EARTHJUSTICE

June 23, 2021

By Email and Overnight Delivery

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RE: Sixty-Day Notice of Intent to Sue to Remedy Violations of the Endangered Species Act in Montana's Authorization and Promotion of Snaring and Increased Trapping in Canada Lynx and Grizzly Bear Habitat

Dear Governor Gianforte, Director Worsech, and Fish and Wildlife Commission members,

I write on behalf of the Center for Biological Diversity, Friends of the Clearwater, Humane Society of the United States, International Wildlife Coexistence Network, Sierra Club, Western Watersheds Project, Wilderness Watch, and Wolves of the Rockies—and pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)—to provide official notice of our intent to file suit against you, in your official capacity, for causing the likely trapping of threatened Canada lynx ("lynx") and grizzly bears in violation of section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B). Governor Gianforte recently signed into law two wolf-trapping bills requiring Montana's Fish and Wildlife Commission (the "Commission") to allow

the use of snares by wolf trappers and establish trapping seasons with the intent to reduce the wolf population. See H.B. 224, 67th Leg., Reg. Sess. (MT 2021) ("HB 224") (amending MCA § 87-1-901); S.B. 314, 67th Leg., Reg. Sess. (MT 2021) ("SB 314") (same). These bills impose a new trapping paradigm in western Montana's lynx and grizzly bear habitat and are likely to cause incidental trapping and injury or death of these threatened species.[1]

Lynx, grizzly bears, and gray wolves all inhabit similar habitat types and geographic range across western Montana, and wolf trapping therefore frequently occurs in areas where lynx and grizzlies are also present. Moreover, because snares and traps are imprecise tools, they pose a substantial risk to non-target species, including lynx and grizzlies. Snares are particularly likely to injure or kill non-target animals at a high rate. Accordingly, legislation that allows for the use of snares by the holder of a wolf-trapping license—and requires the Commission to manage hunting and trapping seasons with the intent to reduce the wolf population—is likely to result in the incidental trapping, including injury or death, of lynx and grizzly bears and thus violates section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B). To avoid unlawful take of these species, the State should, at a minimum, prohibit all trapping and snaring in occupied lynx and grizzly bear habitat. Unless the State takes action in the next 60 days to remedy this violation, the undersigned organizations will seek judicial enforcement of the ESA's take prohibition.

I. Lynx and Grizzly Bear Habitat Is Largely Coextensive with Wolf Habitat in Montana

The threat to listed species posed by Montana's new-wolf killing legislation is considerable because lynx and grizzly bear habitat in Montana overlaps significantly with that of gray wolves. Starting in northwest Montana—from the Northern Continental Divide Ecosystem and the Cabinet-Yaak Ecosystem—lynx, grizzly, and wolf habitats extend southward into west-central Montana. At the same time, habitat for grizzlies and wolves, and to a lesser extent, lynx, extends northward into the state from Yellowstone National Park and the Greater Yellowstone Ecosystem in southwest Montana. Moreover, within this range, lynx, grizzly bears, and wolves frequently occupy the same areas. Due to this substantial overlap between all three species, wolf-trapping in Montana is frequently carried out in lynx and grizzly bear habitat.

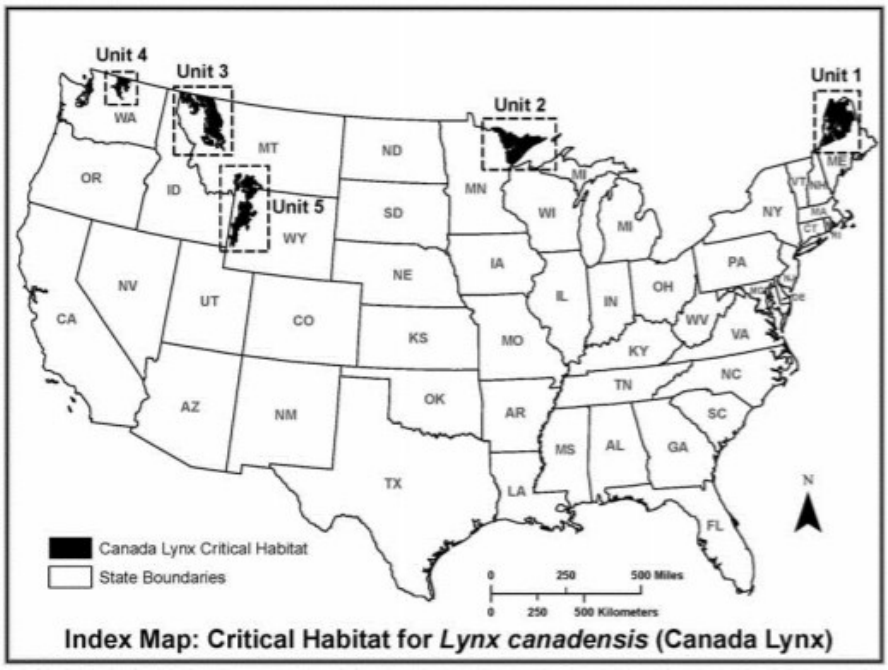
A. Threatened Lynx in Montana

Lynx depend on abundant snow, a variety of high elevation habitats for hunting and denning, and primarily snowshoe hares for prey. Ripple, et al. (2011). Both lynx and snowshoe hares currently range into "southeastern Canada and including parts of Maine, Minnesota, Wyoming, Montana, Idaho, and Washington." Murray, et al. at 1463 (2008) (emphasis added); see also U.S. Fish and Wildlife Service, Species Status Assessment for the Canada Lynx: Contiguous United States Distinct Population Segment, 108-113 (2017) ("2017 Status Assessment for Lynx") (summarizing current conditions for lynx in the same states and Colorado).

[1] This letter addresses only the non-discretionary provisions of the wolf-killing bills. The signatories to this letter will also carefully monitor the Commission's implementation of the bills' problematic discretionary elements, including allowing the use of bait while hunting and trapping wolves.

According to NatureServe,[2] lynx numbers and range in the contiguous United States are substantially reduced from historical levels as result of "overexploitation by both regulated and unregulated harvest that occurred in the 1970s and 1980s."[3] In 2000, the U.S. Fish and Wildlife Service ("FWS") listed lynx as "threatened" under the ESA in the contiguous United States. See generally 65 Fed. Reg. 16052 (2000). FWS has also designated critical habitat for lynx across a number of the lower-48 States, including portions of northwest and southwest Montana. See Figure 1 (below). The lynx population is considered "vulnerable" in Montana.[4]

Figure 1: FWS' Critical Habitat Designation for Lynx – Map from FWS at 79 Fed. Reg. 54841 (2014)



As FWS has noted, research from Montana "has documented the continued presence and broad distribution of resident lynx in much of the northwestern portion of the state." 2017 Status Assessment for Lynx, at 50.

Lynx are also found in southwest Montana near Yellowstone National Park, though with less frequency. Id. at 157-58. While lynx are native to the Yellowstone region, lynx have also dispersed into the state following their release in Colorado. To promote lynx recovery, the Colorado Division of Wildlife (now Colorado Parks and Wildlife) released 218 lynx from Canada in Colorado between 1999 and 2006. Some of these lynx produced offspring. Lynx (both Colorado- and Canadian-born) have dispersed into Montana and other states from

[2] The U.S. Department of the Interior describes NatureServe as "a source for authoritative conservation information on more than fifty thousand plants, animals and ecological communities of the U.S. and Canada." https://www.doi.gov/library/internet/plants (last visited June 22, 2021).
[3] https://explorer.natureserve.org/Taxon/ELEMENT_GLOBAL.2.102126/Lynx_canadensis (last visited June 22, 2021).
[4] Id.

Colorado. See Devineau, et al. (2010); Figure 2. Accordingly, the presence of lynx is well established in Montana.

Figure 2: Lynx Dispersal from Colorado into Montana – Map from Journal of Applied Ecology

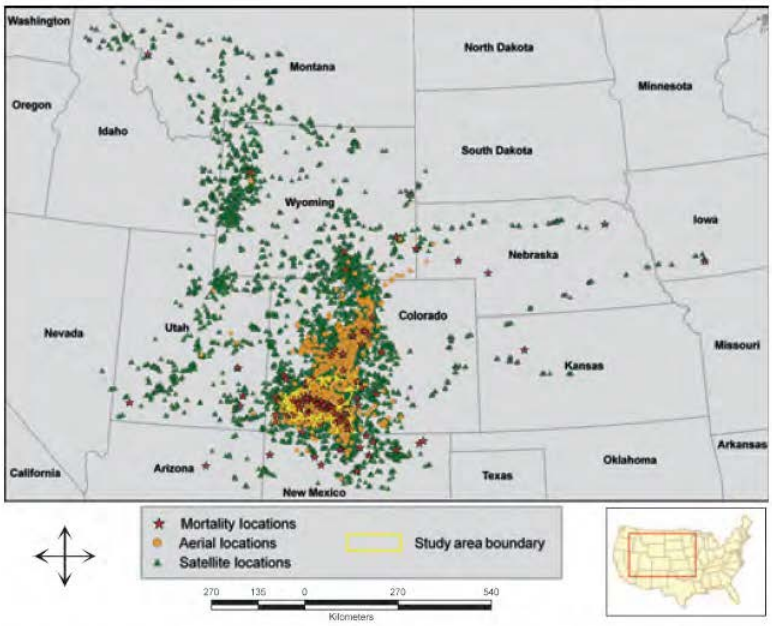


Fig. 1. Map of Colorado outlining the core reintroduction and primary post-release monitoring area, and documenting all post-release locations obtained by either satellite platform transmitter terminal or aerial very high frequency tracking for the 218 lynx reintroduced to Colorado from February 1999 to November 2007. All known mortality locations are shown as stars.

In addition to depending on snow, high elevations, and snowshoe hare, lynx rely on habitat that can provide continuous forest cover for hunting and denning. Murray, et al. at (2008). Moreover, lynx survival within their chosen habitat is reliant on local trapping conditions. According to FWS, "lynx are more likely to survive, breed, and replace themselves in the breeding population if they occupy home ranges where trapping is prohibited or trapping pressure is low." 2017 Status Assessment for Lynx, at 36.

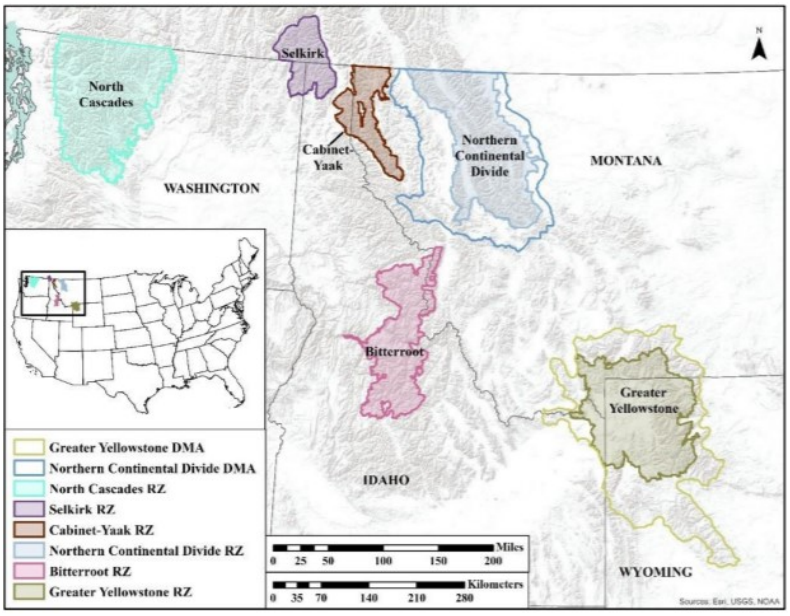
B. Threatened Grizzly Bears in Montana

Grizzly bears once numbered roughly 50,000 individuals in the western United States. FWS, Species Status Assessment for the Grizzly Bear in the Lower-48 States: A Biological Report, 4 (2021) ("Status Assessment for the Grizzly Bear"). With European-American settlement, however, grizzlies were "shot, poisoned, and trapped wherever they were found," eliminating them from everywhere but mountain redoubts far removed from human intolerance. Crow Indian Tribe v. United States, 343 F. Supp. 3d 999, 1004 (D. Mont. 2018) (quotation omitted).

By the time FWS listed grizzly bears in the contiguous United States as "threatened" under the ESA in 1975, grizzlies had been "reduced to less than two percent of their former range in the lower-48 States … and the estimated population in the lower-48 states was 700 to 800 individuals." Status Assessment for the Grizzly Bear, at 4.

Currently, grizzly bears in the contiguous States remain confined to a few isolated populations in Montana, Wyoming, and Idaho along with potential occupancy of the North Cascades in Washington. Based on these remnant populations, FWS has designated six areas as grizzly bear recovery zones. Id. at 3-4; see Figure 3 (below). Montana is home—in full or in part—to four of these recovery zones: (1) the Northern Continental Divide Ecosystem; (2) the Cabinet-Yaak Ecosystem; (3) the Greater Yellowstone Ecosystem; and (4) the Bitterroot Ecosystem. See Figure 3.

Figure 3: Grizzly Bear Recovery Zones and Demographic Monitoring Areas in the Continental United States – Map courtesy of FWS[5]



Consistent with the designated recovery zones, Montana's grizzly populations are concentrated in northwest Montana's Cabinet-Yaak and Northern Continental Divide Ecosystems and in southwest Montana's Greater Yellowstone Ecosystem. Moreover, according to the Interagency Grizzly Bear Committee, while "[g]rizzly bears in the Bitterroot Ecosystem [edging into west-central Montana] remain relatively uncommon" there have been "increasing reports [of grizzlies in the Bitterroots] in recent years."[6]

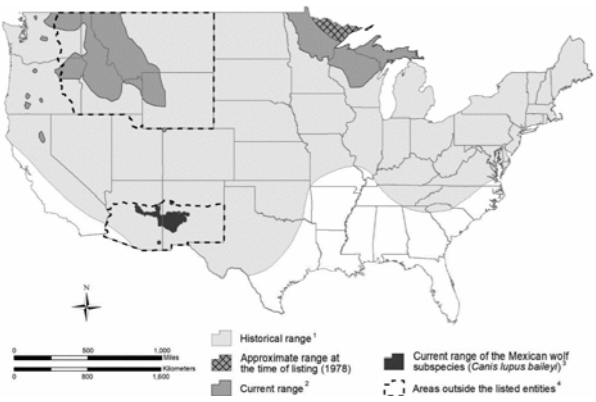
[5] https://www.fws.gov/mountain-prairie/es/species/mammals/grizzly/20210131_V1.1_SSA_for_grizzly_bear_in_the_lower-48_States.pdf (last visited June 22, 2021).
[6] http://igbconline.org/bitterroot-ecosystem/ (last visited June 22, 2021).

Within their recovery zones, the U.S. Fish and Wildlife Service describes grizzly bears as habitat "generalists" that "occupy[] habitats from deserts to alpine mountains and everything in between." Status Assessment for the Grizzly Bear, at 47. Grizzly bears' varied diets aid their adaptability, and they "will consume almost any food available including vegetation, living or dead mammals or fish, insects, worms, plants, human-related foods, and garbage." Id. at 48. In Montana, grizzly bears rely on ungulate carcasses, among other foods, for protein. Id. at 183 (observing that grizzly diets in the Greater Yellowstone Ecosystem rely on bison, elk, mule deer, moose, pronghorn, and bighorn sheep), 191 (noting that grizzlies in the Northern Continental Divide Ecosystem eat deer and elk). Grizzly bears—as with lynx and wolves—prefer habitats that offer forest cover. Id. at 47.

C. Overlap with Wolves

As with lynx and grizzly bears, Montana's gray wolf habitat ranges across the western portion of the state. See Figure 4.

Figure 4: Gray Wolf Range in the Continental United States – Map courtesy of FWS[7]



As this map makes clear, wolves' geographical habitat range substantially overlaps lynx and grizzly bear habitat in Montana.

Within their overlapping habitat ranges, wolves, lynx, and grizzly bears frequently choose the same habitat types and occupy the same areas.

Wolves "exhibit[] no particular habitat preference except for the presence of native ungulates within [their] territory on a year-round basis."[8] However, wolves are most likely to select habitat with a high ungulate density—the primary prey and food source for wolves—as well as forest cover (similar to lynx and grizzlies). Oakleaf, et al. (2006). The generalized nature of wolf habitat preferences—which in turn resembles the adaptability of grizzly bears when selecting habitat—means that wolves, lynx, and grizzly bears often inhabit the same areas throughout Montana.

[7] https://www.govinfo.gov/content/pkg/FR-2020-11-03/pdf/2020-24171.pdf (last visited June 22, 2021).
[8] http://fieldguide.mt.gov/speciesDetail.aspx?elcode=AMAJA01030 (last visited June 22, 2021).

Wolf and grizzly bear habitat often overlaps due to the two species' reliance on ungulates as a consistent food source. See FWS Status Assessment for the Grizzly Bear, at 183. And while wolves and grizzly bears may thus compete for carrion and prey, researchers have found no evidence that the presence of wolves in an area negatively influences grizzly bear populations. Id. Rather, researchers in the Greater Yellowstone Ecosystem have observed that any wolf-caused "reduction of winter-killed ungulates may be buffered by increased availability of meat to adult grizzly bears during the active season as a result of grizzly bears usually prevailing in usurping wolf-killed ungulate carcasses." Id. Thus, wolves and grizzly bears can—and frequently do—occupy the same habitat.

Wolf habitat also overlaps with that of lynx, and the presence of wolves in an area can play an important role in food availability for lynx. Lynx rely on snowshoe hare as their primary food source but often must compete with coyotes for their prey. Ripple, et al. (2011). However, wolves suppress coyote populations and can thereby increase hare populations. Id. Thus, where wolves and lynx intersect, wolves can ensure a greater abundance of hare, which in turn benefits nearby lynx. Id. FWS and other federal agencies have speculated that, with climate change reducing snow depth, the overlap between lynx and wolf habitat will only increase. See FWS et al., Canada Lynx Conservation Assessment and Strategy, 71 (2013) ("Interagency Lynx Conservation Assessment").

In short, lynx, grizzly bears, and wolves occupy similar geographic ranges and frequently occupy the same types of habitat within those ranges. This substantial overlap in habitat for these three species means that wolf-trapping in the state frequently occurs in areas also occupied by lynx and grizzlies.

II. Snares and Traps Capture, Injure, and Kill Non-Target Lynx and Grizzly Bears

Snares and traps are known to frequently capture, injure, or kill non-target species such as lynx and grizzly bears. Snares are particularly likely to kill or cause severe injuries to captured non-target animals. In recent years—even without allowing wolf-trappers to use snares—Montana's Department of Fish, Wildlife and Parks ("FWP") has reported hundreds of captures, injuries, and deaths of non-target species in traps, including multiple instances of lynx and grizzly bears captured in leghold traps intended for wolves and other species.

A. Snares and Traps Are Inherently Non-Selective and Indiscriminate

According to trapping experts and researchers, snares[9] and leghold traps[10] are inherently non-selective and indiscriminate, meaning they can capture or kill a broad range of animals beyond the species targeted by the trapper. Iossa, et al. (2007) ("It has long been recognized that

[9] Snares are cable devices designed to noose around an animal's neck or foot. As the animal pulls or resists the snare, a locking mechanism will eventually tighten the snare until the animal is strangled; restrained by the foot, leg, or body; or dies.

[10] "Leg-hold traps have two jaws that open to 180° when set, and clamp together to hold an animal's foot or leg when triggered. The trap is attached to the ground or an anchor by a chain or cable." Iossa, et al. (2007).

non-target captures can be very high in comparison to target captures."); see also Proulx, et al. (2015).

Proulx, et al. (2015) note that snares capture non-target species at high rates, and this trend is especially true of neck snares targeting canids, such as wolves. Surveys on the selectivity rates of coyote neck snares have reported rates of 52 percent (Guthery and Beasom (1978)) and 77 percent (Phillips (1996))—indicating that between 23 and 48 percent of the animals snared in coyote traps are non-target species.

Lynx and grizzly bears are among those non-target species incidentally captured or killed in snares targeting wolves and other canids.

A 2013 lynx assessment by FWS and other federal agencies concluded that "lynx are very vulnerable to trapping and snaring and can be easily overexploited." Interagency Lynx Conservation Assessment, at 79. The agencies found that vulnerability extends to "[i]ncidental trapping or snaring of lynx" which "can occur in areas where regulated trapping for other species, such as wolverine, coyote, fox, fisher, marten, bobcat and wolf, overlaps with lynx habitats." Id. at 71 (emphases added).

According to Proulx, et al. (2015), between 1990 and 2014, the Canadian Wildlife Health Cooperative reported at least 157 incidents of non-target snare captures, including eight instances of lynx killed in snares. Id. However, as that number reflects only specimens voluntarily submitted by trappers, it "probably represents [only] a small proportion of the snared animals that die and go unreported by people." Id. Proulx, et al. (2015) also identified one instance in which a trapper in Alberta, Canada set 10-15 killing neck snares to capture wolves, and instead captured three non-target animals within a week, including one black bear and one grizzly bear.

B. Snares and Traps Frequently Injure or Kill Non-Target Animals

Snares and traps injure or kill non-target animals at high rates. Neck snares are often intended to kill the target animal, and therefore also kill the non-target animals that are frequently ensnared. See Proulx, et al., (2015).[11] Leghold snares and traps, which are not intended to kill, can nevertheless cause injuries that result in death or permanently impair the animal after release. However, because these injuries are not always immediately apparent, animals may be released into the wild with injuries that are incorrectly overlooked as non-existent or insignificant. See Proulx, et al. (2020); Andreasen, et al. (2017); Cattet, et al. (2008); Iossa, et al. (2007); Interagency Lynx Conservation Assessment, at 79.

According to Iossa, et al. (2007), leghold snares in particular may cause high mortality in non-target species. Consistent with this finding, FWS and other federal agencies have found that "[i]njuries and mortality rates are greatest to lynx incidentally caught in snares and Conibear [killer] traps." Interagency Lynx Conservation Assessment, at 79; see also Rochlitz (2010)

[11] Killing neck snares can be divided into two broad categories: (1) manual killing neck snares, in which the animal provides the energy necessary to tighten the noose (as with leg snares); and (2) power killing neck snares, in which a spring-loaded mechanism provides the energy necessary to tighten the noose and strangle the captured animal. Proulx, et al. (2015).

("The mortality and morbidity of animals caught in snares is higher than with most other restraining traps.").[12]

Leghold snares and traps, by restraining animals by their limbs, can cause compression or constriction injuries that can damage tissue, restrict vascular flow, and can have harmful effects beyond the extremity that is actually constricted. Research indicates that as little as two to four hours of serious restriction can result in long-term loss of neuromuscular function or persistent pain. See Jacobson, et al. (1994).

In addition to constriction injuries, snares and traps also cause bone fractures, dislocations, tooth and gum damage from biting the snares and traps, hypothermia or hyperthermia, and dehydration. See Nocturnal Wildlife Research Party Ltd., Review: Welfare Outcomes of Leg-hold Trap Use in Victoria (2008) ("NWR Report"). Trapped animals and their offspring are also vulnerable to being killed by other animals. See Status Assessment for the Grizzly Bear, 150-51 (reporting that "[i]n 2013, a snared subadult female grizzly bear was killed by a large, probably male bear" and also noting "the killing of a [grizzly] cub by another bear while its mother was captured"). Moreover, the physiological effects of stress, trauma, and shock from being captured can cause death after release. See NWR Report; Proulx, et al. (2020); Cattet, et al. (2008).

Proulx, et al. (2020) write that "significant capture-related effects in ursids may go undetected at the time of capture, thus providing a false sense of the welfare of released animals." Cattet, et al. (2008) found that grizzly bears captured in leghold snares more frequently exhibited biochemical indicators of muscle injury as compared with grizzlies captured by helicopter or barrel trap. The same researchers observed that the rate of movements made by bears decreased below normal levels immediately after capture and took between three to six weeks to normalize after release. This illustrates that even those animals released from snares with no apparent injuries may nevertheless incur significant injuries. Cattet, et al. (2008) reported that one grizzly died of capture myopathy—a physical reaction to the stress and trauma associated with snaring—approximately 10 days after being captured by a leghold snare. Similarly, FWS reported the death of a subadult male grizzly from exertional myopathy after being trapped in 2019. See Status Assessment for the Grizzly Bear, at 151.

As with grizzly bears, injuries to trapped lynx may frequently go undetected. See Interagency Lynx Conservation Assessment, 79 ("Some trap-related injuries (e.g., dislocations, fractures, mild freezing) are difficult to detect in lynx in the field."). FWS and other federal agencies admit that "a substantial portion of lynx caught in foothold traps may experience injuries and foot freezing." Id.

[12] The Montana Trappers Association admits that "[l]eg snares are far less practical [than leghold traps] and contribute to more significant and permanent damage." http://www.montanatrappers.org/management/traps-today.htm (last visited June 22, 2021).

C. Montana Trappers Already Capture Non-Target Species—Including Lynx and Grizzly Bears

Even before the wave of new trapping and snaring activity authorized by the state's new wolf-killing legislation, Montana trappers already capture, injure, and kill non-target animals—including lynx and grizzly bears—on a regular basis.

According to Montana FWP, in the six-year period between 2012 and 2017, trappers reported 349 captures of non-target species across the state. FWP, Incidental Captures of Wildlife and Domestic Dogs in Montana, 2012-2017, 1 (2018). Forty-five percent of these incidentally-captured individuals "died as a result of the capture," and at least 33 percent of those released alive sustained visible injuries such as cuts and swelling of the feet and neck. Id.

FWP reported three lynx and three grizzly bears among those non-target captures—including one lynx and one grizzly caught in leghold traps intended for wolves. Id. at 1-2. At least one trapped grizzly bear sustained foot damage prior to release. See Non-Target Wildlife Captured in Traps (non-Wolf Traps) Reported to FWP, 2013-14. And while FWP classified the other captured grizzly bears and lynx as "uninjured/released" or simply "released," FWP records do not indicate whether these animals were monitored following release.[13] Without those additional data, it is impossible to determine the extent to which these animals avoided harm from capture. See Proulx, et al. (2020); Andreasen, et al. (2017); Cattet, et al. (2008); Iossa, et al. (2007). However, even the readily available data collected by FWP demonstrates that trapping and snaring of wolves in Montana will inevitably result in capture and injury to non-target species including lynx and grizzly bears.

III. The ESA Prohibits Incidental Take of Lynx and Grizzly Bears

Such capture and injury of lynx and grizzly bears violates the ESA. Section 9 of the ESA prohibits the unauthorized "take" of an endangered species. 16 U.S.C. 1538(a)(1)(B). The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." Id. § 1532(19). "Take" includes direct as well as indirect harm and need not be purposeful. See Babbit v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 704 (1995). A take may even be the result of an accident. See National Wildlife Federation v. Burlington Northern Railroad, 23 F.3d 1508, 1512 (9th Cir. 1994).

The ESA's take prohibition applies equally to threatened species, unless otherwise indicated by a species-specific rule promulgated by the FWS pursuant to ESA § 4(d). See 50 C.F.R. 17.31(a). The species-specific rules for Canada lynx allow for no exception to the prohibition of take in the trapping or snaring context. The species-specific rules for grizzly bears permit take only for self-defense, defense of others, scientific research, and other limited circumstances. 50 C.F.R. 17.40(b). Accordingly, the ESA protects lynx and grizzly bears from take or attempted take by recreational trapping or snaring.

[13] See Non-Target Wildlife Captured in Traps (Non-Wolf Traps) Reported to FWP, 2014-15; Non-Target Wildlife Captured in Wolf Traps Reported to FWP, 2012-2015.

These ESA protections apply equally against trapping or snaring authorized by a state official or agency. It is unlawful for any person to "cause [an ESA violation] to be committed." 16 U.S.C. § 1538(g). The term "person" includes "any officer, employee, agent, department, or instrumentality … of any State, municipality, or political subdivision of a State … [or] any State, municipality, or political subdivision of a State …." Id. § 1532(13).

Thus, 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 a taking…. [A] governmental third party pursuant to whose authority an actor directly exacts a taking … may be deemed to have violated the provisions of the ESA." Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997) (emphasis added) (holding that Massachusetts exacted a taking by issuing licenses and permits authorizing gillnet and lobster pot fishing—activities known to incidentally injure Northern right whales). As in Strahan, state hunting and trapping schemes violate the ESA's section 9 prohibition on take when "a risk of taking exists [even] if trappers comply with all applicable laws and regulations in place." Animal Prot. Inst., Ctr. for Biological Diversity v. Holsten, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008) (holding Commissioner of the Minnesota Department of Natural Resources liable for incidental killing of lynx); see also Strahan v. Sec'y, Massachusetts Exec. Off. of Energy & Envtl. Affs., 458 F. Supp. 3d 76, 95 (D. Mass. 2020)(holding Massachusetts Executive Office of Energy and Environmental Affairs and Director of Massachusetts Division of Marine Fisheries liable for incidental trapping of Northern right whales); Ctr. for Biological Diversity v. C.L. Otter, No. 1:14-CV-258-BLW, 2016 WL 233193 (D. Idaho Jan. 8, 2016) (holding Idaho Governor and others liable for incidental trapping of lynx), on reconsideration, sub nom. Ctr. for Biological Diversity v. Otter, No. 1:14-CV-258-BLW, 2018 WL 539329 (D. Idaho Jan. 24, 2018); Red Wolf Coal. v. N. Carolina Wildlife Res. Comm'n, No. 2:13-CV-60-BO, 2014 WL 1922234 (E.D.N.C. May 13, 2014) (holding North Carolina Wildlife Resources Commission liable for incidental take of red wolves).

The ESA has a broad citizen-suit provision, which provides that "any person may commence a civil suit on his own behalf to enjoin any person, including … any … governmental instrumentality or agency … who is alleged to be in violation of any provision of [the ESA]." 16 U.S.C. § 1540(g). By filing such a civil action, a plaintiff may seek to enjoin both present activities that constitute an ongoing take and future activities that are likely to result in take. See Burlington Northern Railroad, 23 F.3d at 1511.

IV. Implementation of Montana's Wolf-Killing Bills Violates the ESA's Prohibition on Incidental Take of Threatened Species

Montana's wolf-trapping bills are likely to cause incidental take—including harm, wounding, or killing—of threatened lynx and grizzly bears in violation of ESA section 9. Montana's recently enacted HB 224 requires the Commission to "allow for the use of snares by the holder of a [wolf] trapping license." MCA § 87-1-901(1). Recently enacted SB 314 requires the Commission to establish hunting and trapping seasons "with the intent to reduce the wolf population" in Montana. Id. These measures portend a new wave of snaring activity in Montana accompanied by an escalated level of trapping activity to achieve the state's new wolf-population-reduction mandate.

Because lynx and grizzly bear habitat significantly overlaps with that of Montana's gray wolf population, changes to state-sanctioned wolf-trapping activities will alter trapping conditions in lynx and grizzly territory. Moreover, because snares pose particular dangers to non-target species, they threaten injury or death to lynx and grizzlies, even when targeting wolves. These adverse impacts are likely to occur even if trappers follow all applicable state laws and regulations. Thus, by authorizing the use of snares by wolf trappers, HB 224 increases the likelihood that Montana trappers—who already regularly capture non-target lynx and grizzly bears—will incidentally injure or kill lynx and grizzlies. SB 314 further heightens this danger by requiring the Commission to manage wolf trapping seasons to reduce the population, which portends increased trapping—including a surge in the incidental trapping of non-target species.

In short, implementation of HB 224 and SB 314 is likely to cause the incidental take—including the injuring or killing—of lynx and grizzly bears. Thus, activities authorized by the State of Montana to implement these bills violate section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B).

V. Conclusion

The Center for Biological Diversity, Friends of the Clearwater, Humane Society of the United States, International Wildlife Coexistence Network, Sierra Club, Western Watersheds Project, Wilderness Watch, and Wolves of the Rockies work to protect and conserve Canada lynx and grizzly bears in Montana. Activities to implement Montana's new wolf-killing legislation threaten to impede conservation of these species. Accordingly, the parties to this notice letter request that Montana take immediate action to prevent the future take of ESA-listed species as a consequence of the state's new wolf-killing legislation, which violates federal law. At a minimum, this would require the State to prohibit all trapping and snaring in occupied lynx and grizzly bear habitat.

If Montana does not remedy this violation within 60 days of the receipt of this letter, the parties to this notice letter intend to institute legal action in federal court to enforce the ESA.

Sincerely,

Ben Scrimshaw

References

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