UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Fort Myers Division

CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104,

SIERRA CLUB
85 2nd Street
San Francisco, CA 94105

SOUTH FLORIDA WILDLANDS ASSOCIATION
1455 Tyler Street
Hollywood, FL 33020,

WILDLANDS CPR
117 West Broadway Street
Missoula, MT 59802,

BRIAN SCHERF
1060 Tyler Street
Hollywood, FL 33019,

Plaintiffs,

v. — Civ. No.

SALLY JEWELL, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240,

JONATHAN B. JARVIS, Director
National Park Service,
1849 C Street, N.W.
Washington, DC 20240,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This suit challenges two decisions by the National Park Service ("NPS") to authorize a substantial secondary trail network of off-road vehicle ("ORV") trails in two management units of the Big Cypress National Preserve ("Preserve") in southern Florida. On August 5, 2010, and July 22, 2011, NPS issued Closure Orders authorizing an 83-mile secondary trail system in the Turner River Unit, and a 64-mile secondary trail system in the Corn Dance Unit, respectively.

2. In promulgating these decisions which resulted in 147 miles of secondary ORV trails, NPS did not conduct any agency review under governing federal environmental statutes and executive orders, nor did NPS consult with the U.S. Fish and Wildlife Service ("FWS") concerning the adverse effects that these vast secondary ORV trail systems would have on the highly imperiled Florida panther or other federally protected species. Accordingly, these decisions must be set aside – and the secondary trail networks in the Turner River and Corn Dance units closed to ORV use – because they are inconsistent with the agency's own 2000 ORV Management Plan that governs ORV use in the Preserve, and are contrary to various statutory and other legal obligations as described herein.

JURISDICTION

3. The Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(g) and 28 U.S.C. §§ 1331 and 1346. Plaintiffs have properly given notice to Defendants of their claims under the Endangered Species Act in accordance with 16 U.S.C. § 1540(g)(2).

PARTIES

4. Plaintiff Center for Biological Diversity ("the Center") is a non-profit 501(c)(3) corporation headquartered in San Francisco, California, with offices in Florida, Arizona, New Mexico, Washington, Oregon, Minnesota, and Washington, D.C. The Center for Biological

Diversity works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues throughout the United States and the world, including protection of plant and animal species from the impacts of global warming. In addition to more than 500,000 online supporters, the Center has more than 41,000 members throughout the United States and the world, including more than 1,000 members in Florida. The Center brings this action on its own institutional behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy educational, recreational, and scientific activities regarding the Florida panther and other species harmed by NPS's decisions challenged in this case. The interests of the Center and its members in observing, studying, and otherwise enjoying the panther, Wood stork, Red-cockaded woodpecker, and Everglades snail kite, as well as other species and their habitats, have been harmed by Defendants' actions and will continue to be harmed by extensive ORV use.

5. Plaintiff Sierra Club is a national nonprofit organization with approximately 600,000 members (including approximately 27,500 members in Florida) dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club works to protect endangered species and habitats as well as to ensure that our national parks and preserves are managed in a way that protects our natural heritage. The Sierra Club and its members lead group hikes throughout Big Cypress National Preserve, including in the Turner River and Corn Dance Units. The Preserve is a favorite destination of many Sierra Club members in Florida, who enjoy the unparalleled tranquility of the area and its undisturbed vistas, and who enjoy looking for signs of Florida panthers and the

possibility of observing a panther or panther tracks. Hikes throughout the Preserve are diminished in quality as a result of extensive ORV use and ORV-assisted hunting occurring on the large secondary trail networks in the Turner River and Corn Dance Units. The routine passage of ORVs on hiking trails in the Preserve creates noise, exhaust, safety concerns, and user conflicts, further diminishing the aesthetic and recreational interests of Sierra Club members in using the Preserve. Sierra Club was a party to 2001 lawsuit defending the ORV Plan and the 2007 Bear Island Unit lawsuit.

6. Plaintiff South Florida Wildlands Association (SFWA) is a non-profit environmental organization incorporated in the State of Florida to protect remaining wildlife habitat in the Greater Everglades. SFWA's focus is on the large swaths of still undeveloped lands which exist outside of south Florida's urban boundaries. SFWA's conservation efforts are carried out through educational talks at various community venues, emailed "action alerts," interviews and articles in the press and other media, communication during agency hearings and public comment periods, and, where necessary, litigation. Executive Director Matthew Schwartz has many years experience leading outings in the Preserve, including in the Turner River and Corn Dance Units. As the Preserve is one of the last pieces of land in the region allowing for spectacular wildlife viewing, hiking, and solitude, SFWA's members hold a keen appreciation for the Preserve, both for its value as intact habitat for the Florida Panther and other species, and also for the opportunities it provides the public and SFWA's members to experience a part of Florida in the mostly primitive form in which it operated prior to extensive human disturbance. SFWA's members routinely use the Preserve, including the Turner River and Corn Dance Units, and they are harmed by the decisions to authorize extensive secondary trail systems in these units because of the inherent user conflicts that result, severely diminishing their recreational and

aesthetic interests in the Preserve, its wildlife, and its resources. Specifically, SFWA's members use the Preserve for wildlife observation, hiking, camping, and other uses such as photography and birdwatching. They are drawn to the scenic beauty of the area, and enjoy the vistas of vast expanses of prairies and marshes with interspersed hammocks. They enjoy exploring the hiking trails of the Preserve, as well as looking for, and the possibility of observing, rare, threatened or endangered species, or signs of such species, including the Florida panther. They have routinely hiked through the areas where NPS in 2010 and 2011 authorized secondary ORV use. They have observed the damage to soils and vegetation in the Preserve that results from ORV use, such as deep rutted soils and destroyed prairie and marsh grasses. They have observed the pooling of water and other forms of disrupted hydrological flows. Such damage causes SFWA's members sadness, frustration, a sense of loss, and anger, and it discourages some of them from visiting the most heavily damaged parts of the Preserve.

7. Plaintiff Wildlands CPR is the only national conservation organization that specifically targets off-road vehicle abuse of public lands and actively promotes wildland restoration, road removal, and the prevention of new road construction. Wildlands CPR is based in Missoula, Montana, and works on ORV issues nationally. Its members come from throughout the United States, including Florida, and have recreated in Big Cypress National Preserve in the past, and will continue to do so in the future. Wildlands CPR members are interested in protecting the Preserve, and the wildlife that depend on the Preserve, from the impacts of off-road vehicles. They are also interested in protecting quiet, non-motorized recreational opportunities in the Preserve, such as hiking, camping, wildlife and birdwatching, photography, and other similar activities that have been degraded by ORV use. Their enjoyment of the

Preserve will be impaired by the decision at issue. Wildlands CPR was a party to the 2007 Bear Island Unit lawsuit

8. Plaintiff Brian Scherf is a resident of Hollywood, Florida. Since the mid-1980s, Mr. Scherf has hiked through the Preserve, including in the Turner River and Corn Dance Units, approximately six to ten times a year. He plans to continue hiking regularly in the Preserve, and has concrete plans to hike in the Preserve at least four to six times in the next year (and will likely have similar plans in future years). Mr. Scherf hikes and observes wildlife in the Preserve because he enjoys the natural beauty of the area and the expansive vistas, as well as looking for rare, threatened, and endangered species, and signs of such species, including the Florida panther. On previous hikes, Mr. Scherf has encountered other hikers who have reported observing Panthers in the vicinity, and the possibility of observing a Panther excites Mr. Scherf and adds immense value to his recreational activities in the Preserve. On many occasions in the Preserve, including in the Turner River and Corn Dance Units, Mr. Scherf has encountered vegetation and soil destruction that results from ORV use, such as deep ruts, large areas drained of water while other areas have deep pools of water, and areas in which soils have lost their cohesion, turning into a muddy quagmire. Observing such damage to, and destruction of, the Preserve causes Mr. Scherf great sadness and anger and also harms his aesthetic enjoyment of the area as the expansive vistas are damaged and crossed with wide muddy, rutted ORV trails; vegetation is damaged; trails he has walked, and the soils they cross, become muddy bogs; and species and their signs that he hopes to see, such as the Panther, are less common. These extensive impacts are made worse over time, as the cumulative nature of the impacts adds up to make the degradation of resources even more noticeable. His interest in hiking and otherwise

enjoying the Preserve has been, and will continue to be, seriously harmed by the authorization of an extensive secondary ORV trail system in the Turner River and Corn Dance Units.

9. Defendant Sally Jewell is the Secretary of the U.S. Department of the Interior ("DOI"). As the parent agency of NPS, DOI is ultimately responsible for the administration, management, and protection of our Nation's federal lands, including Big Cypress National Preserve.

10. Defendant Jonathan Jarvis is the Director of NPS, the agency within DOI charged with the administration, management, and protection of the National Park System, including Big Cypress National Preserve.

STATUTORY AND REGULATORY FRAMEWORK

A. Big Cypress Establishment Act and the National Park Service Organic Act

11. Big Cypress National Preserve was established by Congress in 1974 via the Big Cypress Establishment Act to "assure the preservation, conservation, and protection of the natural, scenic, hydrologic, floral and faunal, and recreational values of the Big Cypress Watershed in the State of Florida and to provide for the enhancement and public enjoyment thereof." 16 U.S.C. § 698f(a). In establishing the Preserve, Congress stressed that "public uses and enjoyment would be limited to activities where, or periods when, such human visitation would not interfere with or disrupt the values which the area is created to preserve." H. Rep. No. 502, 93rd Cong., 1st Sess. 7 (1973). One of the House sponsors of the legislation explained that the "ecosystem of the Big Cypress area is fragile indeed and must be given every protection if we are to avert the elimination of the wildlife forever." 119 Cong. Rec. H32838 (Oct. 7, 1973) (Statement of Rep. Fuqua). Congress further directed the Secretary of the Interior to administer

the Preserve lands "as a unit of the National Park System in a manner which will assure their natural and ecological integrity in perpetuity . . . ." 16 U.S.C. § 698i(a).

12. Of particular pertinence here, the statute directs the Secretary to develop "rules and regulations" which are "necessary and appropriate to limit or control" potentially destructive practices on the Preserve's resources, specifically including the use of "motorized vehicles" and "hunting, fishing, and trapping." 16 U.S.C. § 698i(b).

13. As a part of the National Park System, the Preserve must be managed to achieve the fundamental purpose of the National Park Service Organic Act of 1916 ("Organic Act"). The Organic Act requires NPS to "conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. This "nonimpairment" mandate requires that NPS only proceed with decisions where NPS has formally determined that the natural resources of a National Park unit will not be impaired, as that term is construed under the Organic Act. The Organic Act was amended by the Redwood Act to further reinforce that NPS lands shall be managed in a manner that prioritizes the preservation of such lands. *Id.* at § 1 a-1.

B. Executive Orders 11,644 and 11,989

14. In 1972, President Richard Nixon signed Executive Order ("EO") 11,644, which sets forth the criteria that are to be employed in the designation of areas and trails for the use or nonuse of ORVs on federal lands. The EO provides that ORV use on public lands must be "controlled and directed so as to protect the resources of those lands," and that "[a]reas and trails [for ORV use] shall be located to minimize damage to soil, watershed, vegetation, or other resources . . . . [and] minimize harassment to wildlife or significant disruption of wildlife

habitats." EO 11,644 §§ 1, 3(a). Executive Order 11,644 also requires the NPS to "ensure adequate opportunity for public participation in the promulgation of [such regulations] and in the designation of areas and trails" for ORV use. *Id.* at § 3(b).

15. Reaffirming and strengthening Executive Order 11,644 five years later, President Jimmy Carter issued Executive Order 11,989, directing agencies to close areas or trails to ORV use when such vehicles are causing or might cause "considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat, or cultural or historic resources of particular areas or trails of public lands." Exec. Order No. 11,989.

C. National Environmental Policy Act

16. The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. Its purposes are to "help public officials make decisions that are based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment," and to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." *Id.* §§ 1500.1(b)-(c).

17. NEPA requires each federal agency to prepare and circulate for public review and comment a detailed Environmental Impact Statement ("EIS") prior to undertaking any major federal action significantly affecting the human environment. 42 U.S.C. § 4332(2)(C). The EIS serves two important purposes: it ensures that the agency will have available and will carefully consider detailed information concerning significant environmental impacts in reaching its decision, and it guarantees that the relevant information will be made available to the public and other governmental agencies that may play a role both in the decisionmaking process and in the implementation of the decision.

18. If, after preparing a final EIS, the agency makes "substantial changes in the proposed action that are relevant to environmental concerns," the agency must, following solicitation of public comment, prepare a supplemental EIS ("SEIS") which analyzes the environmental implications of the changes. 40 C.F.R. § 1502.9(c).

19. Unless a proposed agency action is one that normally requires an EIS, or one that has such minor environmental consequences that it can be categorically excluded from consideration in an EIS, an agency must prepare an Environmental Assessment ("EA") to determine whether the proposed action will have significant environmental impacts requiring preparation of an EIS. 40 C.F.R. § 1501.4. If the agency concludes on the basis of its EA that its action will not have significant impacts on the environment, the federal agency must document its decision and explain the reasons why the project's impacts are insignificant in a "finding of no significant impact" ("FONSI"). 40 C.F.R § 1508.13.

D. Endangered Species Act

20. Recognizing that certain species of plants and animals "have been so depleted in numbers that they are in danger of or threatened with extinction," Congress enacted the Endangered Species Act ("ESA") to provide both "a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531. The ESA reflects "an explicit congressional decision to afford first priority to the declared national policy of saving endangered species." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

21. A species may be listed as endangered or threatened. An endangered species is one that is "in danger of extinction throughout all or a significant portion of its range . . . ." 16

U.S.C. § 1532(6). A threatened species is one that is "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.*

22. Section 9 of the ESA makes it unlawful for any person to "take" an endangered species without express authorization from FWS. 16 U.S.C. § 1538(a)(1). "Take" means "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). The term "harm" is further defined by FWS regulations to encompass habitat modification or degradation that injures an endangered species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering, 50 C.F.R. § 17.3, and "harass" is defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." *Id.*

23. Section 7 of the ESA directs all federal agencies, in consultation with the Secretary of Interior, to use their existing authorities to conserve threatened or endangered species. 16 U.S.C. § 1536(a)(1). "Conservation" means "to use and the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* at § 1532(3).

24. Section 7 of the ESA further requires all federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. at § 1536(a)(2). To carry out this obligation, an agency formally "consults" with the FWS when it undertakes an action that "may affect" listed species, unless the "federal agency determines . . . that the proposed action is not likely to adversely affect any listed species." 50 C.F.R. § 402.14. The agency requesting

consultation must, among other things, "provide the [FWS] with the best scientific and commercial data available or which can be obtained during the consultation." *Id.* Formal consultation results in the issuance by the FWS of a biological opinion.

25. In formulating a biological opinion, FWS is required to "use the best scientific and commercial data available," and to determine whether the effects of the action, "taken together with cumulative effects," are likely to result in jeopardy to the species. 50 C.F.R. § 402.14(g). Each biological opinion must contain, among other things, "[a] detailed discussion of the effects of the action on listed species or critical habitat." *Id.* at § 402.14(h)(2).

26. If a biological opinion finds that the proposed action is not likely to jeopardize the continued existence of the species, but may result in the take of individual animals, FWS must prepare an incidental take statement ("ITS") which permits an agency to "take" a specified number of individual members of a protected species if the taking is incidental to an otherwise lawful activity, 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 17.3, 402.14(i), and if the agency complies with required terms and conditions of the ITS to minimize and mitigate take. 16 U.S.C. §§ 1536(c)(2), 1536(b)(4). An ITS must be as specific as possible to set a trigger for reinitiation of consultation, and the burden is on FWS to employ an effective surrogate if a quantified take number cannot be provided.

27. Where FWS has previously issued a biological opinion, the action agency is required to reinitiate consultation with FWS at any time "[i]f the amount or extent of taking specified in the incidental take statement is exceeded" or "[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion." 50 C.F.R. § 402.16. If an action agency fails to reinitiate consultation when either of those conditions is triggered, it is a violation of section 7,

16 U.S.C. § 1536, and also a violation of section 9, 16 U.S.C. § 1538, because any takes exceeding a pre-existing incidental take authorization are *per se* unlawful.

E. Administrative Procedure Act

28. The Administrative Procedure Act, 5 U.S.C. §§ 701-706, provides for judicial review of agency action. Under the APA, the reviewing court must "hold unlawful and set aside agency action, findings, and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A reviewing court must also set aside agency action, findings, and conclusions found to be without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

FACTUAL BACKGROUND

A. Creation of the Preserve, the 1991 GMP, and the 1995 Lawsuit

29. The Preserve is located to the north and west of the Everglades in southwest Florida. NPS has divided the Preserve into six planning or management units: Bear Island, Deep Lake, Turner River, Corn Dance, Loop, and Stairsteps Units. *See* ORV Plan at 8, available at http://www.nps.gov/bicy/parkmgmt/upload/BICY-ORVManangement-Plan-2012-Scan.pdf. The Preserve is a mosaic of extensive prairies and marshes, forested swamps, and shallow sloughs on exceptionally flat terrain. The Preserve is an important watershed located upstream of Everglades National Park and its habitat is fragile and sensitive to disturbances. Due to soft soils and fragile vegetation, the marshes and prairies are highly sensitive to ORV use, which can cause severe and irreparable damage to the Preserve's ecosystems.

30. The Preserve is home to a variety of plant life. Of the hundreds of plant species known to exist in the Preserve, 96 are listed by the State of Florida as threatened or endangered. *See* Muss, Austin, & Snyder, *Plants of the Big Cypress National Preserve* (2003), available at

http://www.briarcliff.edu/departments/biol/BIOL%2052IR/Plants%20of%20the%20Big%20Cypress%20National%20Preserve.pdf. One of the major problems associated with ORV use in the Preserve is that ORVs not only permanently destroy soils, but also spread exotic, invasive plant species which outcompete native plants.

31. The Preserve is also home to abundant animal biodiversity, including thirty animal species that receive special protection or are recognized by the State of Florida, the federal government, or international treaties. For example, the Preserve and nearby public lands provide more than half of the remaining essential habitat for the highly imperiled Florida panther (*Felis concolor coryi*), which was listed as an endangered species in 1967 and has remained on the Endangered Species List. *See* 32 Fed. Reg. 4,001 (Mar. 11, 1967). There are currently approximately 100-120 adult and immature Florida panthers remaining, many of which use the Preserve. The Preserve is considered by panther experts as the core of the species' "primary zone" – land that is essential to the long term persistence of the species in the wild.

32. At least six other federally protected wildlife species reside in the Preserve: the Cape sable seaside sparrow, Everglades snail kite, Wood stork, West Indian manatee, Red-cockaded woodpecker, and Eastern indigo snake. All of these sensitive species are vulnerable to ORV noise and other effects of ORV damage to the Preserve's resources.

33. Since the 1930s, people have accessed what is now Preserve property using motorized ORVs, including swamp buggies, tracked vehicles, smaller all-terrain vehicles, and airboats. Historically, ORVs were allowed to go virtually anywhere, usually leaving visible tracks on the ground. While NPS has identified ORV use as a popular activity in the Preserve – primarily with hunters and recreational ORV users – the vast majority of visitors to the Preserve

are non-ORV users who engage in birdwatching, wildlife viewing, hiking, experiencing wilderness, and other non-motorized activities.

34. Congress created the Preserve in 1974. In October 1991, NPS issued a General Management Plan ("1991 GMP") and a Final Environmental Impact Statement ("FEIS") for the Preserve. The GMP and FEIS addressed all aspects of management of the Preserve, including ORV management. At that time, ORVs could access the Preserve at almost any location and travel almost anywhere on trails crisscrossing much of the land. Only the Loop Unit and two designated trails were closed to ORV use under the 1991 GMP. NPS further reported that the network of ORV trails, totaling nearly 23,000 miles of trails, had developed haphazardly over the years, with many trails following active and abandoned mineral access roads, former logging trams, and major prairies and marshes.

35. The more detailed ORV management plan promised in the 1991 GMP was not forthcoming. In 1995, several environmental groups and individuals, including some of the plaintiffs in this lawsuit, sued NPS and other federal agencies over ORV management in the Preserve. *See Fla. Biodiversity Project v. Kennedy*, Case No. 95- 50-Civ-FtM-24D (M.D. Fla.). The lawsuit claimed that NPS failed to circumscribe or manage ORVs in the Preserve in any meaningful way, resulting in an overall dispersed trail network of approximately 23,000 miles which severely damaged the Preserve's natural resources. The lawsuit was settled by an October 25, 1995 Settlement Agreement, in which NPS agreed to prepare the ORV management plan contemplated by the 1991 GMP and to prepare a Supplemental Environmental Impact Statement ("SEIS").

B. <u>The 2000 ORV Management Plan and the 2000 Biological Opinion</u>

36. In August 2000, NPS announced the availability of the Final Big Cypress ORV Management Plan and SEIS ("ORV Plan"). *See* 65 Fed. Reg. 49593-01 (Aug. 14, 2000). On September 28, 2000, NPS issued a Record of Decision, adopting the final version of the 2000 ORV Plan.

37. Based upon legislative mandates, NPS stated in the ORV Plan that "ORV use can occur only to the extent that it does not significantly adversely affect the preserve and its natural and cultural resources. Appropriate use of ORVs within this context, and the means for achieving that use, are provided in this plan." ORV Plan at 9. Due to its "scope and complexity," *id.* at 7, NPS contemplated a three-phase implementation process with all aspects of the plan being implemented within ten years. *Id.* at 59. Under the ORV Plan, NPS would apply a "precautionary principle, which would favor resource protection over resource use" in its management of motorized recreational ORVs. *Id.* at 27. The plan "emphasizes protection of natural and cultural resources in a manner that would leave the resources unimpaired for future users, while allowing ORV access for resource-related recreational opportunities." *Id.* at 28.

38. The ORV Plan allowed for an "adaptive management approach" which included continual review and modification of the plan as needed to ensure effectiveness and compliance with mandates and policies, and "adaptive management techniques" which would "apply lessons learned from research and field experience to improving ORV management . . . ." ORV Plan at 27. Management actions would be adopted that "assure the highest protection of the [P]reserve's resources." *Id.* at vii. Any modifications to the plan would comply with all appropriate laws and regulations, including, but not limited to, NEPA, the Executive Orders, and the ESA. *Id.* at 7. Modifications to the plan would also include appropriate public involvement. *Id.*

39. Some of the key features of the ORV Plan included the prohibition of ORV trails in all prairies, *see* ORV Plan at vi; the requirement that all ORV use must be restricted to designated trails, *id.*; and the limitation of no more than 400 miles of designated primary trails in the Preserve, *id.* at 29. As to particular management units of the Preserve, NPS closed the Deep Lake Unit and the Loop Unit to all ORV use, and NPS limited ORV use to "approximately 30 miles of designated primary trails" in the Bear Island Unit, "approximately 140 miles of designated primary trails" in the Turner River Unit, and "approximately 60 miles of designated primary trails" in the Corn Dance Unit. *Id.* at 76, 34. With respect to the Stairsteps Unit, NPS closed Zone 1 to all ORV use, limited Zone 2 to "approximately 10 miles of designated primary trails," limited Zone 3 of the Stairsteps Unit to "approximately 25 miles of designated primary trails," and limited Zone 4 of the Stairsteps Unit to airboat use only on designated trails. *Id.*

40. While the ORV Plan did not provide numeric limits on secondary trail mileage either cumulatively or individually, the ORV Plan made clear the distinction between "primary" trails and "secondary" trails:

> *Primary trails* would be those trails emanating from the designated access points and *providing recreational access within the preserve*. *These trails would be the principal ORV routes*. *Secondary trails would be identified to provide access to private property or specific destinations such as campsites*. Like the primary network, secondary trail alignments would be based on field surveys and GIS analyses. *Secondary trails would branch off of the primary trails and would receive less use*. *Trails accessing a private property would be limited to use by that landowner if no other destination existed along that route*. *Secondary trails for public recreational use accessing features such as designated campsites would extend for a short distance from the primary trail*.

ORV Plan at 34 (emphasis added). Therefore, as the ORV Plan explained, in contrast to primary trails which may access any type of recreational destination so long as the overall primary trail mileage comports with the Plan's primary trail mileage limits, secondary trails are essentially for ingress or egress to private property or a designated campground, but are not for general

recreational driving to access hunting and other recreational destinations. *Id.* Also, secondary trails must be short individually and cumulatively within a management unit, in order to comply with the Plan's directives, as demonstrated by NPS's authorization under the ORV Plan of a mere .34 miles of secondary trails in the Bear Island Unit of the Preserve – the first management unit to complete trail closures pursuant to the ORV Plan.

41. Before finalizing the ORV Plan, NPS engaged in formal consultation with FWS, pursuant to section 7 of the ESA, concerning the ORV Plan's primary trail network of no more than 400 miles of trails in addition to short secondary trails satisfying the ORV Plan's criteria. At the end of that consultation process, FWS issued a biological opinion on July 14, 2000, which NPS attached as Appendix C to the ORV Plan. *See* ORV Plan at 545-91. Inherent in FWS's authorization of the project pursuant to the biological opinion was NPS's commitment to the "application of the precautionary princip[le] [sic]" in managing ORV use in the Preserve. *Id.* at 547.

42. While both the ORV Plan and biological opinion focused on the Bear Island Unit with respect to the Florida panther, they also acknowledged the regular and routine use of other units – including the Turner River and Corn Dance Units – by panthers. *See* ORV Plan at 105 (map documenting panther telemetry locations in the Preserve); *id*. at 573 (same). FWS noted that "[t]he effect of the proposed action will be to reduce the extent of trails that panthers may move away from during periods of high use." *Id.* at 574. Despite that, FWS determined that the "continuation of ORV activities in areas occupied by panthers . . . will result in a continuation of the avoidance behavior observed" by scientists. *Id.* at 575. Therefore, FWS concluded that ORV use, even at the limited level of use authorized by the Plan (i.e., no more than 400 miles of primary trails in addition to a short secondary trail network), "could alter

normal breeding, feeding, and sheltering behavior," leading FWS to issue an incidental take statement for harassment of panthers due to ORV use. *Id.* at 575-82. FWS required, as "reasonable and prudent measures," that "NPS will reduce the extent of trails in" the Preserve, and that NPS will determine "[a]ppropriate levels of [ORV] use compatible with the Florida panther . . . [in] all areas of BICY." *Id.* at 582. FWS further required, as terms and conditions of section 7 authorization, that NPS "will implement studies described in Table 3 of the proposed action to preserve panthers and determine ORV carrying capacity for management units within BICY." *Id.*

43. In the 2000 biological opinion, FWS also consulted with NPS concerning Wood storks (which had approximately 45 colonies in the Preserve at that time), Red-cockaded woodpeckers (which had 53 clusters in the Preserve at that time), and Everglades snail kites (which nest and forage in various units of the Preserve). *See* ORV Plan at 569-71. For all three species, FWS concluded that adverse effects could be avoided only if NPS applied appropriate setback distances from each ORV trail, based on the best available scientific evidence. *See* ORV Plan at 574-75 (requiring NPS to use "setbacks for ORV trails from [wood stork] colony sites [that] are consistent with the recommendations" in the species' habitat management guidelines); *id.* (requiring that "ORV trails near active [woodpecker] clusters will be designed to either avoid the cluster, or be placed at least 200 feet from the aggregate of cavity trees that comprise the cluster site"); *id.* (requiring "appropriate set-back distances" "to determine the placement of designated trails in sensitive areas" for snail kites).

44. As to all species, FWS explained that "[t]he placement of designated trails . . . may require further consultation *once more specific details are developed for the activity.* NPS will continue to coordinate these activities with the Service to ensure consultation, if necessary,

is completed for these activities." ORV Plan at 571 (emphasis added). Citing its own regulations, FWS explained that "reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained and if . . . the amount or extent of taking specified in the incidental take statement is exceeded" or "the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion." *Id.* at 583.

45. In 2001, ORV users filed a lawsuit in federal court challenging the 2000 ORV Management Plan and SEIS. *See Wildlife Conservation Fund of Am. v. Norton*, Case No. 2:01-cv-25-FtM-29DNF (arguing that "[t]he new anti-access edicts in Big Cypress reflect one Administration's political agenda and disregard of on-the-ground facts and the law related to the Preserve."). Several of the plaintiffs in this lawsuit intervened on behalf of NPS to uphold the legality of the ORV Plan. On February 22, 2005, this Court ruled that NPS had taken the required "hard look" at its options and that the ORV Plan and SEIS were not arbitrary or capricious, an abuse of discretion, or otherwise contrary to law.

C. The 2007 Bear Island Lawsuit

46. The first management unit in which NPS closed trails pursuant to the ORV Plan was the Bear Island Unit, with most trail closures occurring immediately upon implementation of the ORV Plan in 2000. In February 2007, at the request of ORV users, NPS issued a decision reopening various ORV trails in the Bear Island Unit – trails which the agency had closed in 2000 pursuant to the ORV Plan because of serious adverse impacts to prairies, soil, hydrology, and wildlife (particularly panthers). Although the ORV Plan limited ORV use to "approximately 30 miles of designated primary trails" in the Bear Island Unit, *see* ORV Plan at 76, NPS's 2007 decision brought the primary trail mileage in the Bear Island Unit to 34.95 miles and the

secondary trail mileage in the unit to 9.41 miles (from a previous total of .34 miles), for a total of 44.36 miles of ORV trails in the unit. NPS did not conduct any NEPA review whatsoever, and only sought to comply with the ESA after it was notified of legal violations by members of the public.

47. In December 2007, environmental organizations and individuals, including some of the plaintiffs in this lawsuit, brought suit challenging NPS's 2007 decision as violating various laws, including NEPA, the ESA, and the ORV Executive Orders. NPS's primary argument was that NEPA review and other legal compliance was not necessary because the designation of the primary and secondary trails in the Bear Island Unit was implementation of, and consistent with, the 2000 ORV Plan and SEIS, and therefore no additional legal obligations existed in 2007.

48. In July 2012, the Honorable John Steele of this Court rejected NPS's position and ruled for the plaintiffs on their claims. In particular, Judge Steele emphasized that NPS could not – under the plain terms of the ORV Plan – open "approximately 44 miles" of combined primary and secondary ORV trails in the Bear Island Unit when the Plan only contemplated authorizing "approximately 30 miles," without first preparing a supplemental NEPA document. *See Defenders of Wildlife v. Salazar*, 877 F. Supp. 2d 1271, 1300-01 (M.D. Fla. 2012)

49. As to secondary trails, Judge Steele rejected the notion that the ORV Plan "placed no limit on secondary trails and, therefore, increasing these trails 30-fold was within the contemplation of the plan." *Defenders*, 877 F. Supp. 2d at 1300. Judge Steele also ruled that, under the ORV Plan, secondary trails cannot be used for "recreational ORV use" but rather only for "limited ingress and egress"; their endpoints must be non-recreational "specific destinations" such as private property and designated campgrounds; "locations used for hunting" and other recreation are not appropriate destinations for secondary trails (unlike with primary trails); and

secondary trails must be short both individually and cumulatively within a management unit. *Id.* at 1300-01. The court also made clear that NPS has the burden in a supplemental NEPA document to identify and document the "specific destination" to which a proposed secondary trail runs, and to accept public comment on the propriety of that trail, *before* NPS can designate the trail for use. *Id.* at 1301 (faulting NPS for "not identify[ing] the 'specific destinations'" and admonishing NPS for ending secondary trails in hunting locations).

50. Judge Steele's findings with respect to secondary trails were consistent with sworn testimony of John Donahue, a current NPS official and the former Preserve Superintendent who wrote and implemented the 2000 ORV Plan in the Preserve. In providing sworn testimony during the discovery phase of the Bear Island Unit lawsuit, Mr. Donahue – who was the "main architect" and the "principal author" of the ORV Plan – testified that secondary trails were meant to be "small" and "de minimis" cumulatively, and that it is inconsistent with the ORV Plan to have secondary trails covering 30% of the mileage of authorized primary trails in a given management unit, as was the case after NPS's 2007 Bear Island Unit trail opening decision that the Court ultimately set aside as contrary to the ORV Plan. Mr. Donahue confirmed that, in the ORV Plan, NPS "never intended for the secondary trail system to have anything more than a small, cumulative amount of trails." Mr. Donahue also testified that hunting sites cannot serve as "specific destinations" for purposes of secondary trail locations, as they may only access designated campgrounds and private property. NPS is aware of Mr. Donahue's testimony both as a result of the Bear Island lawsuit and because the plaintiffs in this lawsuit attached pertinent portions of Mr. Donahue's testimony to their December 20, 2012 notice letter alleging violations of the ESA, as required by 16 U.S.C. § 1540(g)(2)(A)(i).

51. In addition to finding that NPS had violated NEPA in opening 44 miles of trails in the unit where only approximately 30 miles had been authorized by the ORV Plan, Judge Steele found that NPS violated the NPS Organic Act and the Big Cypress Establishment Act, "[b]ecause the Court finds that the administrative record does not reflect a rational basis for NPS's 2007 decision to reopen trails in the BIU." *Defenders*, 877 F. Supp. 2d at 1303. Judge Steele also found NPS in violation of the ORV Executive Orders because "NPS has failed to articulate whether or how it applied the minimization criteria to the 2007 decision" and "the decision to reopen the trails was therefore arbitrary and capricious." *Id.* at 1304.

52. Judge Steele also found NPS and FWS in violation of the ESA. As the court explained, nothing had changed since the 2000 biological opinion when FWS consulted with NPS concerning only 30 miles of primary trails and short secondary trails in the Bear Island Unit, meaning that FWS's concurrence to NPS's reopening of an additional 14 miles of trails in the unit in 2007 was "the very definition of 'arbitrary and capricious." *Defenders*, 877 F. Supp. 2d at 1306-07. In particular, the court admonished the agencies because NPS's decision "involved the addition of approximately 9.4 miles of 'secondary' trails . . . . but FWS's Amended Opinion does not include an analysis of the locations of these trails and whether their placement and anticipated level of use would affect the endangered panther" or other listed species. *Id.* at 1308.

53. Having found that NPS's 2007 authorization of ORV use in the Bear Island Unit exceeded what had been contemplated by the ORV Plan and the various laws the ORV Plan implements, Judge Steele set aside the relevant portion of NPS's trail opening decision challenged by the plaintiffs – over NPS's requests to leave that decision in place – and provided

NPS with a fourteen-day window to "assist the defendants with implementing the requisite trail closures." *Defenders*, 877 F. Supp. 2d at 1308.

D. NPS's Designation of Secondary ORV Trails in the Turner River and Corn Dance Units

54. While the Bear Island case was pending, NPS proceeded with designating primary and secondary ORV trails in the Turner River and Corn Dance Units of the Preserve. On August 5, 2010, and July 22, 2011, NPS issued Closure Orders authorizing an 83-mile secondary trail system in the Turner River Unit, and a 64-mile secondary trail system in the Corn Dance Unit, respectively. On July 22, 2011, NPS announced that "all backcountry access via off-road vehicle is along designated primary and secondary trails only," meaning that one major component of the ORV Plan had been achieved (i.e., eliminating dispersed use). At that time, NPS also issued maps formally illustrating the primary and secondary trails open to ORV use in the Turner River and Corn Dance Units.

1. Turner River Unit

55. In the Turner River Unit – where the ORV Plan limited ORV use to "approximately 140 miles of designated primary trails," *see* ORV Plan at 76 – on August 5, 2010, NPS designated 126.5 miles of primary trails and 82.5 miles of secondary trails. *See* NPS, Turner River Unit Designated Trail Map, available at http://www.nps.gov/bicy/planyour visit/upload/20120726-TRU-Designated-Trails.pdf. Thus, NPS has designated 209 miles of total ORV trails in this unit, which is more than 49% larger than what the ORV Plan authorized, and significantly larger than the ORV trail system FWS analyzed in its biological opinion.

56. Most of the secondary trails authorized by NPS in the Turner River Unit are longer than anticipated by the ORV Plan, *see* ORV Plan at 34 (secondary trails may only "extend for a *short distance* from the primary trail") (emphasis added), and in some cases secondary trails

have other secondary trails branching off from them, which is also prohibited by the ORV Plan. *Id.* (secondary trails must "branch off of primary trails").

57. Not only do many of the secondary trails fail to end at a narrow subset of "specific destinations" allowed by the ORV Plan (e.g., private property or designated campground), but many of the trails allow general recreational driving on the way to hammocks, hunting areas, or other non-specific recreational destinations in direct contravention of the ORV Plan. *See id.* at 34 ("Secondary trails would be identified to *provide access to private property or specific destinations such as campsites*") (emphasis added). Thus, NPS has designated dozens of miles of *secondary* trails in this unit to reach non-specific recreational destinations that the ORV Plan allows only *primary* trails to access. Further, many of the secondary trails simply form loops to connect primary trails, in violation of the requirement that secondary trails must be only for ingress and egress to private property and designated campgrounds, and not serve general ORV recreational driving. *Id.*; *see also Defenders*, 877 F. Supp. 2d at 1300-01 (finding that secondary trails cannot be used for "recreational ORV use" but rather only for "limited ingress and egress," and their endpoints must be "specific destinations" such as private property and designated campgrounds because "locations used for hunting" and other non-specific recreation are not appropriate destinations for secondary trails under the Plan).

58. Even the secondary trails that access private properties are in violation of the ORV Plan because they allow general recreational use by all Preserve ORV permitholders rather than use for ingress and egress by the individual property owner. *See* ORV Plan at 34 ("Trails accessing a private property would be limited to use by that landowner if no other destination existed along that route."). In many cases there are multiple trails accessing a single private property, but that use of duplicative secondary trails to reach a single destination is contrary to

the ORV Plan's stated purpose to reduce the spatial extent of ORV trails in the Preserve. *See id.* at iv (explaining that the ORV Plan "[limit[s] ORVs to designated roads and trails, which would produce a major reduction in the spatial extent of the [P]reserve affected by ORVs").

2. Corn Dance Unit

59. In the Corn Dance Unit – where the ORV Plan limited ORV use to "approximately 60 miles of designated primary trails," *see* ORV Plan at 76 – on July 22, 2011, NPS designated 65 miles of primary trails and 64 miles of secondary trails. *See* NPS, Corn Dance Unit Designated Trail Map, available at http://www.nps.gov/bicy/planyourvisit/upload/20120726-CDUDesignated-Trails.pdf. Thus, NPS has designated 129 miles of ORV trails in this unit, which is more than double the number of ORV trails authorized by the ORV Plan (115% more than authorized), and significantly larger than the trail system FWS analyzed in its biological opinion.

60. As with the Turner River Unit, most of the secondary trails authorized by NPS in the Corn Dance Unit are longer than anticipated by the ORV Plan, *see* ORV Plan at 34 (secondary trails may only "extend for a *short distance* from the primary trail") (emphasis added), and in some cases secondary trails have other secondary trails branching off from them, which is also prohibited by the ORV Plan. *Id.* (secondary trails must "branch off of primary trails").

61. Likewise, many of the secondary trails authorized by NPS in the Corn Dance Unit fail to end at a narrow subset of "specific destinations" allowed by the ORV Plan (e.g., private property or designated campground), but rather allow general recreational driving on the way to hammocks, hunting areas, or other non-specific destinations in direct contravention of the ORV Plan. *See id.* at 34 ("Secondary trails would be identified to *provide access to private property*

or specific destinations such as campsites") (emphasis added). Thus, NPS has designated dozens of miles of *secondary* trails in this unit to reach non-specific recreational destinations that the ORV Plan allows only *primary* trails to access. Further, many of the secondary trails form loops to connect primary trails, once again in violation of the requirement that secondary trails must be only for ingress and egress to private property and to access designated campgrounds, and not serve general ORV recreational driving. *Id.*; *see also Defenders*, 877 F. Supp. 2d at 1300-01.

62. Even the secondary trails in the Corn Dance Unit that access private properties are in violation of the ORV Plan because they allow general recreational use by all Preserve ORV permitholders – rather than use for ingress and egress by the individual property owner – and in many cases there are multiple trails accessing a single private property, meaning that the use of duplicative secondary trails is contrary to the ORV Plan's stated purpose to reduce the spatial extent of ORV trails in the Preserve. *See id.* at 34 ("Trails accessing a private property would be limited to use by that landowner if no other destination existed along that route.").

E. Plaintiffs' December 20, 2012 Notice of Violations

63. After Judge Steele issued his ruling concerning the Bear Island Unit in July 2012, the plaintiffs in this lawsuit sent NPS and FWS, via certified mail, a 17-page notice letter and five attachments alleging violations of the ESA, as required by 16 U.S.C. § 1540(g)(2)(A)(i), as well as violations of other governing laws. Despite efforts between Plaintiffs and NPS to amicably resolve the dispute short of litigation, they were unable to reach a mutually agreeable resolution, thus necessitating this lawsuit.

PLAINTIFFS' CLAIMS FOR RELIEF

Claim One: NPS's Failure to Prepare an Environmental Impact Statement or an Environmental Assessment In Violation of NEPA

64. By authorizing – in addition to a primary ORV trail system – an extensive secondary ORV system accessing various non-specific hunting and other recreational destinations not permitted by the ORV Plan, NPS has authorized a de facto primary trail system of 209 miles of total ORV trails in the Turner River Unit (49% more than authorized by the ORV Plan), and of 129 miles of total ORV trails in the Corn Dance Unit (115% more than authorized by the ORV Plan). In authorizing that extensive mileage of ORV trails in excess of the ORV Plan's limits for these management units, NPS failed to conduct an environmental analysis pursuant to NEPA. NPS did not prepare an EIS, did not prepare an EA, did not issue a FONSI, and did not prepare an SEIS supplementing its 2000 EIS issued in conjunction with its adoption of the ORV Plan. As a result, NPS did not evaluate the environmental effects of the extensive trail systems in the Turner River and Corn Dance Units, nor has it evaluated, in particular, the extensive secondary trails systems in these units in which NPS has authorized routine recreational use rather than mere ingress and egress to private property. Nor has NPS disclosed the likely environmental impacts of its proposed action to the public in any manner, or provided notice and public comment as required by NEPA.

65. NPS's decision to authorize extensive ORV use in the Turner River and Corn Dance in excess of the ORV Plan's limits – i.e., a de facto primary trail system of 209 miles in the Turner River Unit and 129 miles in the Corn Dance Unit, when accounting for the extensive "secondary" trails accessing non-specific recreational destinations which the ORV Plan reserved only for primary trails – may have significant environmental impacts, including rutting, compaction, and displacement of the sensitive soils and bedrock in the prairies and marshes in

these units, damage and destruction of vegetation, and permanent alteration of surface water flows and hydrology. Moreover, the extensive ORV use authorized by NPS in these units is likely to disturb wildlife, including the endangered Florida panther, threatened Wood stork, threatened Red-cockaded woodpecker, and threatened Everglades snail kite, and also destroy the habitat of these species and other habitat. NPS's action will thus significantly affect the quality of the human environment.

66. NPS's failure to consider and disclose the potential environmental impacts of its decision to authorize a total of 209 miles of ORV trails in the Turner River Unit and 129 miles in the Corn Dance Unit – when the ORV Plan only allows a maximum of 140 miles and 60 miles of trails accessing recreational destinations in these units, respectively – in an EIS, or in a SEIS, violates NEPA, 42 U.S.C. § 4332(2)(C), its implementing regulations, and is arbitrary, capricious, and otherwise contrary to law, in violation of the APA, 5 U.S.C § 706.

67. NPS's failure to at least consider and disclose the potential environmental impacts of its proposal to authorize 209 miles of ORV trails in the Turner River Unit and 129 miles of ORV trails in the Corn Dance Unit in an EA, in order to determine whether it should prepare an EIS or SEIS, and its decision to proceed with its proposed action without issuance of a FONSI documenting why its action will not have significant impacts on the human environment, violates NEPA and the CEQ regulations, 40 C.F.R. §§ 1501.4, 1508.13, and is arbitrary, capricious, and otherwise contrary to law, in violation of the APA, 5 U.S.C § 706.

Claim Two: NPS's Violations of the Big Cypress Establishment Act, the National Park Service Organic Act of 1916, And The 2000 ORV Plan

68. NPS's authorization of expanded ORV use within the Turner River and Corn Dance Units will have substantial, and irreversible, impacts on the soils, hydrology, and wildlife of the Preserve and it will impair non-motorized recreational use of the Preserve. It therefore

violates NPS's mandates under the Big Cypress Establishment Act and the Organic Act. In particular, NPS's failure to prepare an impairment determination – and to thus ensure that the decisions will not impair resources as that term is construed in the Organic Act – before authorizing the secondary ORV trail systems in the Turner River and Corn Dance Units violates the express requirements of the Organic Act. Therefore, NPS's actions in authorizing the secondary trail networks in these units was arbitrary, capricious, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706.

69. It is especially arbitrary and capricious and contrary to the mandates governing the Preserve for NPS to authorize ORV use without ensuring that such use will not impair prairies, marshes, and sensitive resources given that in 2000 NPS found that those resources required protection, and that it had sought to protect them by significantly limiting ORV use by reducing the miles of designated trails in the Turner River Unit to 140 miles and in the Corn Dance Unit to 60 miles. NPS's August 5, 2010 and July 22, 2011 ORV trail authorization decisions therefore violate the ORV Plan and represent an arbitrary and capricious reversal of the NPS's 2000 decision on how to fulfill its statutory duties.

70. In authorizing the extensive secondary trail networks in the Turner River and Corn Dance Units, NPS did not even attempt to reconcile its decisions with the Big Cypress Establishment Act's mandate that NPS administer the Preserve "in a manner which will assure [its] natural and ecological integrity in perpetuity" by developing "rules and regulations" which are "necessary and appropriate to limit or control" potentially destructive practices on the Preserve, specifically including the use of "motorized vehicles" and "hunting." 16 U.S.C. §§ 698i(a)-(b). Failing to heed that mandate, much less directly apply it in rendering the trail

designation decision, was arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

71. The ORV Plan sought to effectuate the mandates of the Big Cypress Establishment Act and the Organic Act. It provides "methods for limiting and controlling ORV use to minimize impacts to resources in the preserve . . . methods of avoiding adverse impacts to wetlands and sensitive resources for ORV's . . . and procedures and considerations for closing, opening and reopening areas to ORV use." ORV Plan at 15-16. The ORV Plan mandates reducing approximately 23,300 miles of dispersed ORV use to 400 miles of designated primary trails. In the Turner River and Corn Dance Units, it calls for reducing the miles of primary trails, to approximately 140 and 60 miles, respectively, with the express purpose of minimizing impacts to sensitive substrates, vegetation, and panthers and other wildlife. The ORV Plan closed trails in sensitive habitats such as prairies and marshes, and studies, including carrying capacity studies, were to be undertaken in specific time frames, and management decisions made thereon. NPS's authorization of trails in the Turner River and Corn Dance Units without observance of these requirements are contrary to the provisions and intent of the 2000 ORV Plan that implement the mandates of the Big Cypress Establishment Act and the Organic Act, and are arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

72. Under the plain terms of the ORV Plan – and as affirmed by Judge Steele in construing the ORV Plan's plain terms – NPS cannot designate a secondary trail unless NPS has verified that (1) it has, as an endpoint, private property or a designated campground, and is, therefore, not a loop; (2) the trail will only be used for ingress and egress by the property owner, if designated for private property access, and not for public recreational use; (3) the trail must branch off of a primary trail, and not another secondary trail; (4) the trail itself is short; and (5)

the cumulative mileage of secondary trails in a given management unit must be a fraction of the authorized primary trail mileage so as not to exceed the ORV Plan's authority. In designating extensive secondary trails in the Turner River and Corn Dance Units, NPS has violated *all* of these key directives, and thus acted arbitrarily and capriciously, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

73. On information and belief, many of the secondary ORV trails authorized by NPS in the Turner River and Corn Dance Units end at non-specific destinations prohibited by the ORV Plan such as hunting areas, wildlife viewing areas, recreational areas, and hammocks. Before designating these trails for ORV use, NPS never assured itself, as it must, that every single secondary trail in the Turner River and Corn Dance Units ends at a defined non-recreational "specific destination" such as private property or designated campground, as required by the ORV Plan. That failure was arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

74. On information and belief, several of the secondary trails authorized by NPS in the Turner River and Corn Dance Units are loops that do nothing more than connect primary trails for recreational ORV use – something expressly prohibited by the ORV Plan's mandate that a secondary trail must serve as a means of ingress and egress to private property or a designated campground. NPS's authorization of loop trails as designated secondary trails was arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

75. On information and belief, several of the secondary trails authorized by NPS in the Turner River and Corn Dance Units branch off of other secondary trails, rather than primary trails, in direct contravention of the plain terms of the ORV Plan. *See* ORV Plan at 34 (requiring that "[s]econdary trails would branch off of the primary trails"). NPS's authorization of

secondary trails branching off of other secondary trails was arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706

76. On information and belief, the secondary trails that access private properties are in violation of the ORV Plan because they allow general recreational use by all ORV permitholders, rather than use for ingress and egress by the property owner as directed by the ORV Plan. *See* ORV Plan at 34 ("Trails accessing a private property would be limited to use by that landowner if no other destination existed along that route."). Also, in many cases there are multiple trails accessing a single private property, meaning that the use of duplicative secondary trails is contrary to the ORV Plan's stated purpose to reduce the spatial extent of ORV trails in the Preserve. *See id.* at iv (explaining that the ORV Plan "[limit[s] ORVs to designated roads and trails, which would produce a major reduction in the spatial extent of the [P]reserve affected by ORVs"). NPS's authorization of multiple secondary trails to a single private property, and its authorization of general recreational use on secondary trails accessing private properties, was arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

77. NPS has also failed to ensure that no secondary trails traverse prairies – the most sensitive vegetative resource in the Preserve – which is an express requirement of the ORV Plan. Nor is NPS applying the precautionary principle to trail designation decisions, as required by the ORV Plan. Those failures by NPS were arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

78. The ratio of the secondary trail network in each of these units as compared to the primary trail network in those units (Corn Dance Unit: 64 miles secondary compared to 65 miles primary; Turner River Unit: 83 miles secondary compared to 126.5 miles primary) is well outside of what the Plan contemplated. Particularly since the ORV Plan limited primary trails to

60 miles in the Corn Dance Unit and 140 in the Turner River Unit, NPS's decision to designate a combined 129 miles and 209 miles, respectively, is patently unlawful under the ORV Plan, and therefore arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

79. NPS has also violated the ORV Plan's directives limiting the secondary trail mileage to a de minimis fraction of the primary trail mileage in a management unit. As former Preserve Superintendent Donahue confirmed, the ORV Plan requires that secondary trails be "small" and "de minimis" cumulatively and also prohibits secondary trails from covering, in the aggregate, even 30% of the mileage of authorized primary trails in a given management unit. Here, NPS has allowed secondary trails (64 miles) in the Corn Dance Unit at 107% of the authorized primary trail mileage (60 miles) in that unit, and NPS has allowed secondary trails (83 miles) in the Turner River Unit at 59% of the authorized primary trail mileage (140 miles) in that unit. In both units, these amounts *far exceed* the 30% ratio in the Bear Island Unit (9.41 miles of secondary trails compared to an authorization of 30 miles of primary trails) which Superintendent Donahue – the NPS official who wrote the ORV Plan – testified under oath was inconsistent with the ORV Plan and which Judge Steele found to violate the ORV Plan in overturning NPS's Bear Island Unit decision. Accordingly, NPS's authorization of such massive secondary trail networks in these units – relative to the primary trail mileage authorized by the ORV Plan – was arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

80. NPS also failed to include the public in its decision authorizing the extensive secondary trails systems in the Turner River and Corn Dance Units. The ORV Plan requires that any modifications to the Plan be accompanied by public involvement. *See* ORV Plan at 7 (explaining that "[m]odifications to the plan" would "includ[e] appropriate public

involvement”). In authorizing these secondary trail networks, however, NPS never provided notice to the public or solicited public comment concerning the proposal. Indeed, the only public involvement provided by NPS was an agency website through which ORV users can submit additional secondary ORV trails they want added to the designated ORV trail network in the Turner River and Corn Dance Units, which is still operative. There was no similar public process for raising concerns about existing or proposed secondary trails in these units. Accordingly, NPS’s failure to provide meaningful (or any) public participation before authorizing the extensive secondary ORV trail networks in the Turner River and Corn Dance Units was arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

Claim Three: NPS’s Violations of
Executive Orders 11644 and 11989

81. NPS has not demonstrated that it considered, much less applied, the minimization criteria to each of the secondary trails designated in the Turner River and Corn Dance Units, as required by the ORV Executive Orders. *See* Exec. Order No. 11,644 §§ 1, 3 (requiring that “[a]reas and trails [for ORV use] shall be located to minimize damage to soil, watershed, vegetation, or other resources . . . . [and] minimize harassment to wildlife or significant disruption of wildlife habitats”). To the contrary, NPS evidently designated secondary trails open to ORV use based on ORV user interest, rather than an evaluation that such trails would, in fact, be located to minimize damage to soil, hydrology, vegetation, prairies, marshes, sensitive wildlife, and wildlife habitat. Accordingly, NPS violated the express mandate of the ORV Executive Orders, and acted arbitrarily, capriciously, and contrary to law, in violation of the APA, 5 U.S.C. § 706.

Claim Four: NPS's Violations of the Endangered Species Act

82. In designating a secondary trail network in the Turner River and Corn Dance Units that far exceeds what was contemplated by the ORV Plan in both size and scope in those units, NPS has placed greater stress on the federally protected wildlife that inhabits the Preserve than was anticipated in the Plan. In so doing, NPS has also substantially modified the ORV Plan in a manner that causes adverse effects to listed species and their habitats that FWS never considered in the 2000 biological opinion, and, as a result, exceeds the incidental take authorized by that opinion. For both of those reasons, NPS was required by the plain language of 50 C.F.R. § 402.16 and by the 2000 biological opinion to reinitiate consultation with FWS *before* designating the massive secondary trail networks in the Turner River and Corn Dance Units. *See* 50 C.F.R. § 402.16 (reinitiation of consultation is required "[i]f the amount or extent of taking specified in the incidental take statement is exceeded" or "[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion"); *see also* ORV Plan at 583. As a result, NPS's failure to reinitiate consultation with FWS before authorizing ORV use on the extensive secondary trail networks in the Turner River and Corn Dance Units was arbitrary, capricious, and contrary to law, in violation of the ESA, its implementing regulations, and the APA, 5 U.S.C. § 706.

83. FWS's 2000 biological opinion expressly noted that "[t]he placement of designated trails . . . may require further consultation *once more specific details are developed for the activity*. NPS will continue to coordinate these activities with [FWS] to ensure consultation, if necessary, is completed for these activities." ORV Plan at 571. Yet, NPS

moved forward in 2010 and 2011 not only with the placement of designated primary trails, but with an immense secondary trail network far exceeding anything FWS had previously reviewed and analyzed in connection with ORV management in the Preserve. However, NPS did not seek reinitiation of consultation with FWS concerning that action. As Judge Steele also made clear in his Bear Island Unit ruling, NPS may not designate trails in excess of what was contemplated in the ORV Plan until and unless FWS has, in a biological opinion, "include[d] an analysis of the locations of these trails and [determined] whether their *placement and anticipated level of use* would affect the endangered panther" and other listed species, *Defenders*, 877 F. Supp. 2d at 1307 (emphasis added) – something which FWS has not done here because NPS failed to reinitiate consultation with FWS. NPS's authorization of the secondary trails in the Turner River and Corn Dance units without first reinitiating consultation and having FWS analyze the location and level of ORV use as it affects panthers and other listed species was arbitrary, capricious, and contrary to law, in violation of the ESA, its implementing regulations, and the APA, 5 U.S.C. § 706.

84. By failing to reinitiate consultation with FWS, NPS has also failed to account for the fact that the extensive secondary trail networks authorized by NPS in the Turner River and Corn Dance Units will almost certainly result in significantly increased hunting of panther prey (e.g., deer, hogs) by hunters using secondary ORV trails to access more remote areas of the Turner River and Corn Dance Units. As panther prey is impacted by this increased hunting pressure, panthers too will be adversely affected by lower prey availability causing them to expend more energy to find prey resources. Therefore, NPS's decisions to authorize extensive secondary trails in these units without consulting with FWS were arbitrary, capricious, and

contrary to law, in violation of the ESA, its implementing regulations, and the APA, 5 U.S.C. § 706.

85. Because NPS has failed to reinitiate consultation with FWS despite designating secondary trail networks in the Turner River and Corn Dance Units that far exceed the authorization previously granted by FWS's 2000 biological opinion, and because that immense trail system has almost certainly resulted in unauthorized takes of panthers, wood storks, red-cockaded woodpeckers, and snail kites, NPS is in violation of sections 7 and 9 of the ESA, its implementing regulations, and the APA, 5 U.S.C. § 706.

86. NPS never conducted the studies on ORV use and panther compatibility – which were required as mandatory terms and conditions of the 2000 biological opinion – to "determine ORV carrying capacity for management units within BICY" *before* designating the secondary trail networks in the Turner River and Corn Dance Units. That is a violation of section 7, *see* 16 U.S.C. § 1536(a)(1), and also a failure by NPS to rely on the best available scientific evidence in authorizing the secondary trail networks, *see* 16 U.S.C. § 1536(a)(2). *See Defenders*, 877 F. Supp. 2d at 1306-07 ("In 2000, FWS concluded that an approximate limit of 30 miles of primary trails and *short* secondary trails in the BIU would cause some incidental take of the Florida panther. This 'take' *was allowed only if NPS completed several studies related to ORV use and its impacts* [on panthers].") (emphasis added).

87. NPS failed to ensure, via consultation with FWS, that the appropriate setback distances – as dictated by the best available scientific evidence – were applied to each and every designated secondary trail in the Turner River and Corn Dance Units near known Wood stork, Red-cockaded woodpecker, and Everglades snail kite habitat, as required by the 2000 biological

opinion. That failure violates section 7 of the ESA, its implementing regulations, and the APA, 5 U.S.C. § 706.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that, in authorizing an 83-mile secondary trail system in the Turner River Unit, and a 64-mile secondary trail system in the Corn Dance Unit, respectively, and failing to conduct necessary studies to determine appropriate areas and levels of use and setting ORV use thereon, NPS violated NEPA by failing to consider and disclose in any manner the environmental impacts of authorizing extensive secondary ORV trails through the sensitive resources of those management units; violated the Big Cypress Enabling Act, National Park Service Organic Act of 1916, the 2000 ORV Plan, and Executive Orders 11644 and 11989 by authorizing extensive secondary ORV trail use in these management units without appropriately considering or providing for the protection and conservation of Preserve resources or even preparing an impairment determination; violated the ESA by failing to reinitiate consultation with FWS; violated the ESA by failing to provide for the conservation of the Florida panther, Wood stork, Red-cockaded woodpecker, and Everglades snail kite; violated the ESA by allowing the unauthorized take of Florida panthers and other federally protected species; and violated the APA by acting arbitrarily, capriciously, and not in accordance with the law with regard to each of these statutory duties;

2. Set aside the secondary trail openings (except those accessing private property or designated campgrounds) authorized in the Turner River Unit by NPS's August 5, 2010 Closure Order until and unless NPS completes an appropriate analysis pursuant to NEPA, the NPS Organic

Act, the Big Cypress Establishment Act, the ORV Executive Orders, and the ESA, and in compliance with the 2000 ORV Plan;

3. Set aside the secondary trail openings (except those accessing private property or designated campgrounds) authorized in the Corn Dance Unit by NPS's July 22, 2011 Closure Order until and unless NPS completes an appropriate analysis pursuant to NEPA, the NPS Organic Act, the Big Cypress Establishment Act, the ORV Executive Orders, and the ESA, and in compliance with the 2000 ORV Plan;

4. Enjoin NPS from authorizing ORV use of any kind on any secondary trail in the Turner River and Corn Dance Units (except those accessing private property or designated campgrounds) until NPS complies fully with all applicable laws;

5. Enjoin NPS from authorizing recreational ORV use on secondary trails accessing private property, and limit such access to the landowner of record, pursuant to the ORV Plan;

6. Award Plaintiffs their reasonable attorney fees and litigation costs in this action; and

7. Grant such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

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