



Northwest
Eugene, Oregon

Southwest
Taos, New Mexico

Northern Rockies
Helena, Montana

Southern Rockies
Durango, Colorado

Defending the West

www.westernlaw.org

Western Environmental Law Center

August 21, 2012

SENT VIA U.S. MAIL (DELIVERY CONFIRMATION)

Bob Ream, Chairman
Mt. Fish Wildlife & Parks Comm.
521 Clarke Street
Helena, MT 59601

Dan Vermillion, Vice-Chairman
Mt. Fish Wildlife & Parks Comm.
P.O. Box 668
Livingston, MT 59047

Ron Moody, Commissioner
Mt. Fish Wildlife & Parks Comm.
109 Bach Avenue
Lewistown, MT 59457

A.T. Stafne, Commissioner
Mt. Fish Wildlife & Parks Comm.
8079 U.S. Highway 2
Wolf Point, MT 59201

Shane Colton, Commissioner
Mt. Fish Wildlife & Parks Comm.
335 Clark
Billings, MT 59101

Mt. Fish Wildlife & Parks Comm.
1420 East 6th Avenue
Helena, MT 59620-0701

Joe Maurier, Director
Mt. Depart. of Fish Wildlife & Parks
1420 East 6th Avenue
Helena, MT 59620-0701

Brian Schweitzer, Governor
Office of the Governor
Montana State Capital Building
P.O. Box 200801
Helena, MT 59620-0801

Ken Salazar, Secretary
United States Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Sixty-Day Notice of Intent to Sue for Violations of Sections 9 of the Endangered Species Act, 16 U.S.C. § 1538.

Dear Sirs:

WildEarth Guardians, the Alliance for the Wild Rockies, Friends of the Wild Swan, and Native Ecosystems Council hereby provide this sixty-day notice of their intent to sue for violations of Section 9 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1538.

The five members of the Montana Fish Wildlife and Parks Commission (“Commission”) named above, as well as Joe Maurier, in his official capacity as the Director of Montana Department of Fish Wildlife and Parks (“Department”) share the authority of managing wildlife in Montana. These state officials (collectively “the State” or “Montana”) share the responsibility of setting when, where, by what means, and under what circumstances wildlife may taken in Montana.

In exercising this authority, these State officials have authorized, and continue to authorize trapping and snaring in areas occupied by Canada lynx (“lynx”), a threatened species under the ESA. Authorizing trapping and snaring in areas occupied by lynx has resulted in at least 9 reported instances of lynx being taken since lynx obtained protective ESA status in March, 2000, and additional instances are reasonably certain to occur in violation of the ESA.

This sixty-day notice serves to put these State officials on notice of their liability under the ESA and inform the State of our intent to bring a citizen suit after the sixty-day period has run. This notice is provided pursuant to, and in accordance with, Section 11 (g) of the ESA, 16 U.S.C. § 1540 (g).

A. The ESA's prohibition on take.

Section 9 of the ESA prohibits any person from taking an endangered species. 16 U.S.C. § 1538(a)(1)(B). "Any taking and every taking - even of a single individual of the protected species - is prohibited by the Act." *Loggerhead Turtle v. County Council of Volusia County, Florida*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995), *aff'd by Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231 (11th Cir.1998), *cert. denied*, 526 U.S. 1081 (1999). This prohibition applies to threatened species as well. 50 C.F.R. § 17.31 (a).

The term "take" is defined broadly and 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). Congress intended the term "take" to be defined in the "broadest possible manner to include every conceivable way" in which a person could harm or kill fish or wildlife. S. Rep. No. 307, 93rd Cong., 1st Sess. 1, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2989, 2995. A take need not be intentional. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 701 (1995).

Under certain terms and conditions, the taking of a threatened or endangered species that is incidental to the purpose of otherwise lawful activity maybe allowed. 16 U.S.C. § 1539 (a)(1)(B). To escape liability under the ESA, however, the person must apply for and receive an incidental take permit ("ITP") from the U.S. Fish and Wildlife Service ("Service"). 16 U.S.C. § 1536(b)(4),(o)(2).

As a prerequisite to receiving an ITP, the applicant must submit a habitat conservation plan that specifies the impact that will likely result from such taking, what steps the applicant will take to minimize and mitigate such impacts, the funding that will be available to implement such steps, and any alternative actions to such taking that were considered by the applicant and the reasons why such alternatives are not being utilized. 16 U.S.C. § 1539 (a)(2)(A).

After providing an opportunity for public comment, the Service will then issue the applicant an ITP if, and only if: (1) the taking is incidental; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (3) the applicant ensures that adequate funding for the

conservation plan is provided; and (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. *Id.* The ESA explicitly directs that all ITPs “contain such terms and conditions as the Secretary deems necessary or appropriate.” 16 U.S.C. § 1539 (a)(2)(B)(v).

B. State liability for violating the ESA’s prohibition on take.

The ESA’s prohibition on take applies to all “persons.” 16 U.S.C. § 1538 (a)(1). A “person” includes any “officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State.” 16 U.S.C. § 1532 (13). The ESA’s citizen suit provision, in turn, authorizes suits against any person, including any governmental instrumentality or agency to the extent permitted by the Eleventh Amendment. 16 U.S.C. § 1540 (g)(1).¹

Under the ESA, therefore, State governmental officers may be liable for violating the ESA’s prohibition on take. State liability for take extends not only from the State official’s own on-the-ground activities but also for activities undertaken by others who are acting under the State’s authorization.

“The ESA not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting the taking . . . [A] governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.” *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997)

¹ The Eleventh Amendment grants states sovereign immunity from being sued by citizens in federal court without their consent. *Alden v. Maine*, 527 U.S. 706, 745-47 (1999). However, to ensure that federal law remains the supreme law of the land, there is an exception allowing for lawsuits that seek to enjoin state officials from engaging in a continuing violation of federal law. This exception was recognized by the Supreme Court in *Ex Parte Young*, 209 U.S. 123, 159-60 (1907) and in *Green v. Mansour*, 474 U.S. 64, 68 (1985), and recognized by the Ninth Circuit in *In re Ellett*, 254 F.3d 1135, 1138 (9th Cir. 2001). To comply with the Eleventh Amendment, ESA take cases involving state regulatory actions brought against state officials for violating federal law in federal court must be prospective in the form of relief they request.

(state liable for take of right whales for authorizing use of lobster potting and gillnetting); *see also Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (Forest Service's management of timber stands was a taking of woodpecker); *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (EPA's registration of pesticides containing strychnine was take of endangered species); *Palila v. Hawaii Dep't of Land and Nat. Resources*, 639 F.2d 495 (9th Cir. 1981) (state's authorization of feral goats and sheep in palila habitat constitutes take); *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1251 (11th Cir. 1998) (county liable for take of sea turtles from authorization of beach lighting).

In *Animal Protection Institute v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008), the Court held that the Minnesota Department of Natural Resources's ("MDNR") authorization of trapping and snaring in areas occupied by lynx without first obtaining the requisite ITP violated Section 9 of the ESA. In that case, 13 lynx takings had been reported since 2002 and the MDNR had not taken the necessary steps to protect lynx from future takes by obtaining an ITP. The Court declared MDNR had violated Section 9 of the ESA and ordered the state agency to "promptly take all action necessary to insure no further taking of threatened Canada lynx by trapping or snaring activities within core Canada lynx ranges, including but not limited to: applying for an [ITP by a date certain]." *Id.* at 1081.

C. Montana's authorization of trapping and snaring in occupied lynx habitat has already resulted, and is reasonably certain to result, in take of lynx.

Lynx are "known to be very vulnerable to trapping." Lynx Conservation Assessment and Strategy ("LCAS") at 85. "Ward and Krebs (1985) stated that trapping was the single most important mortality factor in their Yukon study area." *Id.* "[T]rappers relate that lynx are relatively easy to capture; they appear to have little fear of human scent, they respond to baits and lures, and can be attracted using visual attractants." Ruggiero et al. 2000. *Ecology and Conservation of Lynx in the United States* ("Science Report"). University Press of Colorado, Boulder,

CO. 480p at 280.² “Not surprisingly, the level of trapping in and around the population under study influences survival rates.” *Id.* at 287.

One study found that 95% of all lynx deaths in a particular study area were human related (mostly fur-trapping), and only 5% of deaths were from natural causes. *Id.* at 288. “In interior Alaska, Stephenson (1986) estimated that annual mortality rates from trapping ranged from 55-100% of radio marked lynx. On the Kenai Peninsula in Alaska, Bailey et al. (1986) suggested trapping was directly or indirectly involved in all nine lynx deaths in their study area during two years of high hare density, with trapping remove 80% of individuals over one year of age.” *Id.* In the same study area during a trapping closure, no adult male lynx died of natural causes during periods of low hare densities. *Id.*

In July, 1993, the Washington Department of Fish & Wildlife (“WDFW”) issued a report on the status of lynx in the State of Washington. The WDFW concluded that “[l]ynx are highly susceptible to trapping.” WDFW Report at 23.³ Of “98 radio-collared or marked research animals in eight studies, 49 (50%) died from human related causes, the majority of which were trapping.” *Id.* (citations omitted). Estimates “of the proportion of total [lynx] populations annually removed from trapping have ranged from 65 to 100% . . . These rates of mortality exceed recruitment into the population during snowshoe hare abundance when lynx reproduction is highest.” *Id.* The WDFW suggests that during years of low recruitment in response to low food availability, local populations may be extirpated in areas where heavy trapping is allowed to occur. *Id.*

Although lynx trapping seasons are now closed in the contiguous United States (including Montana) it is well known and documented that lynx are often trapped incidentally or illegally. Science Report at 453; LCAS at 85. “We know

² The Science Report is a comprehensive study by the Federal Lynx Biology Team on the ecology and conservation of lynx in the contiguous U.S. The Science Report was prepared at the request of federal land management agencies in response to the Service’s “proposed rule” to list the lynx under the ESA.

³ The official citation for the report is: Washington Department of Wildlife. 1993. Status of the North American lynx (*lynx canadensis*) in Washington. Unpubl. Rep. Wash. Dept. Wildl., Olympia.

that lynx are taken during legal trapping . . . for other species, such as wolverine and bobcat, even when lynx seasons are closed.” 65 Fed. Reg. 16052, 16087 (March 24, 2000). “Legal trapping activities for bobcat, coyote, wolverine, and other furbearers create a potential for incidental capture of lynx.” *Id.* at 16077; see also *Animal Protection Institute*, 541 F. Supp. 2d at 1081 (13 lynx taken in Minnesota in traps set for other species); *Animal Welfare Institute v. Martin*, 588 F. Supp. 2d 70, 77 (D. Me. 2008) (8 lynx trapped in leg-hold traps in 2007, 1 killed by coniber trap in 2008).

In a December, 2001, Progress Report on the ecology of lynx in Western Montana, the Forest Service’s Rocky Mountain Research Station documented the incidental trapping of lynx in the Seeley-Swan study area. According to the Forest Service “trapping and illegal shooting accounted for 25%” of all lynx mortalities in the study area. Three trapping deaths were reported in the winter of 2001 alone. In January, 2001, M42 was killed in a conibear (i.e., body-crushing trap) trap intended for wolverine after the team had monitored M42’s movements for 11 months. The trap was placed in a leaning tree that held a large meat bait.

Also in January, 2001, a subadult female lynx (F38) died from “trap-related injuries.” The female lynx’s body was recovered in a natural position over a small pool of blood under her body. Her “hind leg had a large patch of exposed skin where the fur was rubbed. Biologists followed old snowshoe tracks found within ten meters of the carcass to a sprung trap with lynx hair in the closed trap jaw. The carcass of F38 was in good body condition, but she had an empty stomach except for lynx hair. Her leg was not broken from the trap, but there was extensive muscle damage . . . it appears the animal was in the trap for a long time before being released.” The third trapping incident involved M50, a young lynx that was caught in a “long-spring trap” and had apparently starved with the trap on its foot. Since March, 2000 (when lynx were listed), Montana reports that at least 9 lynx have been caught in traps set for other species (5 were captured and released, 4 killed).

Each year traps in the U.S. injure or kill millions of “non-target” animals – domestic dogs and cats, rabbits, birds, raptors, livestock, and even listed species such as lynx. According a former professional trapper, at least two nontarget animals are trapped for each target animal.

Notably, the Federal Lynx Biology Team recognizes that “trapping for other large furbearers in areas occupied by lynx may pose a risk. Lynx appear to be extremely susceptible to trapping, and where trapping is permitted it can be (and has been) a significant source of mortality.” Science Report at 453. Such mortality, in areas where lynx densities are low is particularly disruptive. Evidence indicates that when lynx densities are low “incidental or illegal killing can significantly affect lynx population dynamics under some circumstances.” *Id.* (emphasis added).

These findings are consistent with the BLM’s and U.S. Forest Service’s findings in Idaho. There, the two agencies conducted interviews with over seventy-five individuals who “spend a great deal of time outdoors and are familiar with potential Canada lynx habitat and local fauna in general.” The purpose of the interviews was to gain as much information on lynx in Idaho as possible. The interviews revealed two findings: (1) “trapping incidents were fairly common” with lynx; and (2) lynx were commonly trapped accidentally – in situations where the individual was trapping for bobcat or coyote. Upon completion of the interview process, the BLM and Forest Service concluded that “[m]any Canada lynx have been trapped incidentally while targeting bobcat and coyotes. . . . Incidental trapping [of lynx] remains a problem when Canada lynx populations are so critically low.” In the end, the Agencies included incidental trapping as one of the factors for the decline of the species in Idaho. According to one “lynx hunter” in Idaho, “complete protection from all types of direct and indirect trapping” would be needed in order to protect and restore the species.

Protection from trapping is the approach taken by Colorado, where body-gripping devices are now prohibited on public lands and private lands trapping is restricted to 30 days per year (if the land owner can show continuing damage and gets a permit from the state). In Washington, voters passed an initiative prohibiting the use of most traps in the State (i.e., leghold, conibears, and snares). Washington State Recovery Plan for Lynx at 32.⁴ The passing of the initiative eliminated the WDFW’s concern “about incidental trapping mortality.” The WDFW recognized, however, that if “trapping with leghold traps and snares

⁴ The official citation for Washington’s Recovery Plan is: Stinson, D.W. 2001. Washington State Recovery Plan for the Lynx. Washington Department of Fish and Wildlife, Olympia, Washington. 78 pp., 5 maps.

resumes in the future, regulations may need to be evaluated and revised to address risk to lynx.” *Id.*

At present, Montana has and continues to authorize trapping and snaring in occupied lynx habitat despite the documented take of at least 9 lynx in Montana (since lynx became a protected species in March, 2000) and the obvious risk of future incidental take, as described above.

Specifically, Montana’s 2012 regulations authorize the trapping of wolves (for the first time) and the trapping and snaring of furbearers across the State, subject to some minor requirements and restrictions, i.e., recommendations for checking traps, landowner permission, trap identification, limits on traps near exposed carcasses, and breakaway lock devices for snares.⁵ No person may trap or snare wolves or furbearers in Montana without first obtaining a license from the State.

In Montana, the use of traps (both leghold and body-crushing) and snares is authorized in occupied lynx habitat throughout the State and in lynx critical habitat which, by definition, includes areas that are essential to the survival and recovery of the species. To avoid taking lynx, Montana’s regulations do not include any prohibitions or restrictions on where trapping and/or snaring can occur or any mitigation measures designed to decrease the chances of lynx being caught in traps and/or snares.

D. Montana does not have an ITP for authorizing trapping and snaring in occupied lynx habitat.

As mentioned above, in order to avoid liability for the “take” Montana must adopt a conservation plan that outlines how the State will minimize and mitigate the likelihood of incidental lynx takes from trapping and snaring and receive an ITP from the Service. 16 U.S.C. § 1539 (a)(2)(A). To date, Montana has yet to prepare the requisite conservation plan for lynx or obtain an ITP from the Service.

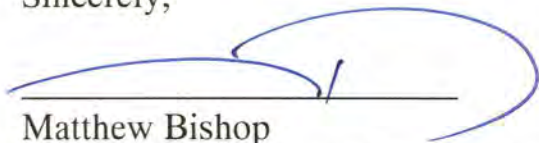
⁵ Montana is divided into legally described trapping districts or management units wherein season dates and limits on the types and numbers of fubearers are identified.

As such, Montana's authorization of trapping and snaring in areas occupied by lynx – an activity that has resulted and will continue to result in the take of protected lynx – is not in compliance with the ESA. Montana has violated and remains in violation of Section 9 of the ESA until it receives an ITP from the Service.

This letter is designed to encourage Montana to bring its actions into compliance with the ESA and put the State on notice of our intent to file a citizen suit if the aforementioned violations of the ESA are not remedied within sixty days of the date of this letter.

If you have any questions or comments, or would like to discuss the issues raised in this letter, please do not hesitate to contact me at bishop@westernlaw.org or (406) 324-8011. Thank you in advance for your attention to this matter.

Sincerely,



Matthew Bishop
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 324-8011 (tel.)
(406) 443-6305 (fax)
bishop@westernlaw.org



Melissa A. Hailey, Esq.
W. Randolph Barnhart, P.C.
50 South Steele Street, Suite 500
Denver, CO 80209

On behalf of:

Wild Earth Guardians
Contact: Wendy Keefover-Ring
P.O. Box 1471
Broomfield, CO 80038

The Alliance for the Wild Rockies
Contact: Mike Garrity
P.O. Box 505
Helena, MT 59624

Friends of the Wild Swan
Contact: Arlene Montgomery
P.O. Box 103
BigFork, MT 59911

Native Ecosystems Council
Contact: Sara Johnson
P.O. Box 125
Willow Creek, MT 59760