EARTHJUSTICE

July 19, 2021

By Email And First Class Mail

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

Dear Governor Little, Director Schriever, Director Gould, and Fish and Wildlife Commissioners,

I write on behalf of the Center for Biological Diversity, Footloose Montana, Friends of the Clearwater, International Wildlife Coexistence Network, Nimiipuu Protecting the Environment, Sierra Club, Trap Free Montana Public Lands, 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 Little signed into law Senate Bill ("SB") 1211, authorizing wolf trapping year-round on private property, see SB 1211 § 3 (amending Idaho Code § 36-201(3)), and the purchase of an unlimited number of tags per person to hunt, trap, or snare wolves in any hunting unit with an open wolf season at the time a wolf is killed. See Id. § 4 (amending § 36-408). Additionally, SB 1211 grants livestock and domestic animal owners permission to kill wolves to address a perceived threat of wolf depredation, as owners see fit. Id. § 5 (amending § 36-1107(c)). This bill imposes a new, unconstrained wolf-removal paradigm in Idaho's lynx and grizzly bear habitat that includes hunting, trapping, snaring, and various other techniques. In response to SB 1211, which went into effect July 1, 2021, the Idaho Department of Fish and Game ("IDFG") amended the State's wolf hunting and trapping seasons, creating new hunting seasons on public lands without weapon restrictions and year-round trapping on private lands.[1] The State's authorization of expanded seasons and take methods is likely to cause incidental trapping, snaring, and injury or death of federally protected lynx and grizzly bears.

Lynx, grizzly bears, and gray wolves all inhabit similar habitat types and geographic ranges in Idaho, and wolf hunting and trapping therefore frequently occur in areas in which lynx and grizzlies are also present. Moreover, because snares and other authorized means of hunting and trapping are imprecise tools, they pose a substantial risk to non-target species, including lynx and grizzlies. Accordingly, legislation that allows for the unlimited number of wolf kills per hunter or trapper—and requires the Wolf Depredation Control Board ("Board") to manage hunting, trapping, and snaring seasons with the intent to significantly reduce the wolf population—is likely to result in the incidental trapping and snaring, 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 of Idaho should, at a minimum, prohibit all hunting, trapping, and snaring in 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.

[1] See also Roger Phillips, F&G Commission Amends Wolf Hunting And Trapping Seasons To Align With New State Law, Idaho Fish & Game, idfg.idaho.gov/press/fg-commission-amends-wolf-hunting-and-trapping-seasons-align-new-state-law (June 17, 2021) (last visited July 14, 2021).

I. Lynx And Grizzly Bear Habitat Is Largely Coextensive with Wolf Habitat in Idaho

Idaho's new wolf-killing legislation poses a considerable threat to lynx and grizzly bears because their habitat in Idaho overlaps significantly with that of gray wolves. Starting in the northern Idaho Panhandle—from the Selkirk Ecosystem and Cabinet-Yaak Ecosystem—lynx, grizzly, and wolf habitat extends southward into the heart of the State, the Bitterroot Ecosystem. The species' overlapping habitat also comprises the State's border with Wyoming and Montana, including southeastern Idaho's Greater Yellowstone Ecosystem.

Within this geographic range, lynx, grizzly bears, and wolves frequently inhabit the same areas. Due to this substantial overlap between all three species, wolf trapping, snaring, and hunting in Idaho is frequently carried out in lynx and grizzly bear habitat.

A. Threatened Lynx in Idaho

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).

According to NatureServe,[2] lynx numbers and range in the contiguous United States are substantially reduced from historical levels as a 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 reports that, in the Northern Rocky Mountain region and in Idaho in particular, lynx live in coniferous forests of Douglas fir and western spruce. See generally 65 Fed. Reg. 16052, 16057 (2000) (listing lynx as a threatened species under the ESA). Idaho contains ideal habitat for lynx. Government researchers, Miller and Rust (2004), write:

> In Idaho lynx are predicted to occur in montane and subalpine coniferous forest habitats … as far south in the west as the northern Salmon River and Lemhi mountains and east and south on the Yellowstone Highlands and Caribou Range (McKelvey 2000; Wisdom et al. 2000). Several lynx occurrences are known from

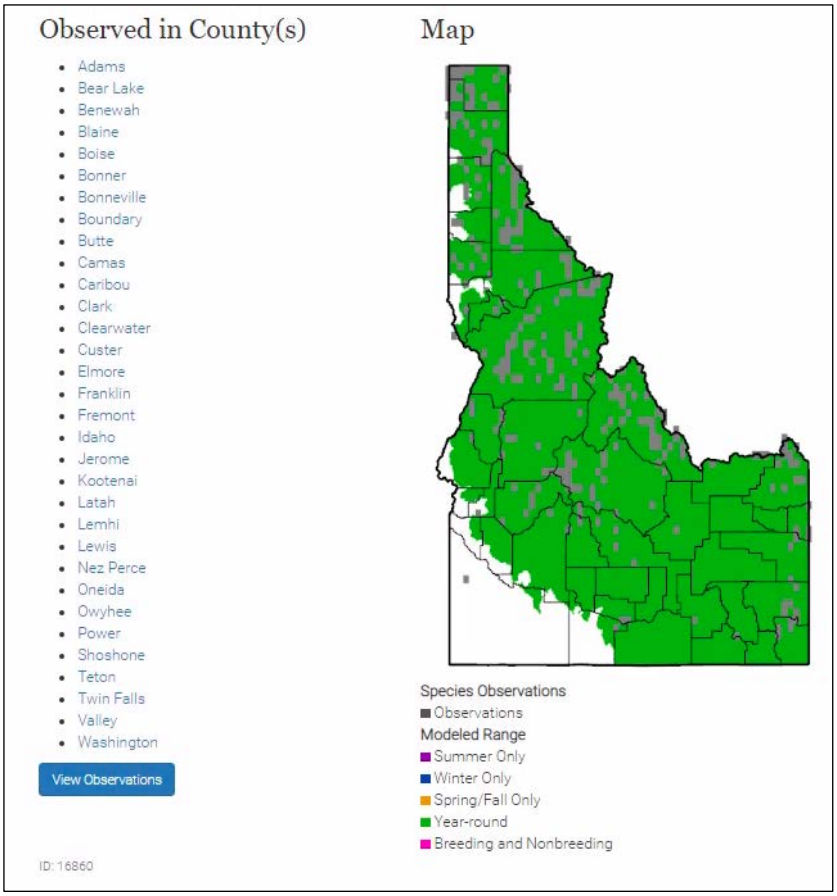
[2] The U.S. Department of the Interior describes NatureServe as "a source for authoritative conservation information on more than fifty thousand plants, animals and ecological communities of the U.S. and Canada." https://www.doi.gov/library/internet/plants (last visited July 14, 2021).

[3] https://explorer.natureserve.org/Taxon/ELEMENT_GLOBAL.2.102126/Lynx_canadensis (last visited July 14, 2021).

the Coeur d'Alene River, St. Joe River, and St. Maries River basins (Idaho Conservation Data Center 2003).

IDFG's contemporary data shows Canada lynx are known or believed to occur in 32 of Idaho's 44 counties with the modeled lynx range extending throughout all of Idaho's 44 counties based on verified lynx observations.[4] See Figure 1.

Figure 1. Reported Observations of Canada Lynx Year-Round Habitat – Map Courtesy of IDFG



Lynx are naturally occurring in Idaho's habitat. Moreover, lynx re-introduced into Colorado (or their offspring) have been documented to travel into and inhabit parts of Idaho, primarily along the southeastern border with Wyoming and Montana, as well as the Panhandle. See Devineau et al. (2010); Figure 2.

[4] Idaho Department of Fish & Game, Idaho Species: Canada Lynx, https://idfg.idaho.gov/species/taxa/16860 (last accessed July 14, 2021).

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

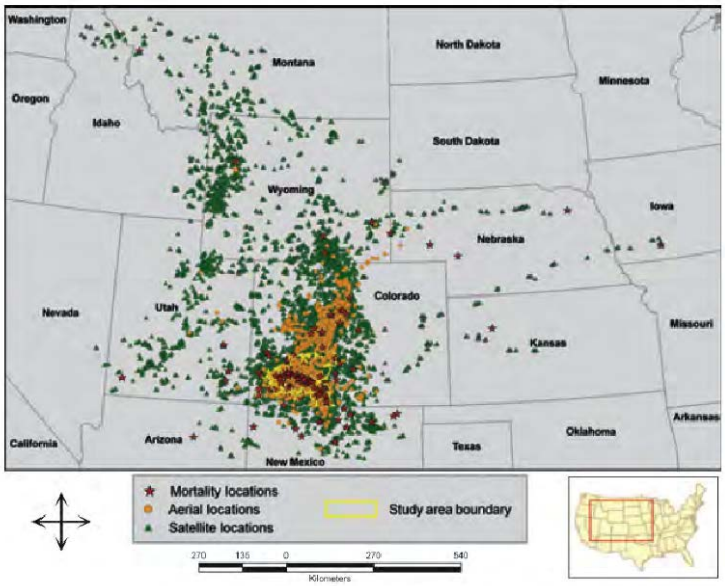


Fig. 1. Map of Colorado outlining the core reintroduction and primary post-release monitoring area, and documenting all post-release locations obtained by either satellite platform transmitter terminal or aerial very high frequency tracking for the 218 lynx reintroduced to Colorado from February 1999 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. (2008). Moreover, lynx survival within their chosen habitat is threatened by local trapping pressure. According to IDFG, lynx may be especially susceptible to trapping, which has been a significant source of mortality. Ruggiero, et al. at 453 (2000).[5] FWS has also determined that "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 Idaho

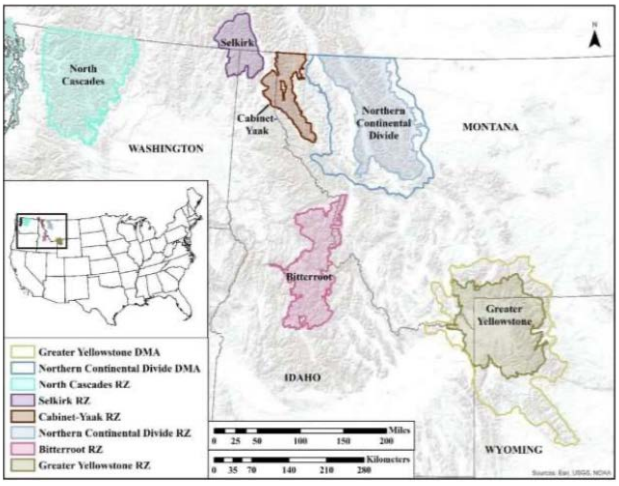
Grizzly bears once numbered roughly 50,000 individuals in the western United States. FWS, Species Status Assessment for the Grizzly Bear in the Lower-48 States: A Biological Report, 4 (2021) ("Status Assessment for the Grizzly Bear"). With European-American settlement, however, grizzlies were "shot, poisoned, and trapped wherever they were found," eliminating them from all 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), aff'd, 965 F.3d 662 (9th Cir. 2020).

[5] See IDFG, Profile on Canada Lynx (2005), http://fishandgame.idaho.gov/ifwis/cwcs/pdf/Canada%20Lynx.pdf (citing McKelvey, K.S., K.B. Aubry, and Y.K. Ortega. 2000. History and distribution of lynx in the contiguous United States. Pages 207-264 in Ecology and conservation of lynx in the United States. USDA Forest Service General Technical Report RMRS-GTR- 30WWW).

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 4. Idaho is home in part to four of these recovery zones: (1) the Selkirk 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[6]



Consistent with the designated recovery zones, Idaho's grizzly populations are concentrated in northern Idaho's Cabinet-Yaak and Selkirk Ecosystems and eastern Idaho's Greater Yellowstone Ecosystem bordering Montana and Wyoming. Status Assessment for the Grizzly Bear, at 4. Moreover, according to the Interagency Grizzly Bear Committee, while "[g]rizzly bears in [central Idaho's] Bitterroot Ecosystem remain relatively uncommon" there have been "increasing reports [of grizzlies in the Bitterroots] in recent years."[7] Grizzly bears' current known distribution also extends beyond the designated recovery zones. FWS, Grizzly Bear Recovery Program 2018 Annual Report, 2, 3, 5, 7, 10 (2018).

FWS 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

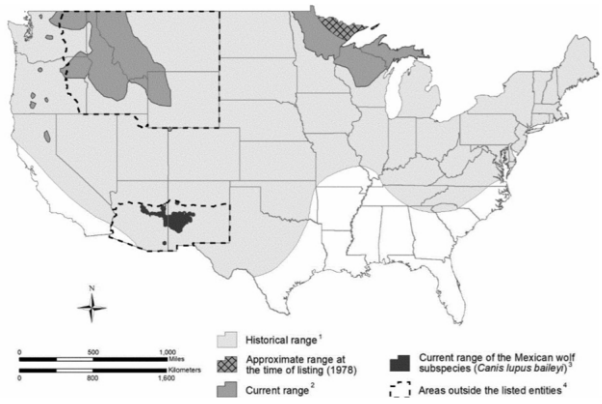
[6] https://www.fws.gov/mountain-prairie/es/species/mammals/grizzly/20210131_V1.1_SSA_for_grizzly_bear_in_the_lower-48_States.pdf (last visited July 140, 2021).
[7] Interagency Grizzly Bear Committee, Bitterroot Ecosystem, http://igbconline.org/bitterroot-ecosystem/ (last visited July 14, 2021).

available including vegetation, living or dead mammals or fish, insects, worms, plants, human-related foods, and garbage." Id. at 48. In the Greater Yellowstone Ecosystem, encompassing eastern Idaho, northwest Wyoming, and southwestern 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). And, 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, Idaho's gray wolf habitat ranges across the northern and central portion of the state in the Cabinet-Yaak, Selkirk, and Bitterroot Ecosystems, as well as the eastern corner of the State within the Greater Yellowstone Ecosystem. See Figure 4. As Figure 4 shows, wolves' geographical habitat range substantially overlaps with lynx and grizzly bear habitat in Idaho.

Figure 4. Gray Wolf Range in the Continental United States – Map courtesy of FWS[8]



Significantly, within their overlapping habitat ranges, wolves, lynx, and grizzly bears frequently choose the same habitat types and are found the same areas. Wolves "exhibit[] no particular habitat preference except for the presence of native ungulates within [their] territory on a year-round basis."[9] 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 live in the same areas throughout Idaho.

In particular, 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

[8] https://www.govinfo.gov/content/pkg/FR-2020-11-03/pdf/2020-24171.pdf (last visited July 14, 2021).
[9] http://fieldguide.mt.gov/speciesDetail.aspx?elcode=AMAJA01030 (last visited July 14, 2021).

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—use the same habitat.

Wolf habitat also overlaps with that of lynx. Since IDFG authorized all methods of wolf killing within lynx habitat, and the season—running from November 15 to March 31[10]—coincides with a time in which lynx family groups are actively hunting snowshoe hare, lynx are particularly vulnerable to wolf trapping. Ulev (2007).

Further, the presence of wolves in an area can play an important role in food availability for lynx. Lynx rely on snowshoe hares 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 hares, which in turn benefits nearby lynx. Id. FWS and other federal agencies have anticipated 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 inhabit and use similar geographic ranges and are frequently found in the same types of habitat within those ranges. This substantial overlap in habitat for these three species means that wolf hunting and trapping in Idaho frequently occurs in areas also used by lynx and grizzlies.

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

Snares and traps are known to frequently capture, injure, or kill non-target species such as lynx and grizzly bears. Idaho's new law authorizing "no limit to the number of wolf tags that an individual can purchase" for hunting, trapping, and snaring is expected to increase the amount of snaring and trapping of wolves in Idaho and thereby increase the number of non-target species that are injured or killed.

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

According to trapping experts and researchers, snares,[11] and leghold traps[12] 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 non-target captures can be very high in comparison to target captures."); see also Proulx, et al. (2015).

[10] IDFG, Idaho Big Game 2021 Seasons & Rules 2021-2022, Gray Wolf Hunting & Trapping Seasons & General Rules (1st Ed. 2021), 82.

[11] 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.

[12] "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).

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 easily be 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 (emphasis 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 to15 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).[13] Leghold snares and traps, which are not intended to kill, can nevertheless cause injuries that result in death or permanently impair the captured individual after release. However, because these injuries are not always immediately apparent, captured 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) ("The mortality and morbidity of animals caught in snares is higher than with most other restraining traps.").

[13] 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).

Leghold snares and traps, by restraining animals by their limbs, can cause compression or constriction injuries that 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 constriction 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 (2013) ("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. Additionally, even if released alive, the temporary immobility of trapped and struggling individuals causes adverse physiological responses, including anxiety, stress, and pain that change hormone, enzyme, and electrolyte levels as well as muscle pH. Iossa, et al. (2007). This distress, when prolonged, can have a deleterious effect on the animal's health and survival after its release. Id. Furthermore, orphaned kittens or yearlings may die if a mother lynx is trapped, because they are dependent on their mothers for survival. Ulev (2007). Experts recommend "restricting trapping during early winter to avoid removing adult females from their kittens" because of the risk that hunting females that are trapped will lead to kittens dying of starvation. Id.

Finally, the longer an animal is trapped, the more likely it is to suffer injury or death. Proulx and Rodtka (2019). Thus, allowing trappers to leave traps and snares on the land without

frequent checks—Idaho allows trappers to check traps as infrequently as every 72 hours—increases the likelihood that incidentally caught grizzlies and lynx will be injured or killed due to prolonged detention and exposure.

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

Even before the wave of unrestrained hunting, trapping, and snaring activity authorized by the State's new wolf-killing legislation, Idaho hunters and trappers already capture, injure, and kill non-target animals on a regular basis.

In a response to a state public records request submitted by Western Watersheds Project, IDFG disclosed data showing widespread capture and mortality of non-target species related to wolf trapping and snaring in Idaho during the 2011-2012 trapping and snaring season.[14] During that time period, wolf trappers in Idaho killed approximately 177 wolves. However, trappers captured approximately 246 non-target animals during that same time, including black bear, bobcats, coyote, deer, elk, fishers, and mountain lions. Of those captured, 116 were released alive, 118 were killed, and the fate of 12 others were not reported.[15]

Between 2011 and 2020, IDFG documented five cases of non-target trapping of lynx in Idaho.[16] Four of those reported instances were challenged in 2018 in Ctr. for Biological Diversity v. Otter, No. 1:14-CV-258-BLW, 2018 WL 539329 (D. Idaho Jan. 24, 2018). Of those instances, the United States District Court for the District of Idaho ruled that one of the four takes was unlawful in which an individual targeting wolves trapped a lynx in violation of Section 9 of the ESA. Id. at 2. While these are the only documented cases in which lynx were trapped in Idaho in recent years, Idaho regulations require a trapper to report non-target catch only when the captured animal has died in the trap.[17]

In the neighboring State of Montana, Montana's Fish, Wildlife and Parks Department ("FWP") reported three lynx and three grizzly bears among non-target captures—including one lynx and one grizzly caught in leghold traps intended for wolves. FWP, Incidental Captures of Wildlife and Domestic Dogs in Montana, 2012-2017, 1-2 (2018). At least one trapped grizzly bear sustained foot damage prior to release. See Non-Target Wildlife Captures in Traps (non-Wolf Traps) Reported to FWP, 2013-2014. And while FWP classified the other captured grizzly bears and lynx as "uninjured/released" or simply "released," FWP records do not indicate

[14] Ken Cole, The Wildlife News, https://www.thewildlifenews.com/2013/02/14/state-public-records-request-shows-widespread-capture-and-mortality-of-non-target-animals-related-to-idaho-wolf-trapping-during-20112012-trapping-season/ (February 14, 2013).
[15] Id.
[16] Reported Non-Target Lynx Captures, document on file with author.
[17] IDAPA 13.01.16 (200.03)(a) and (b). However, this regulation is inconsistent with the statute on which it is based. Idaho Code § 36-1105. The statute requires the reporting of animals "caught, killed and pelted," while the State only requires reporting of animals killed and pelted. The State's "Furtaker Harvest Report" form, which cites to IDAPA 13, asks furtakers to report both live and dead non-target catch totals. Hence, trappers who do not report live catch totals are out of compliance with the statute.

whether these animals were monitored following release.[18] 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 available data collected by IDFG demonstrates that trapping and snaring of wolves in Idaho 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 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 context of trapping or snaring. 50 C.F.R. 17.40(k). 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, these rules protect lynx and grizzly bears from take or attempted take by recreational trapping or snaring.

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. v. Holsten, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008) (holding Minnesota Department of Natural Resources liable for incidental trapping 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

[18] 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, 2012-2014

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's broad citizen-suit provision 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 reasonably likely to result in take. See Burlington Northern Railroad, 23 F.3d at 1511.

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

Implementation of Idaho's wolf-killing legislation is reasonably likely to cause incidental take—including harm, wounding, or killing—of threatened lynx and grizzly bears in violation of ESA section 9. Idaho's recently enacted SB 1211 requires the Commission to place "no limit to the number of wolf tags that an individual can purchase." See SB 1211 § 4 (amending Idaho Code § 36-408). Further, SB 1211 requires the Commission to open a year-round wolf-trapping season on all private property, id. § 3 (amending Idaho Code § 36-201(3)), during which livestock and domestic animal owners can take all steps (e.g., lethal) perceived as necessary to protect their property, id. § 5 (amending Idaho Code § 36-1107(c)). These measures portend a new wave of trapping, snaring, and hunting activity in Idaho to achieve the State's new wolf population-reduction mandate.

Because lynx and grizzly bear habitat significantly overlaps with that of Idaho's gray wolf population, State-authorized unrestrained wolf-killing activities will alter hunting, trapping, and snaring conditions in lynx and grizzly territory. These adverse impacts are likely to occur even if trappers follow all applicable state laws and regulations. Thus, by authorizing year-round hunting on private lands and issuing unlimited wolf tags per individual for hunting, trapping, and snaring, SB 1211 increases the likelihood that Idaho hunters and trappers—who already regularly capture non-target species—will incidentally injure or kill federally-protected lynx and grizzlies.

In short, implementing SB 1211 is reasonably likely to cause the incidental take—including the injuring or killing—of lynx and grizzly bears. Thus, activities to implement this bill violate section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B).

V. Conclusion

The Center for Biological Diversity, Footloose Montana, Friends of the Clearwater, International Wildlife Coexistence Network, Nimiipuu Protecting the Environment, Sierra Club, Trap Free Montana Public Lands, Western Watersheds Project, Wilderness Watch, and Wolves of the Rockies work to protect and conserve lynx and grizzly bears in Idaho and the Northern Rockies. Activities to implement Idaho's new wolf-killing legislation threaten to impede conservation of these protected species. Accordingly, the parties to this notice letter request that Idaho 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 minimum, this would require the State to prohibit all trapping and snaring in lynx and grizzly bear habitat.

If Idaho 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

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