

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CENTER FOR BIOLOGICAL)
DIVERSITY, WILDLIFE ALLIANCE)
OF MAINE, and the ANIMAL)
WELFARE INSTITUTE,)
)
Plaintiffs,)
)
v.) COMPLAINT FOR DECLARATORY
) AND INJUNCTIVE RELIEF
U.S. FISH AND WILDLIFE SERVICE and)
DANIEL M. ASHE, in his official capacity as)
Director of U.S. Fish and Wildlife Service,)
)
Defendants.)
_____)

INTRODUCTION

1. Trappers in Maine kill, injure, and otherwise “take” Canada lynx, a rare cat that is listed as a threatened species under the Endangered Species Act (ESA). In November 2014, the United States Fish and Wildlife Service (FWS) issued an Incidental Take Permit (Permit) to the Maine Department of Inland Fisheries and Wildlife (Maine) for the take of lynx caused by Maine’s trapping programs. Throughout the permitting process, Maine consistently refused FWS’s recommendations for meeting the requirements of the ESA, including recommendations to minimize and mitigate the take to the maximum extent practicable, and recommendations to ensure adequate funding for Maine’s minimization and mitigation plans. Despite Maine’s refusal to accept these recommendations, FWS arbitrarily and capriciously approved a Permit that failed to meet these ESA requirements. FWS also failed to prepare an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act (NEPA).

PARTIES

2. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (Center) is a non-profit organization incorporated in California, with field offices throughout the United States. The Center works through science, law, and media to protect all species that are threatened with extinction. The Center brings this action on its own behalf and on behalf of its adversely affected members who live, work, and recreate in Maine's north woods where lynx are present and at risk from trapping under the Permit. The Center has over 50,000 members throughout the United States, and 320 members who live in Maine. The Center and its members are harmed by injuries and deaths of threatened Canada lynx resulting from FWS's issuance of a legally deficient Permit for Maine's trapping programs. The Center participated in the public comment processes for both the issuance of the Permit and the Environmental Assessment.

3. Plaintiff WILDLIFE ALLIANCE OF MAINE (WAM) is a non-profit organization with offices located in Penobscot, Maine. WAM, an all-volunteer organization dedicated to wildlife advocacy and the non-consumptive use of Maine's wildlife, brings this action on its own behalf and on behalf of its adversely affected members. WAM has over 1,300 members living, working, and recreating in Maine as full-time residents. WAM and its members are harmed by injuries and deaths of threatened Canada lynx resulting from FWS's issuance of a legally deficient Permit for Maine's trapping programs. WAM participated in the public comment processes for both the issuance of the Permit and the Environmental Assessment.

4. Plaintiff ANIMAL WELFARE INSTITUTE (AWI) is a national, non-profit charitable organization headquartered in Washington D.C. and dedicated to reducing animal suffering. AWI brings this action on its own behalf and on behalf of its adversely affected members. AWI has over 40,000 members and constituents throughout the United States, and approximately 500

members and constituents who live in Maine. AWI and its members are harmed by injuries and deaths of threatened Canada lynx resulting from FWS's issuance of a legally deficient Permit for Maine's trapping programs. AWI participated in the public comment processes for both the issuance of the Permit and the Environmental Assessment.

5. Plaintiffs' members regularly visit lynx habitat in Maine for professional and recreational purposes, enjoying, among other things, viewing and photographing wildlife in the Maine north woods. These members enjoy the lynx for its aesthetic beauty; for its history in the state of Maine; and for the recreational, educational, and spiritual benefits derived from the presence of lynx in the landscape. FWS's issuance of a legally deficient Permit harms these members because the injury and death of lynx negatively impacts their ability to view or photograph the species or otherwise to enjoy the lynx's elusive presence. In addition, the Plaintiffs and their members suffer procedural harms from FWS's failure to abide by the issuance criteria for the Permit under the ESA and to prepare an EIS as required by NEPA.

6. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (FWS) is a federal agency within the U.S. Department of the Interior whose chief administrator is the Director of FWS. The mission of FWS is to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. In carrying out its responsibilities, FWS must comply with applicable requirements of the ESA, NEPA, and the Administrative Procedure Act (APA).

7. Defendant DANIEL M. ASHE is the Director of FWS and is sued in his official capacity. Director Ashe is responsible for ensuring that all of FWS's actions comply with the requirements of the ESA, NEPA, and the APA.

JURISDICTION

8. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), and 5 U.S.C. § 702 (Administrative Procedure Act).

FACTS

Maine's Trapping Programs Take Canada Lynx.

9. The Canada lynx (*Lynx canadensis*) is a medium-sized cat known for its ability to hunt and thrive in cold, forested environments with deep snow. Lynx require areas that receive reliable, deep snow in the winter, where its long legs and large, snowshoe-like paws give it a competitive advantage over other predators in hunting its primary prey, the snowshoe hare. Lynx populations are tied to hare abundance, with its cyclical spikes and collapses.

10. Historically, lynx occurred throughout much of the northern United States with boreal or mixed boreal/deciduous forests. In the east, lynx inhabited New York, Vermont, New Hampshire, and Maine. Of these states, breeding populations of lynx persist only in northern Maine.

11. In 2000, FWS listed the contiguous United States population of the lynx as threatened with extinction under the ESA. Loss of lynx through legal and illegal trapping was one factor that necessitated the listing.

12. As part of this listing, FWS designated critical habitat for lynx in Maine. FWS found that Maine was essential for lynx conservation because it is the only eastern state with a breeding lynx population.

13. Irrespective of trapping and other human threats to the lynx, FWS data and University of Maine studies indicate that the Maine lynx population is declining and will continue to decrease by approximately 65% over the next 5 to 20 years due to habitat loss.

14. The principal types of traps allowed in Maine's trapping programs under the Permit are conibear traps, foothold traps, and cable restraints/snares.
15. Conibear traps are lethal, body-gripping traps designed to crush the neck of the animal, although these traps also catch lynx by their paws. Two lynx were reported as killed in conibear traps within the first two weeks of trapping pursuant to the Permit.
16. Foothold traps close around an animal's paw, holding the animal until it can be released or killed. Foothold traps are intended to be non-lethal, but they often injure animals by the force of closure or when animals struggle to escape. 75% of the lynx caught in foothold traps and examined by Maine personnel between 1999 and 2012 (24 of 32) were found to have injuries.
17. Cable restraints/snares seize animals around the neck. Snares are known to kill and injure lynx. Lynx, like all cats, respond to neck snares by struggling, increasing their chance of harm and mortality. Cable restraints/snares have been prohibited for use in Maine by state regulations since 2003, but are a trapping method allowed by the Permit.
18. Between 1999 and 2012, a total of 70 lynx were reported to have been trapped in Maine. Less than half of these captures were examined by Maine personnel (32). Seven of these captures were reported as deaths. In 2013, 14 lynx were reported to have been trapped in Maine.

Permit History Leading To FWS Approval Of A Legally Deficient Permit.

19. In May 2006, Maine began drafting its Permit in response to a pending lawsuit over the illegal take of lynx through the state's trapping program. That lawsuit led to a 2007 Consent Decree approved by this Court that adopted numerous measures to minimize the incidental take of lynx in Maine's recreational trapping program (Case No. 1:06-cv-128-JAW).
20. In May 2007, Maine submitted a draft Permit to FWS.

21. In September 2007, the FWS Maine Field Office notified Maine that the draft Permit did not meet the submission criteria and identified the following necessary changes: “a refined incidental take calculation, specification of monitoring procedures . . . and a fuller explanation of why measures to minimize take that were not adopted are impracticable.” In addition, the FWS Maine Field Office noted that the Permit failed to ensure adequate funding of measures to minimize and mitigate take.

22. In May 2008, Maine provided FWS with a proposed final Permit.

23. In September 2008, FWS advised Maine to withdraw its proposed final Permit because it failed to meet ESA requirements.

24. In April 2009, FWS again noted outstanding deficiencies in the proposed Permit and expressed concern that these were not resolved prior to public notice and comment.

25. In May 2012, FWS provided Maine with recommendations for changes necessary to meet Permit-issuance criteria. These changes included requirements for lynx exclusion devices on conibear traps, Best Management Practice (BMP) standards for foothold traps that reduce the injuries from these traps (such as offset jaws or padded jaws), and elimination of drag sets (foothold traps that are not anchored to the ground).

26. In March 2013, Maine submitted a revised Permit that sought coverage for significantly more trapping because, for the first time, this revised Permit included the State’s animal damage control program and predator management program, both of which engage in extensive trapping in addition to Maine’s recreational trapping program. This Permit also reduced regulation of foothold traps, thereby enhancing the ability to trap in December, a time when lynx are particularly vulnerable to trapping due to their dependence on deep snow. Despite these

additional sources of increased potential take of lynx, Maine made no substantive changes to the proposed Permit's take calculation, minimization plan, or mitigation plan.

27. Maine submitted a final Permit to FWS in October 2014. This Permit lacked most of the mitigation and minimization recommendations made by FWS and failed to ensure adequate funding of the deficient mitigation and minimization plans. Nonetheless, FWS approved the Permit on November 4, 2014.

The Permit's Take Calculation Is Unreliable And Rife With Uncertainty.

28. Maine's Permit provides that, over a fifteen-year period, three lynx may be killed or rendered unreleasable by trapping; nine lynx may suffer severe injury and subsequent rehabilitation; and 183 lynx may be trapped with minor injury and immediate release.

29. Throughout the Permit review process, FWS disagreed with the method Maine employed for calculating take. FWS stated internally that Maine's method was "confounded by assumptions."

30. FWS repeatedly noted deficiencies in Maine's data because Maine failed to account for unreported take of lynx, or for lynx taken in illegally set traps. In November 2012, FWS concluded that 75% of lynx trap events go unreported based on internal consultation between the FWS Maine Field Office and FWS Law Enforcement. Despite this, FWS issued a final Permit that calculated take based solely on the rate of trapper self-reporting.

31. The take calculation accepted by FWS did not consider or address 2013 data on lynx trapping incidents in Maine, even though more lynx (14) were trapped in 2013 than in any year since 1999. If this 2013 data had been included in the formula used to calculate take, the total anticipated take would have been at least 255 lynx, rather than 195 lynx. The take calculation

also relied on data of lynx trapping incidents from years where more restrictive measures from the 2007 Consent Decree were in effect to reduce the number of takes.

32. Although FWS maintained throughout the Permit process that the take calculation should include kitten mortality due to death or significant injury to adult female lynx, the take calculation accepted by FWS did not include kitten mortality.

33. FWS strongly questioned Maine's assumption that no lynx would be taken through Maine's predator management program and animal damage control program. In 2014, FWS used data from incidental trapping rates in the predator management program to calculate a likely take of 645 lynx for all three of Maine's trapping programs.

34. Nonetheless, in July 2014, FWS management instructed agency biologists to publish a finding that Maine's take calculation of 195 lynx was reasonable. The FWS Regional Office also instructed its field biologists not to include discussion of a variety of false or questionable assumptions underlying Maine's take estimate in the final Permit documents.

The Permit Failed To Mitigate Take To The Maximum Extent Practicable.

35. In its first Permit application in June 2007, Maine proposed to mitigate the take from trapping through management of existing lynx habitat, or creation of new lynx habitat, on state or private lands.

36. FWS found fatal flaws in this 2007 mitigation plan, including a lack of clear and long-term habitat creation and management commitments; uncertain effectiveness; unclear connection to the incidental take; no specific adjustments in response to adaptive management triggers; and no monitoring program to assess the plan's effectiveness.

37. In 2008, to offset a lethal take of five lynx, Maine proposed to create 5,000 acres of optimal lynx habitat to support five lynx, including one adult breeding pair and three juveniles.

In 2009, and again in 2011, FWS explained that this proposed mitigation plan was flawed and insufficient to compensate for the lynx deaths and other takes caused by Maine's trapping program.

38. In 2009, FWS required further revisions to the mitigation plan to clarify how existing conservation efforts on state lands could compensate for the lynx takes and to provide legally binding commitments for identified conservation measures.

39. In 2011, FWS stated that Maine should revise the plan to: (1) create or maintain 10,000 acres of optimal lynx habitat, rather than 5,000 acres; (2) establish a management area of 1.5–4 townships in size (34,560–92,160 acres); (3) demonstrate mitigation that compensated for all forms of take, lethal and non-lethal; and (4) prohibit trapping in the mitigation area.

40. Maine refused to make any of the revisions recommended by FWS and required by the ESA. In fact, Maine responded by increasing the proposed lethal take of lynx while decreasing the proposed acreage of optimal lynx habitat. Specifically, in 2013, Maine increased the expected take to eight dead and five severely injured lynx and proposed to create only 4,785 acres of optimal habitat in an 8,000 acre management area.

41. FWS again informed Maine that its 2013 plan committed a much smaller area for lynx habitat than recommended by the FWS habitat management guidelines. These guidelines recommend 10,368 acres of optimal lynx habitat within a 34,560-acre management area to support two adult lynx. Maine's 2013 proposed habitat area also was smaller than the habitat area proposed in 2008, even though the 2008 application requested a lower lethal take of lynx.

42. In June 2014, FWS's biologists noted that the size of the proposed mitigation area was only marginally suitable to attract and support three lynx, and that the proposed mitigation area

did not compensate for all forms of anticipated take, including nine severe injuries and 183 minor injuries.

43. Even though Maine refused to address the numerous flaws in its mitigation plan identified by FWS, FWS approved a Permit that includes a mitigation plan of 6,200 acres of optimal lynx habitat, rather than 10,000+ acres, to compensate for lethal take of three lynx. This mitigation plan fell short of FWS's repeated recommendations for a larger acreage of optimal habitat within a larger management area; did not compensate for all types of take, as FWS previously had insisted upon; and permitted trapping in the lynx mitigation habitat, contrary to FWS's prior demands.

44. Moreover, this "optimal" additional habitat will not support lynx until well after the Permit expires. The plan depends on logging that will not create optimal lynx habitat for 18 years, as compared to the 15-year term of the Permit.

45. FWS also failed to consider the impact of climate change on the proposed mitigation area and its long-term suitability as lynx habitat. The mitigation area is at the southwestern edge of the lynx's critical habitat. The southern part of the lynx range will be most negatively impacted by climate changes during and beyond the Permit period as snowfall decreases and spruce-fir forests shift northward.

The Permit Failed To Minimize Take To The Maximum Extent Practicable.

46. Despite the ESA's requirement that the Permit and plan minimize take "to the maximum extent practicable," 16 U.S.C. § 1539(a)(2)(B), the Permit removed practicable minimization measures that already were in practice pursuant to the 2007 Consent Decree, and failed to adopt further measures that FWS itself repeatedly recommended.

Removal Of Consent Decree Measures Needed To Minimize Take

47. The final Permit removed minimization measures that already were required by the 2007 Consent Decree. These measures are practicable because they were required by Maine and practiced by trappers from 2008 to 2014.

48. The Consent Decree banned foothold traps over 5 and 3/8 inches that pose greater risks to lynx, unless they were placed fully or partially under water, where lynx are not caught. In contrast, the Permit removed all foothold size restrictions.

49. The Consent Decree prohibited snares. Yet, the Permit allows for cable restraints, which are substantially similar to snares and which cause many of the same injuries. The FWS Maine Field Office noted, “[i]t is difficult to understand how Maine added several new forms of trapping and . . . still requests the same level of take.”

50. The Consent Decree recommended the use of foothold traps with offset jaws, for the purpose of reducing incidental trap injuries. FWS omitted this recommendation from the Permit.

FWS Recommendations To Minimize Take Not Included In The Permit

51. The Permit failed to include important minimization measures that FWS repeatedly recommended. Most notable among these were lynx exclusion devices and BMP traps.

52. FWS persistently advised Maine to require lynx exclusion devices on killer-type traps. These lynx exclusion devices essentially are wire boxes placed over the traps that exclude adult lynx from the traps. FWS’s insistence was driven by doubts over Maine’s stance that placing the traps on leaning poles effectively would deter lynx exposure to killer-type traps. In April 2012, a University of Maine study demonstrated the ability of lynx to climb leaning poles to access killer-type traps. In 16 out of 16 trials lynx successfully climbed leaning poles. These trials were

documented and filmed. Despite these trials, FWS approved a Permit that did not require lynx exclusion devices.

53. FWS also consistently recommended requiring use of BMP traps. BMP traps have been evaluated by wildlife professionals and other researchers and have been demonstrated to reduce injury to both target and non-target animals that are caught. About 50 % of Northeast trappers currently use or plan to use BMP traps and thus BMPs are a practical means to minimize the level of take. Nevertheless, FWS approved a Permit that did not require the use of BMP traps to minimize take.

The Permit Failed To Ensure Adequate Funding For The Mitigation And Minimization Plan.

54. Maine estimates that implementation costs of its minimization plan will average \$69,000 annually. The mitigation plan will cost \$65,000 over the life of the Permit. As such, the Permit's minimization and mitigation measures will cost over \$1 million to implement over the 15-year life of the Permit.

55. Despite the ESA requirement that the applicant "ensure that funding for the plan will be provided," 16 U.S.C. § 1539(a)(2), the Permit expressly states that "[Maine] cannot guarantee State funds for future activities to administer the requirements set forth in the [Permit], which are not yet appropriated by the State Legislature."

56. Maine has not ensured any sources of funding for the Permit and its plans. Instead of ensuring funding for the plans, the Permit requires Maine to provide evidence that Maine's legislature has appropriated adequate funds to implement the plans by July 15th of each year.

57. All drafts of the Permit and Findings provided that failure to demonstrate sufficient funding by July 15th of each year would result in revocation of the Permit. In contrast, and

contrary to the ESA, the final Permit provides that failure to demonstrate adequate funding by July 15th of each year “may” result in revocation of the Permit.

FWS Refused To Analyze The Significant Impacts Of The Permit And Failed To Prepare An EIS.

58. In 2009, five years before the completion of the Permit process, FWS began preparing a draft Environmental Assessment of the Permit, based on the false assumption that it was “clear” that the proposed trapping activity would not have a significant impact on the human environment.

59. In 2012, over two years prior to the issuance of the final Permit, the FWS timeline for the Permit indicated that a Finding of No Significant Impact (FONSI) would be one of the final steps for the Permit’s approval.

60. However, comments by FWS biologists and other staff on the 2014 draft FONSI stated that multiple factors under 40 C.F.R. § 1508.27 demonstrated that the intensity of the Permit’s impacts warranted an EIS. For these reasons, the FWS biologists asserted that a full EIS was required to analyze these potentially significant impacts.

61. Uncertainty pervaded the Permit application process. For example, in 2014 FWS estimated that the number of lynx captured in foothold traps alone could be three to seven times higher than the Permit’s estimates, and paragraphs 28 through 34, *supra*, further illustrate the uncertainty over the Permit’s take calculation.

62. Much controversy surrounded this Permit, as evidenced by 11,700 individual comments, the majority of which opposed the Permit as issued, and ongoing litigation. Internal FWS communications described Maine’s Permit application as “highly controversial.”

63. Maine’s Permit was the first permit for incidental lynx takes by a state’s recreational trapping program granted under the ESA. FWS was aware during the course of the Permit’s

approval that this Permit would have a precedential effect on permit applications for trapping programs in Minnesota, Montana, and Idaho.

64. The Permit has significant cumulative impacts from actions directly or indirectly related to the proposed trapping activity. For example, FWS was concerned that Maine had not adequately accounted for unreported and illegal captures of lynx that were related to Maine's trapping activities. In November 2012, FWS concluded that 75% of lynx trap events go unreported.

65. Additionally, Maine's trapping programs impact ESA listed species and critical habitat. Among other impacts, the trapping authorized under the Permit already has resulted in the lethal take of at least two lynx.

66. In 2014, FWS field staff confirmed that multiple intensity factors in fact warranted a full EIS, including: substantial uncertainties about extent of lynx take, degree of injury from trapping, extensive controversy, past and pending lawsuits in Maine and other states, the Permit's precedential effect on lynx Permits in other states, cumulative impacts from unreported and otherwise illegal take of lynx, and the potentially significant impacts on lynx, a threatened species under the ESA, and its critical habitat.

67. Despite these multiple significance factors, in November 2014 FWS issued an EA and a FONSI for this Permit.

FIRST CLAIM

Violation of the Endangered Species Act and the Administrative Procedure Act: Failure to Mitigate Take To The Maximum Extent Practicable

68. Paragraphs 1 through 67 are re-alleged and incorporated by reference.

69. The FWS's approval of the Permit was arbitrary and capricious under 5 U.S.C. § 706 and failed to mitigate the take of lynx to the maximum extent practicable as required by 16 U.S.C.

§ 1539(a)(2)(B) because the Permit was based on an arbitrary calculation of take, and failed to incorporate numerous practicable measures to mitigate the take of lynx. Specifically, (1) the Permit failed to require the creation of adequate optimal lynx habitat to offset the anticipated take; (2) the Permit allows trapping to continue throughout the area designated for mitigation, thus undermining the goals of mitigation; (3) the Permit approved an inadequate acreage to mitigate for the number of lynx taken; (4) the Permit's mitigation area will not achieve optimal status until after the Permit period expires; and (5) the value of the Permit mitigation area for lynx will decrease substantially due to foreseeable negative effects from climate change.

SECOND CLAIM

Violation of the Endangered Species Act and the Administrative Procedure Act: Failure To Minimize Take To The Maximum Extent Practicable

70. Paragraphs 1 through 67 are re-alleged and incorporated by reference.

71. The FWS's approval of the Permit was arbitrary and capricious under 5 U.S.C. § 706 and failed to minimize the take of lynx to the maximum extent practicable as required by 16 U.S.C. § 1539(a)(2)(B) because the Permit was based on an arbitrary calculation of take, and failed to incorporate key practicable measures to minimize the take of lynx. Specifically, (1) the Permit removed numerous requirements previously required and implemented under the 2007 Consent Decree; (2) the Permit failed to include numerous recommendations from FWS that would minimize incidental takes; and (3) the Permit failed to incorporate other compliance measures that would ensure the number of trapped lynx remained as low as practicable.

THIRD CLAIM

Violation of the Endangered Species Act and the Administrative Procedure Act: Failure To Ensure Adequate Funding

72. Paragraphs 1 through 67 are re-alleged and incorporated by reference.

73. The FWS's approval of the Permit was arbitrary and capricious under 5 U.S.C. § 706 and failed to ensure adequate funding for the implementation of the mitigation and minimization plan as required by 16 U.S.C. § 1539(a)(2)(B). Specifically, FWS approved a funding program that: (1) expressly was not guaranteed for the life of the Permit; (2) relied on speculative and unnamed sources; (3) required future legislative action; and (4) did not require revocation of the Permit if Maine failed to demonstrate adequate funding on an annual basis.

FOURTH CLAIM

Violation of the National Environmental Policy Act and the Administrative Procedure Act

74. Paragraphs 1 through 67 are re-alleged and incorporated by reference.

75. NEPA requires FWS to prepare an EIS for major Federal actions, including the issuance of permits, which significantly affect the quality of the human environment. 42 U.S.C. § 4332; 40 C.F.R. § 1508.27.

76. FWS arbitrarily and capriciously failed to prepare an EIS for the Permit. Under 40 C.F.R. § 1508.27, multiple factors indicated that an EIS was required for this Permit, including: (1) the uncertainty of impacts on the human environment; (2) the controversial nature of the Permit; (3) the Permit's precedential effect; (4) the cumulative impact of individually insignificant related actions; and (5) the Permit's impacts on the Canada lynx, a threatened species, and on lynx critical habitat. 40 C.F.R. § 1508.27(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against all Defendants and provide the following relief:

- A. Declare that FWS's issuance of the Permit was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

- B. Vacate the Permit and remand to the agency;
- C. Award appropriate injunctive relief until the violations of law set forth herein have been corrected;
- D. Award Plaintiffs reasonable costs, litigation expenses, and attorney's fees associated with this litigation; and
- E. Grant such further relief as the Court deems just and proper.

Respectfully submitted this 17th day of August, 2015.

/s/ Douglas A. Ruley

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