

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

The Humane Society of the United States
and Help Our Wolves Live

Civil No. _____

Plaintiffs,

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

vs.

Gene Merriam, as Commissioner of the
Minnesota Department of Natural Resources
and Dave Schad, as Director of the Division
of Fish and Wildlife of the Minnesota
Department of Natural Resources,

Defendants.

Plaintiffs The Humane Society of the United States and Help Our Wolves Live, for their Complaint against Defendants Gene Merriam, in his official capacity as Commissioner of the Minnesota Department of Natural Resources, and Dave Schad, in his official capacity as Director of the Division of Fish and Wildlife of the Minnesota Department of Natural Resources (collectively, the “DNR”) state and allege:

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as this action presents a case and controversy under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*

2. As required by the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), Plaintiffs have provided Defendants sixty days’ notice of intent to sue before bringing this action.

3. Venue is proper in this Court under 16 U.S.C. § 1540(g)(3)(A), as the alleged ESA violations are occurring in the District of Minnesota; and under 28 U.S.C. § 1391(b), as

a substantial part of the events and omissions giving rise to Plaintiffs' claims occur in this judicial district, and the Defendants reside and operate here.

SUMMARY

4. This action seeks declaratory and injunctive relief for Minnesota Department of Natural Resources' ("DNR") ongoing violations of section 9 of the ESA, 16 U.S.C. § 1538, with respect to their authorization of trapping and snaring activities that kill, injure, or otherwise harm Canada Lynx, a species that is listed as "threatened" under the ESA.

5. According to U.S. Fish and Wildlife Service records, Defendants' authorization of the use of indiscriminate traps and snares has caused the take of at least twelve federally protected lynx in the State of Minnesota since 2002. Defendants have no regulations in place to require daily checks of body-gripping or conibear-type traps, nor any other measures which might mitigate the high number of illegal taking from a statewide population of approximately eighty or less total animals. Nor are there any regulations in place to require permits for snaring of fox and bobcat or reporting of released animals, which might also assist the DNR in documenting and reducing lynx by-catch.

6. These violations pose an imminent threat of further harm and "take" of Canada Lynx in violation of 50 C.F.R. § 17.31 and section 9 of the ESA, 16 U.S.C. § 1538. Plaintiffs thus seek judicial relief enjoining Defendants from authorizing trapping and snaring that harm Canada Lynx, and such other relief as this Court may deem appropriate.

THE PARTIES

7. Plaintiff The Humane Society of the United States ("The HSUS") is the nation's largest animal protection organization, with more than nine and a half million members and constituents, including more than 139,000 members and constituents in the

State of Minnesota. The HSUS brings this action on its own institutional behalf and also on behalf of its members.

8. Since its inception in 1954, The HSUS has been dedicated to protecting imperiled species and the habitats on which they depend. The HSUS's Wildlife and Habitat Protection and Threatened and Endangered Species Program sections work to ensure the survival of all wild animals from cruelty, exploitation, hunting and trapping, and habitat loss. The HSUS accomplishes these objectives through public education, litigation, legislation, and research and investigations. The HSUS publishes information and citizen alerts regarding the plight of the Canada Lynx to inform its members and constituents of its activities and to request assistance in protecting such an imperiled species. The HSUS was involved in efforts to list the Canada Lynx under the ESA and is currently involved in litigation challenging the U.S. Fish and Wildlife Service's decision to classify the Canada Lynx as threatened rather than endangered, as well as the issuance of regulations exempting the U.S. Forest Service and other agency action from section 7 consultation under the ESA.

9. Members of The HSUS regularly enjoy and will continue to enjoy observing, studying, and otherwise appreciating the Canada Lynx. One HSUS member, in particular, lives within the lynx's historical range in Minnesota and regularly visits areas of lynx habitat in order to observe and study the lynx, to experience the thrill of seeing them in the wild, to photograph them in the wild, and to know that lynx are still present in the ecosystem of which they are a unique and essential component. This member has personally viewed one lynx in the wild and has conducted, and continues to conduct, scientific studies of the lynx through field tracking, observation, research, lecturing, writing, and preparation of educational materials. The interests of The HSUS and its members in observing, studying,

and otherwise enjoying the Canada Lynx, and in obtaining and disseminating information regarding the survival of the species, are harmed by the Defendants' authorization of indiscriminate trapping and snaring that result in the take and harm of this imperiled species, and which may result in HSUS members seeing dead or suffering lynx in the wild.

10. Plaintiff Help Our Wolves Live ("HOWL") is a Minnesota non-profit organization, dedicated to the protection and preservation of the gray wolf, lynx, and other endangered or threatened predator species. HOWL has over 250 members, most of whom live in the State of Minnesota. HOWL brings this action on its own institutional behalf and also on behalf of its members.

11. Since its incorporation in 1971, HOWL has actively advocated for the protection and preservation of wolves, lynx, and other wild species. HOWL accomplishes these objectives through public education, information gathering and dissemination, scientific research, and advocacy. HOWL and its members often submit public comments on proposed agency actions and other agency activities relating to public land management and wildlife protection in the State of Minnesota.

12. Members of HOWL use and enjoy public lands throughout the State of Minnesota, especially the northern part of the State that consists of lynx habitat. The members enjoy observing and studying the Canada Lynx in the wild. The recreational, scientific, spiritual, and aesthetic interests of HOWL and its members in enjoying the Canada Lynx, and in obtaining and disseminating information regarding the survival of the species, have been harmed by Defendants' authorization of indiscriminate trapping and snaring that result in the take and harm of this imperiled species, and which may result in HOWL members seeing dead or suffering lynx in the wild.

13. The interests of Plaintiffs and their members have been and will continue to be injured and harmed by Defendants' trapping and snaring program. The injury being suffered by Plaintiffs occurs because of Defendants' actions in authorizing the trapping and snaring program. Unless the relief prayed for herein is granted, Plaintiffs and their members will continue to suffer ongoing and irreparable harm and injury to their interests. If the requested relief is granted, fewer lynx will be killed in Minnesota, thereby reducing and redressing plaintiffs' injuries.

14. Defendant Gene Merriam is the Commissioner of the Minnesota Department of Natural Resources and has ultimate responsibility for conserving and managing the State's natural resources, and for ensuring compliance with federal conservation laws like the ESA.

15. Defendant Dave Schad is the Director of the DNR's Division of Fish and Wildlife and has been delegated responsibility to manage, protect, and regulate the State's fish and wildlife resources, including the regulation of trapping and snaring, and for ensuring day-to-day compliance with federal conservation laws like the ESA.

16. Defendants Merriam and Schad are sued in their official capacities, are jointly and severally liable for the ESA violations complained of herein, and are subject to this Court's jurisdiction because of their residence and actions or omissions within the State of Minnesota.

STATUTORY AND REGULATORY BACKGROUND

17. Recognizing that all of the country's "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," 16 U.S.C. § 1531(a)(3), Congress enacted the ESA with the express purpose

of providing both a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] . . . a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

18. The ESA prohibits any “person” from “taking” any species listed as endangered or threatened. 16 U.S.C. §1538(a)(1)(B); 50 C.F.R. § 17.31.

19. The term “take” is defined as “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).

20. 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).

21. It is unlawful for any person to “cause [an ESA violation] to be committed.” Id. § 1538(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.; see also Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (holding EPA liable for violation of the ESA for its registration of strychnine pesticide administered by ranchers which poisoned endangered species).

FACTS

The Canada Lynx

22. The Canada Lynx (*Felis lynx canadensis*) is one of the most imperiled mammals in the continental United States. It is a medium sized cat—measuring from

twenty-four to forty-two inches and weighing between ten and forty pounds—with long legs; large, well-furred paws; long tufts on the ears; and a short, black-tipped tail. The Lynx’s thick fur and wide paws make it superbly adapted to hunt prey, such as snowshoe hare, amidst deep snow.

23. The Canada Lynx inhabits the boreal and coniferous forests of Canada and the northern United States. Biologists generally recognize the historical range of the lynx in the contiguous U.S. as including New England (Maine, New Hampshire, Vermont and New York), the Great Lakes (Michigan, Wisconsin, and Minnesota), the Rocky Mountains (Idaho, Montana, Wyoming, Utah, and Colorado), and the Pacific Northwest Region (Washington and Oregon). Wide swaths of the upper Great Lakes—northern Minnesota in particular—provide the type of forests suitable to lynx for feeding, sheltering, and breeding.

24. Lynx have been extirpated from much of their historic range due to a combination of habitat destruction and fragmentation, exploitation of the population through trapping and hunting, and inadequate legal safeguards.

25. Due to dwindling lynx populations and habitat, the U.S. Fish and Wildlife Service (“FWS”) first determined that the Canada Lynx possibly warranted listing as threatened or endangered in December 1982. On March 24, 2000, the FWS issued its final decision to list the Canada Lynx as a threatened species throughout its range in the contiguous United States. 65 Fed. Reg. 16,052 (Mar. 24, 2000) (codified at 50 C.F.R. § 17.11). The FWS based this decision on the “inadequacy of existing regulatory mechanisms, specifically the lack of guidance for conservation of lynx in National Forest Land” *Id.* at 16,082.

26. A small and imperiled population of Canada Lynx is known to exist in Minnesota. 68 Fed. Reg. 40,076, 40,088 (July 3, 2003) (“In the past 3 years there have been [only] 62 verified reports of lynx in northeastern Minnesota . . . [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”); see also John Myers, Lynx Suffer Nearly 50% Mortality in Study: Scientists Concerned About Larger Trend, DULUTH NEWS TRIB., June 30, 2006 (“over the past 36 months there have been . . . 80 lynx confirmed in Minnesota using DNA testing”).

The DNR’s Actions Causing the Take of Canada Lynx

27. Historically, large numbers of Canada Lynx roamed and resided in Minnesota’s northern forests, including the Superior National Forest. However, after a relative peak in the 1970s, the lynx population crashed. The Defendants’ authorization of extensive trapping at the low end of a lynx population cycle is believed to be the major factor in pushing lynx to the brink of extirpation from the State of Minnesota.

28. The State was eventually forced to implement a ban on hunting and trapping of lynx in 1984. MN ADC 6234.1500.

29. Despite Minnesota’s prohibition on the taking of lynx statewide, Defendants’ continued authorization of indiscriminate traps and snares has resulted, and continues to result, in the illegal taking of lynx. See Phil Delphey, Endangered Species Biologist, U.S. Fish & Wildlife Service, Incident Log of Canada Lynx Taken by Hunting or Trapping in Minnesota Since 2002 (Nov. 2005) [hereafter “FWS Incident Log”].

30. Since November 7, 2002, there have been at least twelve documented lynx takes resulting from DNR-authorized trapping and snaring. FWS Incident Log at 12. These taking events have resulted in at least five confirmed lynx deaths, as well as several injuries. Id. According to biologists, the number of lynx taken in traps and snares in Minnesota is likely much higher due to widespread failures to report such incidents.

31. All of the documented lynx takes are a result of by-catch during trapping operations authorized by the Defendants. Out of the twelve takes, fox was the target animal in seven incidences, and bobcat, marten, and fisher were the target animals in the remaining incidences. Id.

32. Defendants' 2005 Minnesota Hunting and Trapping Regulations Handbook ("Handbook") authorizes any foot or leghold trap with a jaw opening up to 8 ¾ inches or any body-gripping or conibear-type trap with a jaw opening up to 7 ½ inches. Handbook at 52. Although Defendants require that "[a]ny trap capable of capturing a protected animal . . . must be tended at least once each calendar day," Defendants' regulations explicitly exempt "body-gripping or conibear-type traps" – the two types of traps most likely to cause the taking of protected lynx – from this requirement. Id.; see also MN ADC 6234.2200(2) ("A body-gripping or 'conibear' type trap need not be tended more frequently than once every third calendar day . . .").

33. Defendants also authorize indiscriminate snares of up to 10 inches in diameter and up to 16 inches in height. Handbook at 54.

34. Moreover, Defendants no longer require permits for fox and bobcat snaring, activities that often result in the take of Canada Lynx. Defendants removed the fox snaring permit requirement through a regulatory change in 2005. MN ADC 6234.2300(2).

Defendants also actively lobbied the State Legislature for a statutory amendment removing the bobcat snaring permit requirement in 2005. M.S.A. § 97B.625(2). Defendants' Handbook now provides: "Fox and bobcat may be snared only in the Forest Furbearer Zone . . . A permit is no longer required." Handbook at 54. Without permits, Defendants cannot adequately monitor where snaring occurs and at what intensity in order to document lynx by-catch. A permit system would help Defendants assess whether trappers are using untagged snares or violating the required daily snare check. MN ADC 6234.2400(10). Without such a requirement, untagged snares are checked infrequently.

35. Defendants only instruct trappers to release protected species back in the wild "[i]f possible," but do *not* require trappers to *report* the incident. Handbook at 55 (requiring reporting only when a protected animal has been *killed*) (emphasis added). Thus, Defendants do not monitor the number of non-lethal incidental takes of Canada Lynx.

The Present Action

36. On April 28, 2006, Plaintiffs sent notice – pursuant to section 11 of the ESA, 16 U.S.C. § 1540(g)(1)(A) – to Defendants, as well as the FWS and U.S. Department of Interior, advising of Plaintiffs' intent to sue the DNR "over ongoing violations of section 9 of the [ESA] resulting from the illegal take of the federally threatened Canada Lynx arising out of MN DNR's trapping and snaring program." To date, Plaintiffs have received no response.

37. More than sixty days have passed since Plaintiffs provided notice to Defendants, as described in paragraph 36.

38. Defendants' authorization of indiscriminate trapping and snaring activities in the State of Minnesota will continue unless enjoined by this Court, and will cause further "take" of Canada Lynx in violation of the ESA. Plaintiffs will be injured thereby.

COUNT I

39. Plaintiffs incorporate by reference all preceding paragraphs.

40. Defendants' authorization of trapping and snaring has caused and will continue to cause "take" of the imperiled Canada Lynx in violation of section 9 of the ESA, 16 U.S.C. § 1538, and 50 C.F.R. § 17.31.

41. Plaintiffs are injured by Defendants' ongoing violations of the ESA as herein alleged.

42. Plaintiffs are authorized by the citizen suit provision of the ESA to bring this action and obtain injunctive relief to remedy said ongoing violations by Defendants. 16 U.S.C. § 1540(g)(1).

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

43. Declare that Defendants are in violation of the section 9 "take" prohibition of the ESA with respect to the Canada Lynx by authorizing and administering their trapping and snaring program in the State of Minnesota;

44. Enjoin Defendants from continuing to violate the ESA through further "take" of the Canada Lynx;

45. Enter such other temporary, preliminary, or permanent injunctive relief as specifically prayed for by Plaintiffs hereinafter;

46. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys fees, associated with this litigation pursuant to the ESA, 16 U.S.C. § 1540(g); and

47. Grant such further and other relief as the Court deems just and proper.

FAEGRE & BENSON LLP

Richard A. Duncan, # 192983
Mandi L. Hill, # 328212
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

THE HUMANE SOCIETY OF THE UNITED STATES

Jonathan R. Lovvorn
D.C. Bar Number 461163
2100 L Street, NW
Washington, DC 20037
(202) 676-3669

Dated: July 5, 2006

Attorney for Plaintiffs The Humane Society of
the United States and Help Our Wolves Live

M1:1177875.01