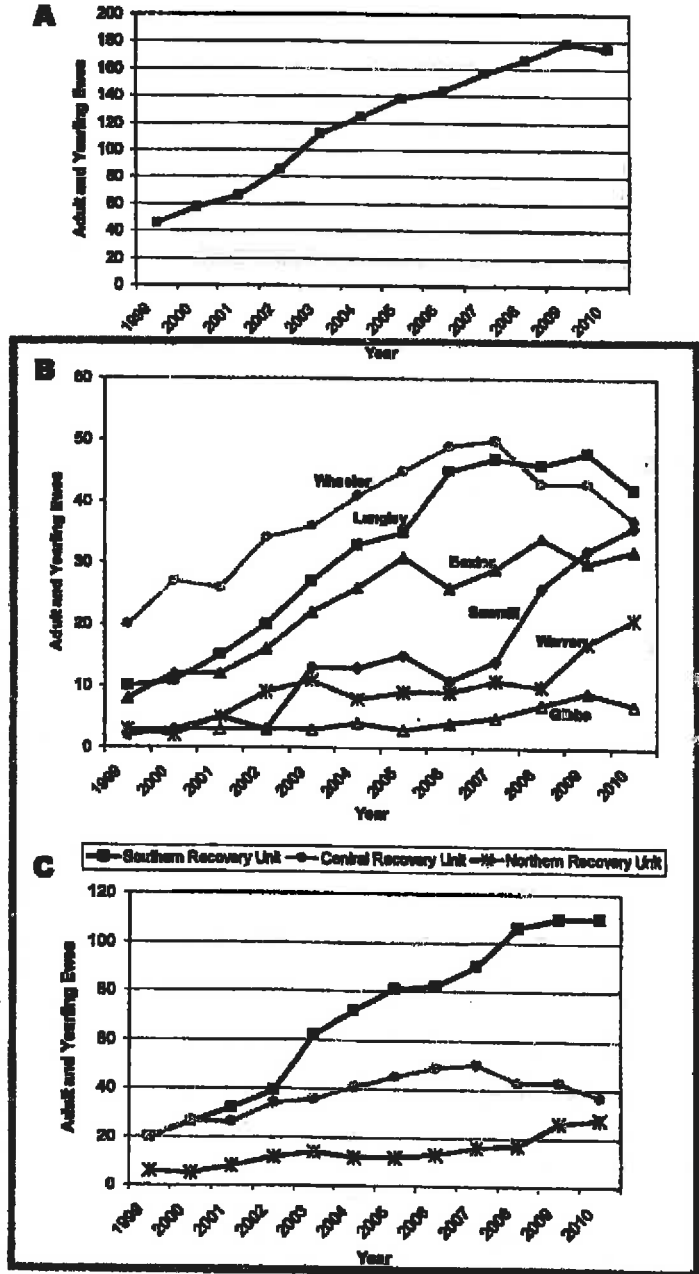


Figure 4. Population trajectories for adult and yearling ewes during 1999–2010 based on a combination of minimum counts, mark-resight estimates, and reconstructed data. All data for the Mount Baxter herd is derived from winter counts except for data from 2002 which are from a summer count. A. Total population trajectory for 6 herds in the Sierra (Mount Langley, Mount Baxter, Sawmill Canyon, Wheeler Ridge, Mount Gibbs, and Mount Warren) with annual population estimates. B. Population trajectories by herd unit. C. Population trajectories by recovery unit.