

Marianne Dugan, OSB # 93256
Internet e-mail address mdugan@mdugan.com
259 E. 5th Ave., Ste 200-D
Eugene, OR 97401
(541) 338-7072
Fax no. (541) 686-2137

Eric K. Helmy, OSB # 01283
The Helmy Law Firm, P.C.
Internet e-mail address eric@helmylaw.com
1600 KOIN Center
222 S.W. Columbia St.
Portland, OR 97201
(503) 224-9946
Fax no. (503) 222-7288

Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BIG WILDLIFE, an Oregon nonprofit corporation;
THE HUMANE SOCIETY OF THE UNITED
STATES, a nonprofit corporation; OREGON
HUMANE SOCIETY, an Oregon nonprofit
corporation; KLAMATH SISKIYOU WILDLANDS
CENTER, an Oregon nonprofit corporation; BARK,
an Oregon nonprofit corporation; CASCADIA
WILDLANDS PROJECT, an Oregon nonprofit
corporation; UMPQUA WATERSHEDS, Inc., an
Oregon nonprofit corporation; and MOUNTAIN
LION FOUNDATION, a nonprofit corporation,

Plaintiffs,

v.

MICHAEL JOHANNNS, in his capacity as Secretary
of the United States Department of the Agriculture;
and UNITED STATES OF AMERICA,

Defendants.

Case No.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF
(NEPA and APA)

INTRODUCTION

1. This action seeks declaratory and injunctive relief from the defendants' decision to kill as much as half the entire cougar population in the State of Oregon as a hired agent of the Oregon Department of Fish and Game. This decision was made without completing any environmental review or other environmental documentation required by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(d), and its implementing regulations, 40 C.F.R. §§ 1500-1508, and is therefore arbitrary, capricious, and not in accordance with law under the Administrative Procedures Act, (APA), 5 U.S.C. § 551-706.

JURISDICTION, VENUE, AND BASIS FOR RELIEF

2. This Court properly has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform her duty). Judicial review is authorized by 5 U.S.C. § 706 because plaintiffs are adversely affected within the meaning of the relevant statute.

3. The decision giving rise to this complaint was made by the Portland office of U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS), Wildlife Services (WS). Venue is properly vested in this Court by 28 U.S.C. § 1391(e).

4. Declaratory relief is appropriate under 5 U.S.C. § 703 and 28 U.S.C. § 2201. Injunctive relief is appropriate under 5 U.S.C. §§ 703 and 705 and 28 U.S.C. § 2202.

PARTIES

5. Plaintiff Big Wildlife is a nonprofit corporation organized under the laws of Oregon, and maintains its offices in Williams, Oregon. It is dedicated to protection of wildlife through the enforcement of environmental laws and the attendant prevention of unlawful killings and trappings of wild animals, including the cougars at issue here.

6. Plaintiff The Humane Society of the United States ("The HSUS") is a nonprofit animal protection organization headquartered in Washington, DC, with seven regional offices across the country. The HSUS has over nine and a half million members and constituents, including over 120,000 members and constituents in the state of Oregon. Members of The HSUS reside in the counties in which the Oregon Cougar Management Plan will authorize the killing of cougars. The HSUS brings this action on its own institutional behalf and also on behalf of its members who enjoy observing wildlife in their natural habitat. Many of its members regularly hike, bicycle, and otherwise enjoy the presence of cougars in the State of Oregon. Wildlife Services' cougar killing program adversely affects the interest of its members by reducing their opportunity to observe cougars and by ruining the aesthetic pleasure they enjoy from observing cougars in their natural habitats. Wildlife Services' decision to engage in the slaughter of wildlife in violation of NEPA also injures the organization's ability to educate its members about this matter and to have meaningful input in Wildlife Services' policy decisions concerning the management of cougars in the State of Oregon.

7. Plaintiff Oregon Humane Society (hereinafter "OHS") is an Oregon non-profit organization. OHS is Oregon's leading local animal welfare organization with 50,000 supporters who are found in every county and town throughout the state dedicated to preventing animal cruelty. OHS, as an organization, has legally-protected interests in the prevention of the types of animal cruelty, suffering, and death that are inherent in this case's subject matter.

8. Plaintiff Klamath Siskiyou Wildlands Center (hereinafter "KS Wild") is an Oregon nonprofit corporation that fights for the protection of the ecological riches of southwest Oregon and northwest California, with particular emphasis on the Rogue River, Siskiyou, and Klamath National Forest, as well as the Medford and Coos Bay Districts of the Bureau of Land

Management (BLM). KS Wild has approximately 1000 dues-paying members. These members are interested in and support KS Wild's work to protect wildlife and wildlife habitat. KS Wild's members regularly spend both personal and professional time watching wildlife and advocating for wildlife protection. KS Wild has demonstrated a longstanding interest in and concern for the wildlife resources ODFW is proposing to destroy. The members of KS Wild regularly use the affected areas on a recreational basis and strongly desire to do so in the future. Since KS Wild has legally-protected interests (as an organization and in a representational capacity on behalf of its members) in the recreational, scientific, ecological, emotional, and/or spiritual attributes in the ecosystems and wildlife at issue in this case, KS Wild has interests in the welfare of the cougars at issue in this case.

9. Plaintiff Bark is a non-profit Oregon corporation based in Portland, Oregon and has worked to protect the Mt. Hood National Forest since 1999. Bark has a specific interest in the continued health of cougar populations in and around the Mt. Hood National Forest, and that interest will be adversely affected by the proposed Cougar Management Plan. Members and staff of Bark live in the communities surrounding the Mt. Hood National Forest and use the Forest extensively for recreation, viewing wildlife and wildflowers, municipal drinking water, hunting, fishing, overall aesthetic enjoyment, and other purposes. Specifically, members and/or staff of Bark have concerns about the presence of large predators, including cougars, in and around Mt. Hood National Forest. With the extirpation or near-extirpation of wolves, bears, lynx, and wolverine on the Mt. Hood National Forest, the presence of cougars are more critical now for the balance of predator-prey relationships than at any other time in modern history. Along these lines, Bark staff and members have participated in tracking surveys designed to document the presence of both large predators and their prey species. Additionally, Bark's

constant presence in Mt. Hood National Forest has led to the documentation of cougar signs (tracks, scat, scratches) and communication of those findings to the USDA Forest Service.

10. Plaintiff Cascadia Wildlands Project ("CWP") is an Oregon non-profit conservation organization dedicated to defending the forests, waters and wildlife of the Cascades region. The CWP has a membership of nearly 700 individuals, 90% of them based in Oregon. The CWP and its members work to ensure adequate habitat and population numbers for a myriad of species in Oregon, including cougars. CWP members derive aesthetic, scientific, educational, spiritual, and recreational benefits from interacting with nature. Some members photograph landscapes and wildlife, including cougars, as their profession and may be affected by the implementation of the Oregon cougar plan.

11. Plaintiff Umpqua Watersheds (hereinafter "Umpqua") is a nonprofit organization dedicated to the protection and restoration of watersheds and biodiversity in the Umpqua River basin and beyond. Since cougars are an inherent and vital part of that biodiversity, Umpqua has legally-protected interests in the cougars' welfare, which defendants actions jeopardize. Moreover, the members of Umpqua Watersheds regularly use the affected areas on a recreational basis and strongly desire to do so in the future.

12. Plaintiff Mountain Lion Foundation was founded in 1986, and is a national nonprofit corporation dedicated to saving America's lion, *Puma concolor* (a term which includes mountain lion, Cougar, Florida panther, and catamount). With more than 10,000 supporters from every state and inhabited continent, a few hundred of which reside in Oregon, the Foundation headquarters are located in Sacramento, California. The Foundation works in the fourteen states where known viable populations of *Puma concolor* still cling to existence. The Foundation has longstanding programs that help citizens live responsibly with mountain lions

rather than killing them indiscriminately, whether or not those lions have conflicted with humans.

13. Plaintiffs would sustain injury to their interests if the defendants are allowed to proceed with the implementation of the Oregon Cougar Plan in the absence of an adequate analysis of the project's environmental impacts. The interests of plaintiffs and their members would sustain further injury because the project will harm wildlife in the State of Oregon.

14. Plaintiffs commented on the Oregon Cougar Plan and also specifically wrote to defendants to advise them that NEPA analysis is required.

15. Defendant Michael Johanns is the Secretary of the United States Department of Agriculture (USDA), and the head of the Federal agency that is responsible for the approval and execution of Wildlife Service's decision to slaughter cougars at issue in the case. Defendant has the ultimate responsibility for ensuring that services within the USDA, including APHIS, comply with and implement the APA and NEPA regarding major federal actions undertaken by the defendants.

RELEVANT STATUTES AND REGULATIONS

A. National Environmental Policy Act

1. NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. Among the critical purposes of the statute are to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken," and to "help public officials make decisions that are based on understanding of environmental consequences" *Id.* § 1500.1(b)-(c). "Public scrutiny [is] essential to implementing NEPA." *Id.*

2. To accomplish these purposes, NEPA requires all agencies of the federal

government to prepare a "detailed statement" regarding all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). This statement is known as an Environmental Impact Statement ("EIS").

3. An EIS must describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) alternatives to the proposed action, (4) "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," and (5) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332.

4. NEPA requires that when an agency proposes to undertake an "action" -- which includes activities that "are potentially under federal control," such as "new and continuing activities, including projects and programs entirely or partially financed, assisted, conducted, regulated, or approved by federal agencies," as well as "federally assisted activities," 40 C.F.R. § 1508.18 -- the agency "must first determine whether the action is one that normally requires" the preparation of an EIS pursuant to NEPA and the Council on Environmental Quality ("CEQ") regulations implementing NEPA. 40 C.F.R. § 1501.4(a).

5. If the agency is not certain whether an EIS is required, it must prepare an Environmental Assessment ("EA") to determine whether an EIS is necessary. 40 C.F.R. § 1501.4. The EA must discuss the need for the proposal, evaluate alternatives that would cause less adverse environmental impacts, and provide sufficient evidence and analysis to support the agency's determination as to whether the proposed action will significantly affect the environment. Id.

6. The only time environmental analysis is not required is when the agency has

"categorically excluded" the action from NEPA review. 40 C.F.R. § 1501.4 (a). However, a categorical exclusion may only be invoked for those actions which do not "individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementing [the CEQ] regulations." 40 C.F.R. § 1508.4.

FACTUAL BACKGROUND

7. Personnel from WS currently conduct cougar "damage control" work in many Oregon counties.

8. The following allegation is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery: In those counties, WS is contracted and paid by the Oregon Department of Fish and Wildlife (ODFW) and by the counties to serve as an agent of ODFW and the counties, to conduct such work.

9. The following allegation is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery: In each of their contracts, WS promises to "[c]ooperate in a wildlife damage control project," and states that "[a]uthority exists under the Animal Damage Control Act of 1931 (7 U.S.C. 426-426b and 426c, as amended) and the Rural Development Agriculture and Related Agencies Act, 1988 (P.L. 100-202), to cooperate with states, individuals, public and private agencies, organization [sic] and institutions to control wildlife damage." The WS contracts further state: "APHIS-WS will provide the requested wildlife damage control services; The Cooperator will reimburse, in advance, the USDA, the sum of up to _____ to cover the costs listed below." The WS contracts also provide that "[c]ontrol activities will be conducted in accordance with applicable Federal, State, and local laws and regulationsAPHIS-WS will hold the cooperator harmless from any liability arising

from the negligent act or omission of the Government officer or employee acting within the scope of his or her employment."

10. In late 2005, ODFW issued an updated cougar management plan, called the Oregon Cougar Management Plan, to go into effect in 2006, which increased cougar hunting and targeted specific populations, to "increase cougar harvest quotas and harvest rates for five years."

11. The Oregon Cougar Plan necessitates a new and greater participation by WS and, thus, involves a significant increase of funds paid by the state to WS to act as an agent for ODFW.

12. According to the terms of the Oregon Cougar Management Plan, WS personnel will be conducting the lethal control of the defined cougars within the state.

13. The Plan contemplates that up to approximately 800 cougars per year will be killed, for up to five years.

14. The current estimated Oregon cougar population is 5100.

15. WS issued a public statement in October 2005 stating that it had made a decision to act as an agent for ODFW, and "has every intention of performing the roles identified in the Oregon Cougar plan to the extent that resources allow." In its statement, WS stated that "additional funding" would be needed beyond what WS had contracted for in the past with ODFW, and that they had requested those funds from the state.

16. Specifically, WS noted that "the Plan is a proactive approach to cougar conflict management that will require an additional \$186,420/year to support 2 new federal cougar specialist positions," and would shift the primary focus of WS personnel in some instances from a case-by-case reactive response to a proactive targeted response.

17. In its public statement, WS also explained in detail the value to the state of using

federal agents, and that WS's actions would increase the effectiveness of cougar management – *i.e.*, increase the number of cougars removed from the environment.

18. In early June 2006, ODFW disclosed that it will immediately begin implementation of the Plan, beginning with three areas of Oregon – the Rogue, Malheur, and John Day watersheds – respectively found in Jackson, Malheur, and Morrow Counties.

19. These initial areas for implementation of the Plan are labeled by ODFW as the Jackson County, East Beulah, and Heppner Units, respectively.

20. WS's decision to implement the Oregon Cougar Management Plan is a major federal action that requires the completion of an environmental review pursuant to the mandates of NEPA.

21. In April 2006, a representative of plaintiff Big Wildlife wrote to WS demanding that the agency comply with NEPA before deciding to kill cougars pursuant to the Management Plan. To date the agency has issued no response.

22. The following allegation is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery: Neither USDA, APHIS, nor WS prepared an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) regarding the Oregon Cougar Management Plan prior to the WS decision to participate in the Plan, and has not prepared either type of document to date.

COUNT I
Violation of NEPA
Failure to Prepare NEPA Analysis

23. Plaintiffs incorporate by reference the foregoing paragraphs.

24. The National Environmental Policy Act (NEPA) and its implementing regulations, 40 C.F.R. §§ 1501.3 and 1508.9, require federal agencies to analyze the foreseeable

environmental impacts, including direct, indirect, and cumulative impacts, of "major federal actions." 42 U.S.C. § 4332(c)(1); 40 C.F.R. 1508.7.

25. Wildlife Services' decision to kill cougars in the State of Oregon on behalf of the State is a major federal action as defined by NEPA.

26. NEPA requires defendants to prepare, at the very least, an environmental assessment (EA) disclosing and analyzing the likely environmental effects of a proposed action, and, if a proposed action may have significant impacts, NEPA requires defendants to prepare a full Environmental Impact Statement (EIS).

27. On information and belief, Defendants have prepared neither an EA nor an EIS for their decision to implement the Oregon Cougar Management Plan.

28. Defendants' decision to forego environmental review violates NEPA, and is arbitrary, capricious, and not in accordance with procedures required by law, in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) and (D).

29. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

30. The relief requested in this case is necessary to preserve the *status quo*, to prevent illegal agency action, and to forestall irreparable injury to the environment.

RELIEF REQUESTED

Plaintiffs seek an order:

1. declaring that defendants failed to comply with NEPA and the APA prior to its decision to kill cougars under the Oregon Cougar Management Plan;
2. enjoining defendants from taking any action to remove cougars from the environment unless and until defendants have complied with NEPA and the APA;

3. awarding plaintiffs their reasonable attorney fees and costs incurred in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and
4. granting plaintiffs such additional relief as the Court deems just and equitable.

Respectfully submitted June 22, 2006.


Marianne Dugan, OSB # 93256
259 E. 5th Ave, Suite 200-D
Eugene, OR 97401
(541) 338-7072
Fax (541) 686-2137
mdugan@mdugan.com

Eric K. Helmy, OSB # 01283
The Helmy Law Firm, P.C.
1600 KOIN Center
222 S.W. Columbia St.
Portland, OR 97201
(503) 224-9946
Fax no. (503) 222-7288
eric@helmylaw.com

Of Counsel for Plaintiffs