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21 Counsel for Plaintiffs

22  
23 IN THE UNITED STATES DISTRICT COURT  
24 FOR THE DISTRICT OF MONTANA  
25 MISSOULA DIVISION

26 FRIENDS OF THE WILD SWAN, a non-profit )  
27 organization; WILDEARTH GUARDIANS, a )  
28 non-profit organization; and THE ALLIANCE )  
FOR THE WILD ROCKIES, a non-profit )  
organization, )

Plaintiffs, )

vs. )

29 DAN VERMILLION, in his official capacity as )  
30 Chairman of the Montana Fish, Wildlife and Parks )  
31 Commission; BOB REAM, in his official )  
32 capacity as a Commissioner of the Montana Fish, )  
33 Wildlife and Parks Commission; MATTHEW )

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

1 TOURTLOTTE, in his official capacity as a )  
 2 Commissioner of the Montana Fish, Wildlife and )  
 3 Parks Commission; LAWRENCE WETSIT, in his )  
 4 official capacity as a Commissioner of the )  
 5 Montana Fish, Wildlife and Parks Commission; )  
 6 RICHARD STUKER, in his official capacity as a )  
 7 Commissioner of the Montana Fish, Wildlife and )  
 8 Parks Commission; and JEFF HAGENER, in his )  
 9 official capacity as Director of the Montana )  
 10 Department of Fish, Wildlife and Parks, )  
 11 )  
 12 )  
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 Defendants. )

INTRODUCTION

1 1. Plaintiffs, Friends of the Wild Swan et al., hereby bring this civil action  
 2 for declaratory and injunctive relief against the above named Defendants,  
 3 individual members of the Montana Fish Wildlife and Parks Commission and the  
 4 Director of the Montana Department of Fish Wildlife and Parks (collectively “the  
 5 Department”), pursuant to the citizen suit provision of the Endangered Species Act  
 6 (“ESA”), 16 U.S.C. § 1540(g), for violations of Section 9 of the ESA, 16 U.S.C. §  
 7 1538.  
 8

9 2. The Department has violated, and continues to violate the ESA by  
 10 authorizing trapping and snaring activities in occupied Canada lynx (“lynx”)  
 11 habitat which has resulted, and will continue to result, in the illegal take of lynx, a  
 12 threatened species protected under the ESA. To date, at least nine reported  
 13 incidents of lynx being caught in traps set for other species have occurred.  
 14

15 3. Wherefore, Plaintiffs – three organizations dedicated to lynx conservation  
 16 and reducing the levels of lynx take in Montana – are hereby compelled to bring  
 17 this civil action.  
 18

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (Federal Question) and 16 U.S.C. § 1540 (ESA).

5. This Court has the authority to review the Department’s actions and/or inactions complained of herein, and grant the relief requested, pursuant to the ESA’s citizen suit provision, 16 U.S.C. § 1540 (g). All requirements for judicial review required by the ESA including the requirement of providing sixty days notice of intent to sue prior to filing a civil action have been satisfied.

6. The relief sought is authorized by 28 U.S.C. § 2201 (Declaratory Judgment), 28 U.S.C. § 2202 (Injunctive Relief), 16 U.S.C. § 1540 (ESA).

7. Venue is proper pursuant to 16 U.S.C. § 1540 (g)(3)(A) and 28 U.S.C. § 1391(e). Friends of the Wild Swan, the lead plaintiff in this action, resides in the Missoula Division and lynx occur and have been taken in the Missoula Division.

8. There is a present and actual controversy between the Parties.

PARTIES

9. Plaintiff, FRIENDS OF THE WILD SWAN, is a Montana non-profit organization with its principal place of business in Swan Lake, Lake County, Montana. Friends of the Wild Swan is dedicated to ensuring the long-term survival and recovery of lynx in Montana, including protecting individual lynx from take.

10. Plaintiff WILDEARTH GUARDIANS is non-profit environmental organization with offices in Santa Fe, New Mexico, Denver, Colorado, and Tucson, Arizona. WildEarth Guardian’s mission is to protect and restore the wildlife wild places, and wild rivers in the American West. This mission encompasses ensuring the long-term survival and recovery of lynx in Montana, including protecting

1 individual lynx from take. WildEarth Guardians has over 4,500 members, many of  
2 whom reside in Montana.

3 11. Plaintiff THE ALLIANCE FOR THE WILD ROCKIES is a Montana  
4 non-profit conservation and education organization in Helena, Montana with  
5 approximately 2,000 members. The mission of the Alliance for the Wild Rockies is  
6 to protect and restore the ecological and biological integrity of the Northern  
7 Rockies. This includes ensuring the long-term survival and recovery of lynx in  
8 Montana.  
9

10 12. All Plaintiffs sue on behalf of themselves, their staff, and their adversely  
11 affected members.

12 13. All Plaintiffs' members and/or staff are dedicated to protecting and  
13 preserving the natural function and biological integrity of Montana's natural  
14 resources and native wildlife populations, including lynx.

15 14. All Plaintiffs' members and/or staff are dedicated to protecting  
16 individual lynx from take.

17 15. Plaintiffs' members and/or staff live near and/or routinely recreate in  
18 occupied lynx habitat in Montana. Plaintiffs' members and/or staff enjoy  
19 observing and studying lynx in the wild, including signs of the lynx's presence,  
20 throughout Montana. The opportunity to possibly view lynx and/or signs of lynx in  
21 the wild is of significant interest and value to Plaintiffs' members and/or staff and  
22 increases their use and enjoyment of Montana's wild places.  
23

24 16. The members and/or staff of Plaintiffs' organizations derive aesthetic,  
25 recreational, scientific, inspirational, educational, and other benefits from these  
26 activities and from working to protect and restore lynx and lynx habitat in  
27

1 Montana. Plaintiffs have an interest in knowing that lynx are still present in  
2 Montana and that Montana's native predator-prey system remains fully intact.  
3 They believe the continued presence of lynx and other native carnivores is, in part,  
4 what makes Montana so unique to the contiguous United States and why Plaintiffs  
5 choose to live and/or recreate here.

6 17. The interests of the members and/or staff of Plaintiffs' organizations  
7 have been, are being, and unless the requested relief is granted, will continue to be  
8 harmed by the Department's actions and/or inactions challenged in this Complaint.  
9 If this Court issues the relief requested the harm to Plaintiffs' members and/or  
10 staff's interests will be redressed.

11 18. Defendant, DAN VERMILLION, is named in his official capacity as  
12 Chairman of the Montana Fish, Wildlife and Parks Commission. As Chairman, Mr.  
13 Vermillion is a properly named state official with responsibility for all actions  
14 and/or omissions challenged in this complaint.

15 19. Defendant, BOB REAM is named in his official capacity as a  
16 Commissioner of the Montana Fish, Wildlife and Parks Commission. As a  
17 Commissioner, Mr. Ream is a properly named State Official with responsibility all  
18 actions and/or omissions challenged in this Complaint.

19 20. Defendant, MATTHEW TOURTLOTTE, is named in his official  
20 capacity as a Commissioner of the Montana Fish, Wildlife and Parks Commission.  
21 As a Commissioner, Mr. Tourtlotte is a properly named State Official with  
22 responsibility all actions and/or omissions challenged in this Complaint.

23 21. Defendant, LAWRENCE WETSIT, is named in his official capacity as a  
24 Commissioner of the Montana Fish, Wildlife and Parks Commission. As a  
25 Commissioner, Mr. Wetsit is a properly named State Official with responsibility all  
26 actions and/or omissions challenged in this Complaint.

1 22. Defendant, RICHARD STUKER, is named in his official capacity as a  
2 Commissioner of the Montana Fish, Wildlife and Parks Commission. As a  
3 Commissioner, Mr. Stuker is a properly named State Official with responsibility all  
4 actions and/or omissions challenged in this Complaint.

5 23. Defendant, JEFF HAGENER, is named in his official capacity as  
6 Director of the Montana Department of Fish, Wildlife and Parks. As Director, Mr.  
7 Hagener is a properly named State Official with responsibility all actions and/or  
8 omissions challenged in this Complaint.

### 9 BACKGROUND

#### 10 The Federal Endangered Species Act (ESA).

11 24. The purpose of the ESA is to “provide the means whereby the  
12 ecosystems upon which endangered and threatened species depend may be  
13 conserved, [and] to provide a program for the conservation of such endangered and  
14 threatened species . . .” 16 U.S.C. § 1531 (b).

15 25. The ESA defines conservation as “the use of all methods and procedures  
16 which are necessary to bring any endangered species or threatened species to the  
17 point at which the measures provided pursuant to [the ESA] are no longer  
18 necessary.” 16 U.S.C. § 1532 (3). The ultimate goal of the ESA is not only to save  
19 endangered and threatened species from extinction, but also to recover these  
20 species to the point where they no longer need ESA protection.

21 26. To achieve the ESA’s survival and recovery goals, Section 9 of the ESA  
22 prohibits any person from taking an endangered species. 16 U.S.C. § 1538(a)(1)(B).  
23 The prohibition on take also applies to threatened species. 50 C.F.R. § 17.31 (a).  
24

25 27. Under the ESA, a “person” includes any “officer, employee, agent,  
26 department, or instrumentality of the Federal Government, of any State,  
27

1 municipality, or political subdivision of a State.” 16 U.S.C. § 1532 (13).

2 28. The term “take” is defined broadly and means to harass, harm, pursue,  
3 hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any  
4 such conduct. 16 U.S.C. § 1532 (19). The ESA defines take in the broadest  
5 possible manner to include every conceivable way in which a person can “take” or  
6 attempt to “take” any listed species. The trapping and/or snaring of a listed  
7 species, regardless of whether the trapping and/or snaring results in actual injury or  
8 death, qualifies as a “take” under the ESA.

9  
10 29. The prohibition on the take of listed species includes direct and indirect  
11 harm and need not be purposeful.

12 30. The ESA’s prohibition on take not only prohibits a person from directly  
13 taking wildlife, it also prohibits a third party from authorizing and/or allowing an  
14 activity that results in the take of a listed species. Governmental third-parties, like  
15 the Department, who authorize, allow, permit, and/or license activities that have  
16 resulted in take may be deemed to have violated the ESA.

17  
18 Canada lynx

19 31. The Canada lynx (“lynx”) is a medium-sized cat with long legs, large,  
20 well furred paws and webbed toes, long tufts on the ears, and a short, black-tipped  
21 tail. Adult male lynx average about 22 pounds in weight and 33.5 inches in length  
22 (head to tail). Adult female lynx average about 19 pounds in weight and 32 inches  
23 in length.

24 32. Lynx are highly specialized predators whose primary prey is the  
25 snowshoe hare. In winter lynx prefer mature, moist multi-storied coniferous forests  
26 stands with high horizontal cover. In the summer, lynx generally remain in their  
27 winter ranges but may broaden their ranges to include young regenerating forests

1 used by hares.

2 33. Large areas of northwest Montana (the Crown of the Continent region)  
3 and areas of southwest Montana (Greater Yellowstone Ecosystem) are occupied by  
4 lynx. The highest concentration of lynx in Montana is in the Seeley Lake area  
5 (between the Swan and Mission Mountains) and in the Purcell Mountains in  
6 northwest Montana.

7 34. Portions of the Helena, Flathead, Kootenai, Bitterroot, Gallatin,  
8 Beaverhead Deerlodge, Lewis and Clark, and Custer National Forests in Montana  
9 are occupied by lynx.

10 35. Population estimates (both actual and effective) for lynx in Montana are  
11 unknown. The best available science estimates that no more than 300 lynx inhabit  
12 the entire State of Montana and that the lynx population in Montana is in decline.

13 The U.S. Fish and Wildlife Service's determination that lynx are threatened.

14  
15 36. On March 24, 2000, the U.S. Fish and Wildlife Service (the "Service")  
16 determined the contiguous United States population of lynx – which includes  
17 Montana – to be "threatened" under the ESA. Lynx are a threatened species in  
18 Montana.

19 37. On February 25, 2009, the Service issued a final (revised) rule  
20 designating critical habitat for lynx. Areas designated as lynx critical habitat by the  
21 Service are deemed essential to the survival and recovery of lynx in the contiguous  
22 United States and include areas deemed "occupied" by lynx in Montana. Lynx  
23 critical habitat was designated in the following Montana counties: Carbon,  
24 Flathead, Gallatin, Glacier, Granite, Lake, Lewis and Clark, Lincoln, Missoula,  
25 Park, Pondera, Powell, Stillwater, Sweetgrass, and Teton.  
26

27 38. Threats to lynx include: (1) the human alteration of forest abundance,



1 composition, and connectivity from forest management practices (logging) and  
2 development; (2) climate change; and (3) mortality from predation, trapping, and  
3 poaching.

4 39. Lynx are vulnerable to trapping and are commonly caught in traps and  
5 snares set for other species. The Federal Lynx Biology Team notes that the  
6 trapping of lynx can occur in areas where regulated trapping for other species, such  
7 as wolverine, coyote, fox, and wolf, overlaps with lynx habitats.

8 40. The Service found that lynx are taken during legal trapping for other  
9 species, such as wolverine and bobcat, even when lynx seasons are closed. The  
10 Service said legal trapping activities for bobcat, coyote, wolverine, and other  
11 furbearers create a potential for capture of lynx.

12 41. The Forest Service notes that lynx are relatively easy to capture, appear  
13 to have little fear of human scent, respond to baits and lures, and can be easily  
14 attracted using visual attractants. The Forest Service found that the  
15 incidental or illegal killing of lynx can significantly affect lynx population  
16 dynamics under some circumstances. The Forest Service found that trapping for  
17 other large furbearers in areas occupied by lynx may pose a risk because lynx  
18 appear to be extremely susceptible to trapping, and where trapping is permitted it  
19 can be (and has been) a significant source of mortality.  
20

21 The Department's Authorization of Trapping in Occupied Lynx Habitat.

22 42. The lynx trapping season is officially closed. However, the Department  
23 has authorized, and continues to authorize, trapping and snaring in occupied lynx  
24 habitat and designated lynx critical habitat in Montana.

25 43. In Montana, no person (resident and/or non-resident) may trap or  
26 attempt to trap a fur-bearing animal or wolf without first receiving a license from  
27

1 the Department.

2 44. “Trap” means to take or participate in the taking of any wildlife  
3 protected by the laws of the state by setting or placing any mechanical device,  
4 snare, deadfall, pit, or device intended to take wildlife ro to remove wildlife from  
5 any of these devices. “Fur-bearing animals” means marten or sable, otter, muskrat,  
6 fisher, mink, bobcat, lynx, wolverine, northern swift fox, and beaver.”

7 45. The Department also allows – by regulation – residents to trap  
8 “predatory” animals (coyotes, weasels, skunk, and spotted skunks) and other non-  
9 game animals such as badger, raccoon and red fox without a license. Non-residents  
10 must still obtain a license.

11 46. Montana is divided into legally described trapping districts or  
12 management units designated by numbers, wherein season dates, limits, and species  
13 of furbearers and wolves may be take are specified.

14 47. Each licensed trapper in Montana is allowed to put out an unlimited  
15 numbers of traps and/or snares.

16 48. The Department has authorized, and continues to authorize, trapping  
17 and/or snaring activities for fur-bearing animals, wolves, predatory animals, and  
18 non-game animals in occupied lynx habitat and designated lynx critical habitat.

19 49. Portions of Trapping Districts 1, 2, 3, 4, and 5 are located in areas  
20 occupied by lynx and in areas designated as lynx critical habitat. Portions of Wolf  
21 Management Units 100, 101, 110, 121, 130, 150, 280, 400, 200, 290, 210, 390,  
22 250, 330, 320, 310, and 316 are located in areas occupied by lynx and areas  
23 designated as lynx critical habitat.

24 50. The Department has authorized and continues to authorize the use of  
25 leg-hold traps, Conibear traps, and snares in occupied lynx habitat and areas  
26 designated as lynx critical habitat by the Service.

27 51. Leghold traps are designed to capture and hold an animal by a limb. The

1 trap's two spring-powered metal jaws slam shut when an animal steps on the  
2 trigger. Conibear traps - sometime referred to as "body-crushing" or "killer" traps  
3 -are made of two metal rectangular jaws hinged at the side with a spring affixed to  
4 one or both sides. When an animal walks or swims through the center of the  
5 rectangles and brushes up against the trigger, the trap's jaws close with a scissor-  
6 like action on the animal's body. A snare is a wire noose attached at one end to a  
7 stake or anchor. Snares catch an animal either by the neck, midsection of the body,  
8 or foot. Snares work by tightening around the animal as it struggles.

9 52. Lynx can be caught in leghold traps, Conibear traps, and snares. It is not  
10 possible to authorize the use of leghold traps, Conibear traps, and snares in  
11 occupied lynx habitat in Montana without risk of lynx being caught.

12 Take of Lynx from the Department's Authorization of Trapping.

13 53. The Department's authorization of trapping, including the use of leghold  
14 traps, Conibear traps, and/or snares in occupied lynx habitat in Montana has  
15 resulted, and is likely to result in, the taking of lynx.

16 54. The Department reports that at least nine incidents of lynx being caught  
17 in traps and/or snares set for other species has occurred since the species received  
18 protective ESA status.

19 55. According to the Department's records three lynx were caught in traps  
20 and/or snares set for other species during the 2000-2001 season. Two of the three  
21 lynx died from trap related injuries.

22 56. According to the Department's records, one lynx was caught in traps  
23 and/or snares set for other species during the 2004-05 season.

24 57. According to the Department's records, three lynx were caught in traps  
25 and/or snares set for other species during the 2005-06 season. One of the three lynx  
26 died from trap related injuries.

27 58. According to the Department's records, two lynx were caught in traps

1 and/or snares set for other species during the 2006-07 season. One of the two lynx  
2 died from trap related injuries.

3 59. In a December, 2001, Progress Report on the ecology of lynx in Western  
4 Montana, the Forest Service's Rocky Mountain Research Station documented the  
5 trapping of lynx in the Seeley-Swan study area. The Progress Report notes that  
6 trapping and illegal shooting accounted for 25% of all lynx mortalities in the study  
7 area.

8 60. Three trapping deaths in Montana were reported by the Forest Service in  
9 the winter of 2001. In January, 2001, a male lynx named "M42" was killed in a  
10 Conibear trap intended for wolverine. The Forest Service was alerted to the  
11 trapping because it had been monitoring M42's movements for 11 months. The  
12 trap was placed in a leaning tree that held a large meat bait.

13 61. Also in January, 2001, the Forest Service's Rocky Mountain Research  
14 Station reported that a subadult female lynx named "F38" died from trap-related  
15 injuries. The female lynx's body was recovered in a natural position over a small  
16 pool of blood under her body. Her hind leg had a large patch of exposed skin  
17 where the fur was rubbed. Biologists followed old snowshoe tracks found within  
18 ten meters of the carcass to a sprung trap with lynx hair in the closed trap jaw. The  
19 carcass of F38 was in good body condition, but she had an empty stomach except  
20 for lynx hair. Her leg was not broken from the trap, but there was extensive muscle  
21 damage. The trapped lynx was likely in the trap for a long time before being  
22 released.

23 62. The third trapping incident in Montana's Seeley Lake area involved a  
24 young male lynx, named "M50" that was caught in a "long-spring trap and had  
25 apparently starved with the trap on its foot.

26 63. In 2006, Federal lynx researchers documented 49 mortalities of radio-  
27 collared lynx in Montana. Causes of mortality included incidental trapping or

1 shooting ( 8%), predation (31%), starvation (29%), and unknown causes (22%).

2 64. In December, 2010, Federal lynx researchers reported that the lynx  
3 population in Montana’s Seeley Lake area appears to be decreasing. Adult lynx  
4 mortality from predation (mountain lions during the non-snow periods), starvation,  
5 and human (accidental trapping in marten or wolverine traps) was listed as the  
6 problem.

7 65. Recently, in Idaho, there have been at least two reported incidents of  
8 take: (1) in February, 2012, a lynx was caught in a bobcat trap; and (2) in January,  
9 2013, a female lynx was caught and killed in a bobcat trap in the northeast corner  
10 of Boundary County, Idaho, in the Purcell Mountains just across the border from  
11 Montana.

12 66. The best available science reveals the amount of reported take of lynx  
13 from trapping and snaring is less than the amount of actual take.

14  
15 **ESA VIOLATION**

16 67. Plaintiffs incorporate by reference all preceding paragraphs.

17 68. Section 9 of the ESA and the ESA’s implementing regulations prohibit  
18 the Department from taking threatened lynx. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R.  
19 § 17.31 (a).

20 69. The Department’s authorization of trapping and/or snaring in occupied  
21 lynx habitat in Montana has resulted in the take of threatened lynx.

22 70. The Department’s authorization of trapping and/or snaring in occupied  
23 lynx habitat in Montana creates a risk that the take of lynx will occur in the future.

24 71. It is not possible to authorize trapping and/or snaring in occupied lynx  
25 habitat in Montana without risk of violating the ESA by exacting a take of lynx.

26 72. The Department’s authorization of trapping and/or snaring in occupied  
27

lynx habitat, is a violation of Section 9 of the ESA, 16 U.S.C. § 1538.

REQUEST FOR RELIEF

73. Plaintiffs incorporate by reference all preceding paragraphs.

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

A. Declare the Department has violated and continues to violate the ESA as alleged above;

B. Enjoin the Department from continuing to violate the ESA;

C. Order the Department to take any and all action(s) necessary to bring its authorization of trapping and/or snaring activities in Montana's occupied lynx habitat into compliance with the ESA;

D. Issue such injunctive relief as Plaintiffs may subsequently request;

E. Retain continuing jurisdiction of this matter until the Department fully remedies the violations of law complained of herein;

F. Grant Plaintiffs their costs and expenses of litigation, including reasonable attorneys' fees pursuant to 16 U.S.C. § 1540 (g); and

G. Grant such other relief that this Court deems necessary, just, and proper.

Respectfully submitted this 21st day of March, 2013.

WESTERN ENVIRONMENTAL LAW CENTER

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