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Sent via Email and Certified U.S. Mail (Return Receipt Requested)

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Re: Notice of Violations of the Endangered Species Act for Failure to Reinitiate Consultation on Impacts to Lynx from U.S. Fish and Wildlife Service Department of Management Authority's Approval of Montana's Export of Gray Wolf Pelts

On behalf of the Center for Biological Diversity (the "Center") and Trap Free Montana ("Trap Free"), we hereby provide notice pursuant to section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), that the U.S. Fish and Wildlife Service ("FWS") and their Division of Management Authority ("DMA") are in violation of section 7 of the ESA, 16 U.S.C. § 1536, and the ESA's consultation regulations, 50 C.F.R. Part 402.¹

As described below, FWS and DMA have violated and are violating the ESA by failing to reinitiate consultation over the impact of their approval of the state of Montana's gray wolf pelt export program under the Convention on International Trade in Endangered Species of Wild

¹ These violations of the ESA are also arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

Flora and Fauna (“CITES”)² and its effects on Canada lynx. FWS and DMA must reinstate consultation in light of the changed circumstances that the new Montana trapping laws and regulations present for threatened lynx and their habitat. The 2014 Biological Opinion (“BiOp”) fails to consider these changes and reinstatement is necessary to consider these impacts. Unless the violations in this notice are remedied, the Center intends to sue DMA and FWS.

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of endangered species and wild places. The Center and its members are concerned with the conservation of imperiled species, including the lynx, and the effective implementation of the ESA.

Trap Free Montana is a nonprofit organization dedicated to increasing public awareness and advocacy for wildlife impacted by trapping. Trap Free advocates for trap free public lands and trapping reform in Montana. Trap Free is based in Hamilton, Montana and focuses its efforts on predator conservation, including gray wolves and Canada lynx.

STATUTORY BACKGROUND

When a species has been listed or critical habitat designated under the ESA, all federal agencies—in this case, DMA, a department of FWS themselves—must ensure through consultation that their programs and activities follow the ESA. 16 U.S.C. § 1536(a)(2). Through consultation under Section 7 of the ESA, federal agencies determine whether their actions will jeopardize listed species’ survival or adversely modify designated critical habitat, and if so, identify ways to modify the action to avoid that result. 50 C.F.R. § 402.14. An agency is required to review its actions “at the earliest possible time” to determine whether an action may affect listed species or critical habitat. 50 C.F.R. § 402.14(a). The scope of agency actions subject to consultation is broadly defined to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (definition of “action”).

Pursuant to CITES, DMA has the authority to permit the export of CITES-listed species, such as gray wolves, under certain conditions. Specifically, a state may apply to DMA, which makes programmatic findings and has specific requirements that allow export under CITES. 50 C.F.R. § 23.69. In 2014, Montana applied to DMA seeking approval for export authority under CITES for gray wolves hunted or trapped in the state. DMA approved that program after consultation with FWS later that year. *See* FWS Biological Opinion on Impacts of the CITES Export Program Approval for the State of Montana on the Canada Lynx (TAILS no. 06E00000-2015-F-0001) (2014). DMA’s approval of the gray wolf pelt export program in Montana under

² CITES is an international convention. “CITES works by subjecting international trade in specimens of selected species to certain controls. All import, export, re-export and introduction from the sea of species covered by the Convention has to be authorized through a licensing system. Each Party to the Convention must designate one or more Management Authorities in charge of administering that licensing system and one or more Scientific Authorities to advise them on the effects of trade on the status of the species.” CITES, *How CITES Works*, <https://cites.org/eng/disc/how.php> (last visited Jun. 28, 2023). In the United States, the CITES program allows for export of species, with approval from DMA, when certain conditions are met. *Id.*

CITES is the agency action at issue. DMA retains discretion under this program, and can authorize activities such as the “implement[ation of] a CITES tag system to allow for the facilitated issuance of export permits.” BiOp at 1. The approval of Montana’s wolf pelt export program under CITES is an ongoing agency action subject to Section 7 of the ESA.

For each federal action, an agency must ask FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If the agency determines that its action is “likely to adversely affect” a listed species or critical habitat, the agency must engage in “formal consultation,” as outlined in 50 C.F.R. § 402.14 (“General Formal Consultation”). 50 C.F.R. §§ 402.02, 402.14(a). To complete formal consultation, the FWS must provide the agency that is the subject of the action with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. Consultation must generally be completed within 90 days from the date on which consultation is initiated. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

If the FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, the FWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the listed species, outlining any “reasonable and prudent measures” that the FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Taking of listed species without the coverage of an incidental take statement is a violation of Section 9 of the ESA. 16 U.S.C. § 1538.

Agencies must reinitiate consultation on agency actions over which the federal agency retains, or is authorized to exercise, discretionary involvement or control:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If 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; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

Until consultation is complete, the agency is prohibited from making any irreversible or irretrievable commitment of resources to the agency action, which may foreclose the formulation

or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d); *see Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1057 (9th Cir. 1994) (recognizing that “timber sales constitute per se irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period”).

FACTUAL BACKGROUND

Threatened Canada Lynx

The Canada lynx (*Lynx canadensis*) is a rare wild cat that is similar in appearance to a bobcat but has much larger feet and is characterized by tufted ears and a pronounced goatee under the chin. Their large paws work like snowshoes and enable walking on top of the deep, soft, snow characteristic of their habitat. This cold-loving cat feeds predominantly on snowshoe hares but also eats birds and small mammals and scavenges carcasses. Lynx mating occurs in late winter, and up to five kittens are born within 62-74 days. Kittens remain with and depend on their mother for one year before dispersing to their own home range.³

Declining population numbers and inadequate regulatory mechanisms led FWS to list the Canada lynx as a threatened species under the ESA in 2000. 65 Fed. Reg. 16052 (Mar. 24, 2000). FWS designated critical habitat in 2006 with revisions in 2009 and 2014. 79 Fed. Reg. 54781 (Sept. 12, 2014). The critical habitat designation includes a large swath of western Montana.

Trapping, habitat destruction, climate change, and other threats continue to harm the Canada lynx today. Montana still contains lynx habitat that has both the quality and quantity of resources necessary to sustain lynx populations. There are currently no reliable estimates of the existing number of lynx in Montana, although the BiOp uses a population estimate of 200 lynx in its analysis based solely on habitat extent. BiOp at 7.

2014 CITES Lynx Biological Opinion

In June of 2014, Montana applied to the DMA for CITES export authority for gray wolves killed in the state. BiOp at 1. In response to this request, DMA initiated intra-agency consultation required under Section 7 of the ESA to review the effects on Canada lynx if it approved Montana’s application. *Id.* Based on the final BiOp, DMA authorized Montana’s export of gray wolf specimens killed through trapping under CITES.

FWS also issued an incidental take statement (“ITS”) to the state of Montana to permit limited incidental take of lynx caught in wolf traps. *Id.* at 8-9. The BiOp estimated that up to ten lynx could be incidentally trapped over the subsequent ten years, with only one of those ten dying or being seriously harmed, without endangering the survival and recovery of the species in Montana. *Id.* at 8. The BiOp included conservation measures to “reduce the likelihood of incidental trapping of lynx” such as the “timing of wolf trapping season (December 15-February

³ Montana Fish, Wildlife and Parks, *Montana Field Guide, Canada Lynx – Lynx canadensis*, available at <https://fieldguide.mt.gov/speciesDetail.aspx?elcode=AMAJH03010>.

28) [to] reduce[] the exposure of lynx to wolf traps[.]” The BiOp further states that “[t]he use of snares and conibear traps is not allowed to trap wolves, which eliminates these as potential mortality factors.” *Id.* at 2, 6.

As required under section 7 of the ESA, FWS also considered the cumulative effects of approving CITES export of gray wolves for Montana. Cumulative effects “. . . are those effects of future State or private activities, not involving Federal activities that are reasonably certain to occur within the action area of the Federal action subject to consultation.” 50 C.F.R. § 402.02. In considering cumulative effects, the BiOp does not contemplate the threat to lynx from wolf trapping on private lands, which is concerning due to the BiOp’s recognition of lynx habitat on private lands. The BiOp states:

In the Northern Rockies ecosystem, 28 percent of potential lynx habitat occurs on private, State, or tribal lands. The Northern Rockies encompass more privately owned lynx forest types than elsewhere in the West; about one-third of lynx forest types are in private ownership. Due to the forested nature of lynx habitat, large portions of this habitat likely occur on private, State, and corporate timber lands...

BiOp at 7.

After considering the effects of the action, conservation measures, and cumulative effects, FWS ultimately concluded in the BiOp that Montana gray wolf exports would not jeopardize lynx. *Id.* at 1, 7. Montana and Alaska are currently the only two states with CITES approval for export of wolf pelts.

Revised Wolf Trapping Rules

In 2021, the Montana Legislature passed two bills, which Governor Gianforte subsequently signed into law, requiring the Montana Fish and Wildlife Commission (“FWC”) to allow the use of snares to trap wolves and the ability to expand wolf-trapping seasons to drastically reduce the wolf population in Montana from roughly 1,100 wolves to 150 wolves. *See* H.B. 224, 67th Leg., Reg. Sess. (MT 2021) (“HB 224”) (amending MCA § 87-1-901); H.B. 225, 67th Leg., Reg. Sess. (MT 2021) (“HB 225”) (same); S.B. 314, 67th Leg., Reg. Sess. (MT 2021) (“SB 314”) (same).⁴ FWC approved the changes to the trapping rules in the summer of 2021, which introduced wolf snaring in lynx habitat and extended the length of the wolf-trapping season by 31 days in 2021 (December 15 – February 28 to the first Monday after Thanksgiving i.e. November 29-March 15). Mont. Code. Ann. § 87-1-901 (2021); *see also* Montana Fish, Wildlife and Parks, *2021 Wolf Hunting and Trapping Regulations*.

In response to significant pushback from conservation groups, including the Center for Biological Diversity, FWC applied a floating wolf-trapping and snaring season opening date

⁴ On March 22, 2023 Montana published a scoping notice for proposed development of a new Montana wolf plan. The development of a new plan is likely to change this number based on the alternative selected. Montana Fish, Wildlife and Parks, *Public Scoping Notice: Proposed Development of a New Montana Wolf Management Plan and Associated Environmental Impact Statement* (Mar. 22, 2023).

based on real time reading of conditions by the agency with a default opening date no later than December 31, instead of December 15, in and near occupied grizzly habitat. However, Montana Fish, Wildlife and Parks (“FWP”) may still set an earlier opening date for these areas, as early as the first Monday after Thanksgiving⁵, which is the opening date that applies across the rest of the state.⁶ In addition, while FWC prohibited wolf snaring on public lands in lynx protection zones, these revised rules continue to allow wolf snaring on private lands, where nontargets like lynx (or grizzly bears) could be captured.⁷

Montana’s New Wolf-Trapping Rules Require Reinitiation of Consultation

Montana’s new wolf trapping rules explicitly contradict assumptions that the BiOp relied on in approving Montana’s wolf pelt export program. The rules reject conservation measures to “reduce the likelihood of incidental trapping of lynx” considered in the BiOp and undermine the BiOp’s cumulative effects analysis. BiOp at 6-7.

Specifically, the BiOp relied on a wolf-trapping season that runs from December 15 to February 28 to conclude that season length “reduces the exposure of lynx to wolf traps” and did not contemplate that the wolf-trapping season would begin more than two weeks earlier on the first Monday after Thanksgiving and extend 15 days later to March 15.

The BiOp also considers trap setbacks of 150 feet from roads and trails on public lands as a conservation measure to reduce the impacts of wolf trapping on lynx. BiOp at 1. However, the trapping regulations eliminated all trap setbacks on roads closed year-round to motor vehicles. This exemption does not include snowmobiles, thus giving snowmobiles access to trap with no setback requirements. Montana Fish, Wildlife and Parks, *2022 Wolf Furbearer Trapping and Hunting Regulations*.

In its discussion of conservation measures that will reduce impacts of the action, the BiOp also explicitly recognizes that snares are not allowed to trap wolves and therefore does not analyze them as a potential mortality factor. BiOp at 1.

Furthermore, in its assessment of cumulative effects, the BiOp did not consider that wolf snaring would be allowed in lynx habitat. The BiOp discussed the potential threat to lynx posed by other state or private actions, such as timber management, mineral extraction, grazing, oil and gas exploration, and recreational use, *id.*, but did not contemplate the added impact of the state allowing snaring on private lands in lynx habitat. The BiOp failed to consider snaring on private

⁵ Montana’s 2022 trapping guidelines dictate that the wolf trapping season runs from the first Monday after Thanksgiving to March 15. Montana Fish, Wildlife and Parks, *2022 Wolf Furbearer Trapping and Hunting Regulations*. The BiOp considers a season from December 15-February 28, which is at least a month less than the current regulations. BiOp at 6.

⁶ Lynx and grizzly bear habitat have significant overlap, thus wolf trapping in grizzly habitat is also likely to have an impact on lynx. *See* Montana Fish, Wildlife and Parks, *2022 Black Bear Hunting Regulations*, pg. 6. *See also* Montana Fish, Wildlife and Parks, *2022 Wolf Furbearer Trapping and Hunting Regulations*, pg. 14.

⁷ 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.” USDA Forest Service et al., *Canada lynx conservation assessment and strategy*, 3rd ed. at 79 (2013). 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 . . . wolf, overlaps with lynx habitats.”

lands despite that fact that “28 percent of potential lynx habitat occurs on private, State, or tribal lands [and] [t]he Northern Rockies encompass more privately owned lynx forest types than elsewhere in the West; about one-third of lynx forest types are in private ownership.” *Id.*

In the final sentence of the BiOp discussing “effects of the action,” FWS explicitly stated that “[s]hould observations from the implementation of the proposed action demonstrate a substantial deviation from the assumptions presented above, reinitiation of this consultation may be necessary.” BiOp at 7.

ESA VIOLATIONS

Multiple events triggering the need to reinitiate consultation have occurred since FWS issued its 2014 BiOp on the impacts to lynx from Montana’s wolf pelt export program under CITES. Specifically, the 2021 legislation and subsequent regulatory changes allowing wolf snaring on public and private lands, extending the wolf-trapping season, and eliminating certain trap setback requirements, constitutes new information not previously considered, as well as a modification to the agency action that was not considered in the BiOp, and allows for the amount or extent of take in the ITS to be exceeded. 50 C.F.R. § 402.16. Yet DMA and FWS have failed to timely reinitiate and complete consultation regarding the continued approval of Montana’s wolf pelt export program under CITES, in violation of the ESA. 16 U.S.C. § 1536(a)(2), (b)(1)(A); 50 C.F.R. §§ 402.14, 402.16.

By allowing, authorizing, and approving Montana’s wolf pelt export program to proceed prior to the reinitiation and completion of consultation, DMA and FWS are failing to protect the lynx from jeopardy, in violation of Section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2). For this same reason, DMA and FWS are also violating Section 7(d) of the ESA. 16 U.S.C. § 1536(d).

CONCLUSION

For the above-stated reasons, DMA and FWS have violated and remain in ongoing violation of Section 7 of the ESA. If these violations of law are not cured within sixty days, the Center for Biological Diversity intends to file suit for declaratory and injunctive relief, as well as attorney fees and costs. 16 U.S.C. § 1540(g). If you believe that any of the foregoing is inaccurate or otherwise would like to discuss this notice letter, please contact us.

Sincerely,



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