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Plaintiffs, the ANIMAL WELFARE INSTITUTE and the WILDLIFE ALLIANCE OF MAINE, seek preliminary injunctive relief to prevent start of the early fox and coyote trapping season in 2009 to prevent continued take and irreparable harm to the threatened Canada lynx in Maine from the Maine Department of Inland Fisheries and Wildlife's (hereinafter "DIFW") trapping program. An immediate injunction is necessary because of the imminent start of the early fox and coyote trapping season on October 18, 2009, and the likelihood that there will be continued take of Canada lynx in leghold traps set for coyotes and fox and hence continued

violations of the Endangered Species Act by DIFW.<sup>1</sup> The statewide trapping season for bobcat, coyote, fisher, fox, marten and other furbearers other than bear runs from November 1, 2009 to December 31, 2009. *See* fn 1. Plaintiffs specifically request that the early fox and coyote trapping season be enjoined to provide sufficient time for the Court to issue its decision and, should the Court determine that changes to the State's trapping regulations are necessary to prevent further violations of the ESA, for the development of an appropriate remedy.

At the end of the hearing, on June 30, 2009, the Court recognized the necessity of working “under the gun” to provide the Court adequate time to draft a detailed written opinion and for the parties to develop an appropriate remedy should the Court determine that a violation has occurred. *Tr. v. VI*, pp. 1216-1218, 1224-1230. The Court proposed to have a decision issued by the end of August or early September and to have a conference with the parties to determine the best approach for a remedy. *Id.*, p. 1229. To date, no decision has been issued and the early trapping season is set to begin on October 18, 2009.

Furthermore, Plaintiffs have been informed by the U.S. Fish and Wildlife Service (FWS) that the incidental take permit (ITP) concerning DIFW's trapping program is weeks if not months away from completion for public comment. The FWS must then provide for a minimum of 60-days for public comment and then will have to review those comments and make any necessary changes to the ITP. It is also possible that litigation will further delay implementation of the ITP. Thus, with the upcoming trapping season, DIFW will continue to authorize trapping without a valid ITP in violation of the ESA.

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<sup>1</sup> [http://maine.gov/ifw/hunting\\_trapping/trapping/trapping\\_dates.htm](http://maine.gov/ifw/hunting_trapping/trapping/trapping_dates.htm).

Plaintiffs' factual and legal arguments for injunctive relief are detailed in Plaintiffs' Post Trial Brief and thus need not be repeated here. In sum, the Court held in its previous decision that:

The First Circuit has noted that 'take' is 'defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife. *Strahan v. Coxe*, 127 F.3d 155, 162 (1st Cir. 1997). Trapping that causes harm is subsumed under 'harm' and by adding the term 'trap,' Congress must have intended a meaning distinct from 'harm.' It follows, even if a lynx is harmlessly trapped, it has been subject to a prohibited take under the statute...Because the statute explicitly prohibits such take in the absence of an ITP, the Court concludes that the Plaintiffs have made out a case of violation of the ESA that has a reasonable likelihood of success on the merits.

Order on Motion for Preliminary Injunction, Case 1:08-cv-00267 (11/26/2008), pp. 42-43.

During the early fox and coyote trapping season, most trapping is done with foothold traps. *Tr. v. IV*, p. 701, l. 19-p. 702, l. 7. The irreparable harm to lynx caused by leghold traps is explained in detail in Plaintiffs' Post Trial Brief. The evidence shows that, under the current trapping regulations implemented pursuant to the 2007 Consent Decree lynx have been, and will continue to be, caught in foothold traps. *Pltfs' Post Trial Brief*, pp. 2-3, 6. This fact was conceded by the State at the end of the trial and in its post-hearing brief. *Tr. v. VI*, p. 1233, l. 14-17; Defendant's Post-Trial Brief, p. 12.

Notably, of the 30 lynx reported caught by trappers in foothold traps from 1999 through 2006, the vast majority were caught in October. Specifically, 20 lynx were caught in foothold traps in October and ten were caught in foothold traps in November. *Stip. Facts*, ¶¶ 46-79. Since the 2007 Consent Decree, eight of the ten lynx caught by recreational trappers in foothold traps were caught in October during the early fox and coyote trapping season. In 2007, six of the eight lynx reported caught by trappers in foothold traps were trapped in October, and in 2008, both of the lynx caught by trappers in foothold traps were caught in October. *Id.*; Def's Exhs. 20, 21.

Thus it is highly likely that lynx will be caught in foothold traps during the early fox and coyote season scheduled to start on October 18.

In ESA cases, the “balance of hardships and the public interest tips heavily in favor of protected species.” *Strahan v. Coxe*, 127 F.3d 155, 171 (1st Cir. 1997) (*quoting* National Wildlife Fed'n v. Burlington N. R.R., 23 F.3d 1508, 1511 (9th Cir. 1994)). The Court correctly stated at the end of the hearing that, if it finds that the State violated the ESA, it cannot excuse that violation because the overall impact on the lynx is not detrimental or based on the economic impact to the trappers. Tr. v. VI, p. 1220, l. 22 – p. 1222, l. 18. Plaintiffs’ Post Trial Brief addresses the intervenors’ arguments concerning economics and the purported detrimental impacts to lynx from reducing trapping of coyote and fisher and will not be repeated here. Pltfs’ Post Trial Brief, pp. 42-46. Neither the purported increase in competitors such as coyote due to further trapping restrictions, nor the economic interests of the trapper-intervenors are a permissible basis for not enforcing the ESA. *Id.*, p. 1222, l. 1-6.

Nonetheless, the balance of hardships tips heavily in favor of protecting the lynx from the inevitable harm of being caught and injured in foothold traps. Eliminating the 14-day early fox and coyote trapping season to provide the Court sufficient time to its decision and enable parties to develop an appropriate remedy will have no impact on the Defendant and will have minimal impact on the trapper-intervenors.

## **CONCLUSION**

For the above stated reasons, Plaintiffs request that the Court grant their motion for preliminary injunctive relief to prevent the start of the early fox and coyote trapping season in 2009 to prevent continued unlawful take and irreparable harm to the threatened Canada lynx in Maine

Dated this 13th day of October, 2009.

Respectfully submitted,

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