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April 28, 2006

Via Certified Mail

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Commissioner
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Dave Schad
Director
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Lynn Scarlett
Acting Secretary
U.S. Department of Interior
1849 C Street, NW
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H. Dale Hall
Director
U.S. Fish & Wildlife Service
1849 C Street, NW
Washington, DC 20240

Re: **Sixty-Day Notice of Intent to Sue Over Violations of Section Nine of the Endangered Species Act**

Dear Commissioner Merriam, Director Schad, Secretary Scarlett, and Director Hall:

This letter serves as a sixty-day notice on behalf of The Humane Society of the United States ("The HSUS") and HOWL ("Help Our Wolves Live") of their intent to sue the Minnesota Department of Natural Resources ("MN DNR") over ongoing violations of section 9 of the Endangered Species Act ("ESA") resulting from the illegal take of the federally threatened Canada lynx arising out of MN DNR's trapping and snaring program. This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g)(1)(A).

Background

The Canada lynx is one of the most imperiled mammals in the continental United States. The species lives in coniferous forests of North America where, with the help of its thick fur and wide paws, it is superbly adapted to pursue prey, such as snowshoe hare, amidst deep snow. Wide swaths of the upper Great Lakes—northern Minnesota in particular—provide the type of forests suitable to lynx for cover, denning, and foraging.

The lynx were once common in Minnesota's northern forests. After a relative peak in the 1970s, the lynx population crashed. The MN DNR's

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authorization of extensive trapping at the low end of a lynx population cycle was likely the major factor in pushing lynx to the brink of extinction. The State was eventually forced to implement a ban on hunting and trapping of lynx in 1984, although intentional illegal trapping continued at least through 1986. Similar declines nationwide forced the U.S. Fish and Wildlife Service to list the lynx as a threatened species under the ESA on March 24, 2000. 65 Fed. Reg. 16,052 (Mar. 24, 2000); 50 C.F.R. § 17.11.

As a result of recent surveys, lynx have now been verified in Minnesota.¹ Through DNA testing, the presence of more than sixty lynx (not including the discovery of at least four female lynx with kittens) has been confirmed by MN DNR wildlife biologists.² Over the past three years, global positioning system collars put on thirty lynx have provided researchers with more than 10,000 locations points where lynx have frequented Minnesota.³ For instance, in June 2005, wildlife biologists with the Natural Resources Research Institute of the University of Minnesota-Duluth found thirteen lynx kittens in four dens on the Superior National Forest.

Despite the state ban on the hunting and trapping of lynx in 1984,⁴ the lynx population has not rebounded. The MN DNR's continued authorization of large, all-purpose traps has resulted and continues to result in the illegal taking of lynx. For example, the 2005 Minnesota Hunting and Trapping Regulations Handbook ("MN Trapping Handbook") authorizes any foot or leghold trap with a jaw opening less than $8^{3/4}$ inches or *any body-gripping or conibear-type trap* with a jaw opening less than $7^{1/2}$ inches.⁵ Moreover, the MN DNR only requires that "[a]ny trap capable of capturing a protected animal . . . must be tended at least once each calendar day, *except for body-gripping or conibear-type traps.*" MN Trapping Handbook at 52; see also MN ADC 6234.2200 ("A body-gripping or 'conibear' type trap need not be tended more frequently than once every third calendar day . . ."). This exemption from the daily check requirement also poses additional risks to lynx and other captured animals.

The MN DNR-authorized snaring program has also resulted and continues to result in the illegal taking of lynx. A MN DNR regulation provides that "snares may be used for taking all

¹ For example, the U.S. Fish and Wildlife Service has reported: "In the past 3 years *there have been 62 verified reports of lynx in northeastern Minnesota*, 6 of which provided evidence of reproduction . . . [N]ortheastern Minnesota often supports a resident lynx population because there is ample boreal forest habitat directly connected with that in Ontario, there is a high number of historic lynx records, evidence of lynx reproduction and cyclically abundant snowshoe hares . . . Currently, there are many more lynx in northeastern Minnesota than we knew of at the time of the final rule in 2000." 68 Fed. Reg. 40,076, 40,087-89 (July 3, 2003) (emphasis added).

² Id.; see also John Myers, *Group Wants Trapping Ban to Protect Lynx*, DULUTH NEWS TRIB., Jan. 17, 2006 ("As recently as 2000, DNR biologists said no lynx lived in the state and that any seen here were migrants from Canada. But DNA tests confirm that more than 60 lynx inhabit the state, with at least three times that many believed to be here.").

³ See John Myers, *Groups Urge State Protection for Lynx*, DULUTH NEWS TRIB., Nov. 9, 2005 (Ron Moen, lead researcher for the Natural Resources Research Institute's ongoing lynx study, acknowledges "30 radio-collared lynx" in Minnesota).

⁴ "Taking lynx is prohibited statewide." MN ADC 6234.1500.

⁵ The handbook states: A person may not set, place, or operate (1) any foot or leghold trap with a jaw opening greater than $8^{3/4}$ inches; (2) any body-gripping or conibear-type trap with a jaw opening greater than $7^{1/2}$ inches, except as a waterset; or (3) any body-gripping or conibear-type trap with a jaw opening greater than $6^{1/2}$ inches in or within 3 feet of a culvert, except when completely submerged in water. MN Trapping Handbook at 52.

species of protected wild animals that may be taken by the use of traps.”⁶ MN ADC 6234.2300(1); see also MN Trapping Handbook at 54 (“snares may be used by licensed trappers for taking all species of protected wild mammals that may be taken by the use of traps”). Moreover, the MN DNR actively lobbied for passage of a 2005 state law which lifted the long-standing requirement to obtain a permit for certain snaring activities. The new law, passed on June 30, 2005, explicitly authorizes that “[a] person may use a snare to take a bobcat . . . *without a permit.*” M.S.A. § 97B.625(2) (emphasis added). Moreover, the MN DNR also authorizes permit-free snaring of fox. MN Handbook at 54 (“Fox . . . may be snared only in the Forest Furbearer Zone. A permit is no longer required.”).

Because snares are less expensive and easier to set, they are frequently used by trappers. Thus, permit requirements are one of the few tools the MN DNR has to manage snaring activities. Implemented correctly, permits allow the MN DNR to monitor where snaring occurs and at what intensity and to assist with documentation of by-catch. Moreover, permits allow the MN DNR to assess whether trappers are using untagged snares or violating the required daily snare check. Otherwise, untagged snares are checked infrequently and are often simply abandoned after a period of time, even though they are still armed and lethal. Thus, permit-free snaring activities pose significant hazards to lynx and other wildlife.

Violations of Section 9

The ESA prohibits any “person” from “taking” threatened and endangered species. 16 U.S.C. § 1538; 50 C.F.R. § 17.31. The term “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) (emphasis added). 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” 16 U.S.C. § 1532(12).

It is unlawful for any person to “cause [an ESA violation] to be committed.” 16 U.S.C. § 1539(g). 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.” Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997). Further, 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.” Id. Numerous cases have confirmed that entities such as the MN DNR are responsible and liable for violations of the ESA. See, e.g., Sierra Club v. Yeutter, 926 F.2d 429, 438-39 (5th Cir. 1991) (finding Forest Service’s management of timber stands was a taking of the red-cockaded woodpecker in violation of the ESA); Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (holding EPA liable for taking under the ESA for its registration of strychnine pesticide administered by ranchers which led to poisoning of endangered species); Palila v. Hawaii Dep’t of Land and Natural Res., 639 F.2d 495, 497-98 (9th Cir. 1981) (holding state liable for take caused by practice of maintaining a population of nonnative feral goats in an endangered species habitat); Loggerhead Turtle, et al. v. County Council of Volusia County, Florida, 148 F.3d 1231, 1237 (11th Cir. 1998) (holding that county’s authorization of vehicular beach access during turtle mating season exacted a taking of the turtles in violation of the ESA).

⁶ The MN DNR also requires that “[a]ll snares not capable of drowning the captured animal must be tended at least once each calendar day” MN ADC 6234.2400(1).

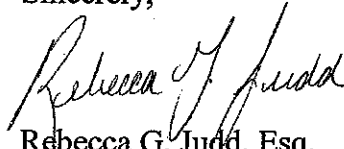
In this case, there is no doubt that the "take" of Canada lynx is occurring. Since November 7, 2002, there have been at least eleven documented lynx takes resulting from MN DNR-authorized trapping and snaring.⁷ These occurrences have resulted in at least six confirmed lynx deaths as well as several injured lynx.⁸ Further, the number of lynx taken in traps and snares in Minnesota is likely much higher due to a failure to report each incident.⁹

Conclusion

The MN DNR has the authority and responsibility to manage the State's fish and wildlife, including the regulation of recreational activities, such as trapping. M.S.A. § 97A.045. The MN DNR has failed to regulate or restrict trapping and snaring so as to prevent illegal take of Canada lynx. The MN DNR's authorization of and its failure to adequately regulate such activities has resulted and will continue to result in take of this species. Therefore, the MN DNR and its officers and directors are in violation of section 9 of the ESA.

The HSUS and HOWL would welcome the opportunity to discuss with you how to resolve these ongoing violations without the need for litigation. However, if we do not hear from you in sixty days, and if these violations of the ESA are still ongoing at that time, The HSUS and HOWL may have no choice but to initiate litigation in Federal Court against one or more of the parties named in this letter.

Sincerely,



Rebecca G. Judd, Esq.

⁷ Dan Stinnett, Field Supervisor for the U.S. Fish and Wildlife Service, stated that "at least 11 lynx have been taken accidentally by trappers." John Myers, *Old Language Puts Lynx in Trapping Bill*, DULUTH NEWS TRIB., May 28, 2005.

⁸ Phil Delphey, Endangered Species Biologist for the U.S. Fish and Wildlife Service, confirmed that "the mortality of those (trapped lynx) is somewhere between six to 10 animals." John Myers, *Group Wants Trapping Ban to Protect Lynx*, DULUTH NEWS TRIB., Jan. 17, 2006.

⁹ Phil Delphey, Endangered Species Biologist for the U.S. Fish and Wildlife Service, also acknowledged that "more lynx probably have been killed by traps and not reported or discovered." Id.