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PETITION

To the Fish and Wildlife Service
United States Department of the Interior

May 13, 2021

To Revise the Special 4(d) Rule for Canada Lynx (*lynx canadensis*) to
Rescind the Exceptions for the Captive Members of the Species
Under the Endangered Species Act



Lynx canadensis (photograph by the Fish and Wildlife Service)

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I. INTRODUCTION

The Harvard Law School Animal Law & Policy Clinic submits this petition to the U.S. Fish & Wildlife Service (“FWS” or “the Service”) on behalf of People for the Ethical Treatment of Animals, Inc. (“PETA”), the Animal Legal Defense Fund (“ALDF”), The Wildcat Sanctuary (“TWS”), Big Cat Rescue (“BCR”), and the Performing Animal Welfare Society (“PAWS”), pursuant to Section 4 of the Endangered Species Act of 1973, 16 U.S.C. §§ 1533, and the Administrative Procedure Act, 5 U.S.C. § 553(e). This Petition requests that FWS revise the Section 4(d) Rule for Canada lynx (*lynx canadensis*) to rescind the exceptions made for the captive members of the species. *See* 50 C.F.R. § 17.40(k). For the reasons stated herein, the Service must take this action to ensure that *all* individuals of the species *lynx canadensis*, whether living in the wild or in captivity, are protected from harm under the Endangered Species Act.

A. Petitioners

Petitioner People for the Ethical Treatment of Animals, Inc. (“PETA”) is a non-profit organization dedicated to protecting animals from abuse, neglect, and cruelty. It undertakes these efforts through public education, cruelty investigations, research, animal rescue, legislation, special events, celebrity involvement, protest campaigns, and lawsuits to enforce laws enacted to protect animals. PETA submits this petition on its own behalf and on behalf of its members with an interest in preserving and recovering the Canada lynx population and in ensuring that the captive members of the species are protected from inhumane treatment.

Petitioner Animal Legal Defense Fund (“ALDF”) is a nonprofit animal protection charity dedicated to protecting the lives and advancing the interests of animals through the legal system. It undertakes these efforts through legal scholarship, public education, cruelty investigations, legislation, and lawsuits to enforce laws enacted to protect animals. ALDF submits this petition on its own behalf and on behalf of its members with an interest in preserving and recovering the Canada lynx population and who want to enjoy observing captive lynx living in humane conditions.

Petitioner The Wildcat Sanctuary (“TWS”) is a non-profit rescue sanctuary located in Sandstone, Minnesota, established in 1999. Funded solely by private donations, TWS provides a natural sanctuary to rescued wild cats in need, including Canada lynx, and inspires change to end the wildlife crisis—i.e., the commercial exploitation of wildlife and the destruction of habitat. Combining natural and spacious habitats with a life free of exhibition, TWS allows all residents to live wild at heart. As a true sanctuary, TWS does not breed, buy, sell, or exhibit animals. Committed to public education about animals in captivity, TWS seeks to create a world where animal sanctuaries are no longer needed. To assure true peace and tranquility for the cats, the sanctuary is not open to the public. TWS is accredited by the American Sanctuary Association and the Global Federation of Animal Sanctuaries, is licensed by the USDA, and is a member of the Big Cat Sanctuary Alliance.

Petitioner Big Cat Rescue (“BCR”) is a non-profit rescue sanctuary established in 1992 and located in Tampa, Florida. BCR is one of the largest accredited sanctuaries in the world dedicated to rescuing and caring for abused and abandoned big cats. BCR’s mission is to provide the best home it can for the cats in its care, end abuse of big cats in captivity, and prevent extinction of wild cats. BCR is home to over fifty lions, tigers, bobcats, and other cats, including

Canada lynx, most of whom have been abandoned, abused, orphaned, saved from being turned into fur coats, or retired from performing acts.

Petitioner Performing Animal Welfare Society (“PAWS”) is a non-profit sanctuary established in 1984 to rescue and care for abused, neglected, or retired captive wildlife. The animals come from circuses, zoos, roadside attractions, and private owners. PAWS operates three sanctuaries in California, including the 2,300-acre ARK 2000 sanctuary where elephants, wild cats, and bears are provided spacious, natural habitats. PAWS is a true sanctuary, meaning it does not buy, sell, breed, or trade animals or make them perform. PAWS also works to end the exploitation of captive wild animals through advocacy, protective legislation, and public education. At PAWS’ sanctuaries, rescued animals are provided a safe, permanent home. PAWS is licensed by the USDA and the California Department of Fish and Wildlife, accredited by the Global Federation of Animal Sanctuaries, and a member of the Big Cat Sanctuary Alliance.

II. LEGAL BACKGROUND

A. The Endangered Species Act

In passing the 1973 Endangered Species Act (“ESA” or “the Act”), Congress declared that “endangered species . . . *be afforded the highest of priorities.*” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978) (emphasis added). The purpose of the statute is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions” to which the United States is committed. 16 U.S.C. § 1531(b). Congress “further declared . . . that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. §§ 1531(c). Thus, as the Supreme Court has announced, the goal of the ESA is to “reverse the trend toward extinction, *whatever the cost.*” *Tenn. Valley Auth.*, 437 U.S. at 184 (emphasis added).

The ESA defines the term “conserve” to mean: “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.” 16 U.S.C. § 1532(3).

Pursuant to Section 4 of the Act, the Service must “list” species as either “endangered” or “threatened,” depending on the extent of the threats to their existence. 16 U.S.C. § 1533. An “endangered” species is one that is already “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A “threatened” species is one that “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

The Act requires the Service to list a species as either “endangered” or “threatened” based on the following five factors: (1) “the present or threatened destruction, modification, or curtailment of its habitat or range;” (2) “overutilization for commercial, recreational, scientific, or educational purposes;” (3) “disease or predation;” (4) “the inadequacy of existing regulatory mechanisms;” and (5) “other natural or manmade factors affecting its continued existence.” 16 U.S.C. § 1533(a)(1)(A)–(E). The Service is required to list a species if any one of these criteria is present. *Southwest Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000).

These definitions and criteria underscore the purpose of the Act—to ensure that endangered and threatened species thrive in their natural habitats.

The Service is also required to base listing decisions “solely” on the “best available scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). In imposing this requirement, Congress expressly intended to “ensure that decisions . . . pertaining to listing . . . are based *solely* upon biological criteria and *to prevent nonbiological considerations from affecting such decisions.*” H.R. Conf. Rep. No. 835, 97th Cong. 2d Sess. 19-20 (1982) (emphasis added). Thus, Congress made clear that “economic considerations have *no relevance* to determinations regarding the status of species.” *Id.* (emphasis added); see also S. Rep. No. 418, 97th Cong., 2d Sess. 12 (1982) (“This amendment would preclude the Secretary from considering economic or other non-biological factors in determining whether a species should be listed . . . Only in this way will the endangered and threatened species lists accurately reflect those species that are or are likely to be in danger of extinction”).

The Service has repeatedly stressed its statutory duty not to rely on economic impacts when making listing decisions. *See, e.g.*, 84 Fed. Reg. 45,020, 45,024 (Aug. 27, 2019) (“the statements Congress included in the legislative history focus on ensuring that economic information would *not affect* or delay *listing determinations*”) (emphasis added). Moreover, in keeping with the overall purposes of the statute, “[e]ven if the available scientific and commercial data were quite inconclusive [the Service] may—indeed must—still rely on it at [the listing] stage.” *Southwest Ctr. for Biological Diversity*, 215 F.3d at 60 (quoting *City of Las Vegas v. Lujan*, 891 F.2d 927, 933 (D.C. Cir. 1989)).

Once a species is listed, it is entitled to various protections under the Act and the agency’s implementing regulations, depending on whether the species is listed as “endangered” or “threatened.” Under Section 9 of the statute, 16 U.S.C. § 1538(a), it is unlawful to “import any [endangered] species into, or export any such species from the United States;” to “deliver, receive, carry, transport, or ship in interstate or foreign commerce . . . in the course of a commercial activity, any such species;” and to “sell or offer for sale in interstate or foreign commerce any such species.” 16 U.S.C. §§ 1538(a)(1)(A), (E), (F). It is also unlawful to “take” a member of an endangered species within the United States or on the high seas. 16 U.S.C. § 1538(a)(1)(B)–(C). “Take” is defined to include “harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect.” 16 U.S.C. § 1532(19). The term “harm” is further defined by regulation to mean “an act which actually kills or injures wildlife.” 50 C.F.R. § 17.3. FWS has further defined the term “harass” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.” 50 C.F.R. § 17.3. Under Section 9, it is also unlawful to “possess, sell, deliver, carry, transport, or ship” any endangered species that was unlawfully “taken.” 16 U.S.C. § 1538(a)(1)(D).

The “grandfather clause” of Section 9 provides an exemption from certain specified prohibitions—but not the “take” prohibition—for “any fish or wildlife which was held in captivity or in a controlled environment” on the date the species was listed. 16 U.S.C. § 1538(b); *see also ASPCA v. Ringling Bros. and Barnum & Bailey Circus*, 502 F. Supp. 2d 103, 109–10 (D.D.C. 2007) (holding that Congress intended the take prohibition to apply to “pre-act” wildlife). However, the statute further provides that this limited exception applies only if “such holding and any subsequent holding or use” of the wildlife “*was not in the course of a commercial activity.*” 16 U.S.C. § 1538(b) (emphasis added). The term “commercial activity” is defined by the Act to mean “all activities of industry and trade, including, but not limited to, the

buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling.” 16 U.S.C. § 1532(2).

Section 4(d) of the Act provides that whenever a species is listed as “threatened,” FWS “shall issue such regulations as [it] deems necessary and advisable *to provide for the conservation of such species.*” 16 U.S.C. § 1533(d) (emphasis added). Therefore, pursuant to the plain language of the Act, any such “special rule” must also “provide for the conservation”—i.e., recovery—of the species. 16 U.S.C. § 1533(d); *see also Sierra Club v. Clark*, 577 F. Supp. 783, 788 (D. Minn. 1984), *aff’d* in part, 755 F.2d 608, 613–15 (8th Cir. 1985). For years, FWS had in place a general Section 4(d) Rule that extended protections of the Act for endangered species to all species listed as “threatened,” unless the agency had issued a *special* 4(d) Rule that provided otherwise. *See* 50 C.F.R. 17.31(a).¹ However, again, all Section 4(d) Rules must be designed “to provide for the conservation of such species.” 16 U.S.C. § 1533(d).

Any person seeking to engage in an otherwise unlawful act with respect to a listed species must apply for a permit to do so under Section 10 of the ESA and must demonstrate that such activity is for “the propagation or survival of the species.” 16 U.S.C. § 1539(a)(1). Moreover, FWS long ago explained that “education through exhibition” would not justify the granting of any such permit. 58 Fed. Reg. 68,323, 68,325 (Dec. 27, 1993). In doing so, FWS explained its concern that “captive-bred animals . . . might be used for purposes *that do not contribute to conservation, such as for pets, research that does not benefit the species, or for entertainment.*” 57 Fed. Reg. 548, 550 (January 7, 1992) (emphasis added). It further explained its concern that persons might conduct prohibited activities with wild-caught animals of these species on the pretext that the animals were captive-bred. *Id.*

In 1998, FWS amended its definition of “harass” as applied to captive wildlife to exclude “generally accepted . . . [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act”; “breeding procedures”; and “provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices . . . are not likely to result in injury to the wildlife.” 63 Fed. Reg. 48,634, 48,639–40 (Sept. 11, 1998) (codified at 50 C.F.R. § 17.3). In the preamble to that rule, FWS explained that, although several commenters had suggested that the agency should amend the definition of “take” to apply only to animals in the wild, the agency could not do so because the statute defined “take” to apply to *all* listed wildlife “whether wild or captive.” 63 Fed. Reg. at 48,636. Thus, the agency explained that, although the statutory definition could be “clarif[ied]” by FWS as it applies to captive wildlife, “the statutory term cannot be changed administratively.” *Id.*

FWS further explained that the purpose of the amendment to the definition of “harass” was to “exclude proper animal husbandry practices that are not likely to result in injury from the prohibition against ‘take.’” *Id.* Therefore, according to the agency, “[s]ince captive animals can be subjected to improper husbandry as well as to harm and other taking activities, the Service considers it prudent to maintain such protections, consistent with Congressional intent.” *Id.* The

¹ In 2019 the Trump Administration amended this provision to eliminate the “general” 4(d) protections for threatened species. 84 Fed. Reg. 44,753, 44,753 (Aug. 27, 2019). But because that rule only applies to species listed *after* the new rule became effective, that amendment to the regulation has no bearing on the Canada lynx, which was listed in 2000. Moreover, that amendment is currently the subject of litigation which has been stayed to allow the new Administration to consider how it wishes to proceed with the contested regulations. Joint Stipulation to Continue Stay of Proceedings for 60 Days at 3, *Animal Legal Def. Fund v. U.S. Dep’t of Interior*, No. 4:19-cv-06812 (N.D. Ca. Apr. 16, 2021), ECF No. 90.

agency further emphasized that “maintaining animals in inadequate, unsafe or unsanitary conditions, physical mistreatment, and the like constitute harassment because such conditions might create the likelihood of injury or sickness,” and that “[t]he Act *continues to afford protection to listed species that are not being treated in a humane manner.*” *Id.* at 48,638 (emphasis added).

The ESA also requires FWS to “encourage . . . foreign countries to provide for the conservation” of listed species and implements the United States’ international obligations with regard to worldwide endangered and threatened species. 16 U.S.C. § 1537. For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) was drafted by representatives of countries—including the United States—participating in the International Union for the Conservation of Nature to ensure that international trade in specimens of wild animals and plants does not threaten their survival. CITES, first implemented on July 1, 1975, today has 175 participating countries.

CITES classifies species in Appendices with varying levels of protection. Appendix II, under which the Canada lynx is listed, “includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival.” *How CITES Works*, CITES, <https://cites.org/eng/disc/how.php>.

B. The Canada Lynx Is Listed as a Threatened Species.

In 2000, the Service listed the Canada lynx (*lynx canadensis*) as “threatened” in the contiguous United States. 65 Fed. Reg. 16,052, 16,052 (March 24, 2000). The distribution of Canada lynx in the contiguous United States includes parts of Washington, Oregon, Montana, Wyoming, Idaho, Utah, Colorado, the Great Lakes Region, and the Northeast from Maine to New York. *Id.* To determine the listing status of the species, the Service considered all five statutorily required factors: (1) “the present or threatened destruction, modification, or curtailment of its habitat or range;” (2) “overutilization for commercial, recreational, scientific, or educational purposes;” (3) “disease or predation;” (4) “the inadequacy of existing regulatory mechanisms;” and (5) “other natural or manmade factors affecting its continued existence.” 16 U.S.C. § 1533(a)(1)(A)–(E). The Service stressed that “one or more” of these factors was sufficient to warrant listing under the Act. 65 Fed. Reg. at 16,071.

As to the first factor, habitat destruction, the Service acknowledged that “People change forests through timber harvest, fire suppression and conversion of forest lands to agriculture,” and that “[f]orest fragmentation may eventually become severe enough to isolate habitat into small patches, thereby reducing the viability of wildlife that are dependent on larger areas of forest habitat.” *Id.* at 16,071. The Service also noted that Canada lynx are “limited to moist, cool boreal forests that support some minimum density of snowshoe hares, where winters are snowy,” *id.*, and concluded that the “lack of guidance for conservation of [Canada] lynx and snowshoe hare habitat” allows “the potential for future degradation of [Canada] lynx habitat.” *Id.* at 16,076.

As to the fourth listing factor, the Service found that “existing regulatory mechanisms do not adequately address the needs of the [Canada] lynx, or reduce the threats to the species or its habitat.” *Id.* at 16,078. FWS summarized various states’ conservation plans for the Canada lynx, but, since most of the Canada lynx habitat was on federal lands, the Service stressed the inadequacy of the federal National Forest Service land management plans for conserving Canada lynx. *Id.* at 16,078–79. The Service also briefly noted that Canada lynx are included in Appendix II of CITES, but that CITES “does not itself regulate take or domestic trade and therefore does

not contribute to protection of the [Canada] lynx in the United States.” *Id.* at 16,079. The Service concluded that “the lack of Plan guidance for conservation of [Canada] lynx, and the potential for Plans to allow for direct actions that adversely affect lynx . . . is a significant threat.” *Id.* On this basis, the agency determined that the Canada lynx must be listed as threatened. *Id.* at 16,082.²

When the Service published its proposed rule to list the Canada lynx, it initially planned to list the wild population as “threatened” and to list *separately* the “captive population” as “threatened due to similarity of appearance” under Section 4(e) of the ESA. 63 Fed. Reg. 36,994, 37,011 (July 8, 1998). Rather than moving forward with that explicit “split-listing” of the species, the Service listed the entire Canada lynx species as “threatened” but promulgated a “special rule” pursuant to Section 4(d) of the Act. 50 C.F.R. § 17.40(k). This “special rule” differentiated the captive members of the species from the wild members, defining “captive lynx” as those “whether alive or dead, and any part or product, if the specimen was in captivity at the time of the listing, born in captivity, or lawfully imported or transported into the contiguous United States.” 50 C.F.R. § 17.40(k)(3). The special 4(d) Rule exempted captive Canada lynx from the Section 9 “take” prohibition; allowed the sale and delivery of captive Canada lynx, parts, and products in interstate commerce; and allowed the export and import of captive Canada lynx, parts, or products as long as the specimens comply with CITES. 50 C.F.R. § 17.40(k)(4)(i)–(iii).

When the Service listed the Canada lynx, states within the contiguous U.S. could no longer export wild lynx under the CITES export requirements as had been possible prior to the listing of the species. 65 Fed. Reg. at 16,084. At the time of listing, however, FWS was aware of facilities in Idaho, Minnesota, Montana, North Dakota, and Utah that “raise captive lynx for commercial purposes,” presumably for fur. *Id.* The Service determined that “[t]hese captive-bred specimens have *neither a positive nor negative effect on the species in the wild.*” *Id.* (emphasis added). Thus, when the Service decided to exempt all captive lynx from the “take” prohibition, it provided no “conservation” basis for doing so—either with respect to the trade in lynx pelts or for any other purpose, such as the exhibition of lynx or their use in entertainment or other commercial enterprises.

III. THE EXCEPTIONS FOR CAPTIVE CANADA LYNX ARE UNLAWFUL.

As both FWS and the National Marine Fisheries Service (“NMFS”) have already acknowledged in other contexts, affording differential legal status of captive members of a listed species versus the wild members of the same species is inconsistent with the text of the ESA. *See, e.g.*, 80 Fed. Reg. 34,500, 34,501 (June 16, 2015) (regarding the chimpanzee) (“the Act does not allow for captive chimpanzees to be assigned separate legal status from their wild counterparts”); 80 Fed. Reg. 7,380, 7,388 (Feb. 10, 2015) (regarding the Southern Resident killer

² At the time the Service listed the Canada lynx, it did not take into consideration the adverse effects of climate change—particularly global warming—on the species. But because the Canada lynx is singularly dependent on the availability of its prey base, snowshoe hare, which in turn is now seriously threatened by climate change, there can be no question that the species must continue to be listed. *See, e.g.*, M. Zimova et al., *Climate Change Means Snowshoe Hares Stand Out Like Lightbulbs Against a Snowless Background*, *Ecology Letters* 19:299-307 (2016) (Exhibit A); Karen Weintraub, *Lynx Numbers Are in Decline in the West*, *N.Y. TIMES* (April 8, 2020), <https://www.nytimes.com/2020/04/08/science/lynx-endangered-species.html> (citing climate change as the “main reason for the declining population” of lynx) (Exhibit B).

whale) (“the ESA does not allow captive animals to be assigned different legal status from their wild counterparts on the basis of their captive status.”).

Indeed, the wholesale exclusion of a captive member of a listed species is an unprecedented and unlawful deviation from decades of agency policy and practice. As explained below, carving out exceptions for captive Canada lynx within the context of a special 4(d) Rule is also unlawful because the ESA is designed to protect both captive and wild members of protected species. And, as demonstrated *infra* in Part IV, captive members of this species are being commercially exploited, harmed, harassed, and even killed. Therefore, continuing to exclude captive Canada lynx from the protections of the statute frustrates the text, purpose, and spirit of the Act.

A. Split-Listing Captive and Wild Members of a Species Exceeds the Service’s Authority Under the Act.

Nothing in the text of the ESA supports treating captive members of a species differently than wild members of the same species at the time of listing. To the contrary, it is well established that the Services (FWS and/or NMFS) may not make arbitrary distinctions between captive and wild members of a species at the listing stage. *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1162 (D. Ore. 2001) (“Listing distinctions below that of subspecies or a DPS of a species are *not allowed under the ESA.*”) (emphasis added); *cf. id.* at 1163 (“[T]he NMFS listing decision creates the unusual circumstance of two genetically identical coho salmon swimming side-by-side in the same stream, but only one receives ESA protection while the other does not. *The distinction is arbitrary.*”) (emphasis added).

Most notably, the agencies charged with administering the Act have themselves concluded that they do not have discretion to treat captive and wild members of a species differently under the ESA. In the Federal Register notice rescinding the exception for captive members of the listed Southern Resident killer whales, NMFS explained that, “based upon the purposes of the ESA and its legislative history, courts have held and the USFWS has recently concluded that the ESA *does not allow captive animals to be assigned different legal status from their wild counterparts on the basis of their captive status.*” 80 Fed. Reg. at 7,388 (citing *Safari Club Int’l v. Jewell*, 960 F. Supp. 2d 17 (D.D.C. 2013)) (emphasis added); *id.* (“[T]he ESA does not support the exclusion of captive members from a listing based solely on their captive status. On its face *the ESA does not treat captives differently.*”) (emphasis added).

Similarly, when rescinding the split-listing of the chimpanzee (where captive members of the species were listed as threatened and wild members were listed as endangered), FWS explained that “such separate legal status is *not consistent with the section 2(b) purpose of conserving endangered and threatened species.*” 80 Fed. Reg. at 34,503 (emphasis added); *id.* (“Thus, nothing in the plain language indicates that captive specimens should be excluded from the Act’s processes and protections that would contribute to recovery (*i.e.*, ‘conservation’) of the entire taxonomic species.”). Such a split-listing is directly contrary to the conservation goals of the Act: “If captive chimpanzees have separate legal status under the Act, particularly with no protections under the Act, *the threat of overutilization would potentially increase.*” *Id.* (emphasis added).

B. The Special 4(d) Rule Cannot Treat Captive Members of Listed Species Differently Without an Underlying Conservation Purpose.

The Service has explored alternative avenues—beyond an explicit split-listing—for such differential treatment before, but has always concluded that such disparate treatment is simply contrary to the ESA. For example, in its final rule rescinding the chimpanzee split-listing, FWS addressed alternative ways the Service might provide differential treatment to captive and wild chimpanzees other than an explicit split-listing. 80 Fed. Reg. at 34,505 (considering “(1) Directly excluding captive chimpanzees from the Act’s protections, or (2) designating only wild chimpanzees as a DPS, with captive chimpanzees not included in the DPS,” but concluding that “*neither approach would be consistent with Congress’ intent for the Act.*”) (emphasis added). The agency stated, however, that *any* such differential treatment would be inconsistent with the purposes of the Act. *Id.* (“The Service *cannot exclude captive animals from a listing once these animals are determined to be part of the species.*”) (emphasis added); *id.* at 34,506 (acknowledging that other ways of creating “separate legal status and no legal protections for captive chimpanzees” would result in “many of the same legal and conservation consequences” as an explicit split-listing, which would be “*inconsistent with Congress’ intent for the Act.*”) (emphasis added). Thus, using a special 4(d) Rule to effectuate a similar differential treatment likewise contravenes the purpose of the Act.

Most important, the Service’s discretion in establishing a 4(d) Rule to determine how the “take” prohibition will apply to threatened species is not unlimited. Rather, as explained above, it is directly circumscribed and constrained by the overarching statutory purpose to *conserve* the species. *Sierra Club v. Clark*, 755 F.2d 608, 612–13 (8th Cir. 1985) (“The extent of the Secretary’s discretion, however, is limited by the requirement that the regulations he is to issue must provide for the *conservation* of threatened species.”).³

The 4(d) Rule for Canada lynx, which treats captive and wild animals differently, does not meet the statutory requirement for furthering “conservation” of the species as a whole. This is not a case, for example, where the differential treatment of various subsets of the species may *help* the wild members’ survival. *See Cal. State Grange v. Nat’l Marine Fisheries Serv.*, 620 F. Supp. 2d 1111, 1202–03 (E.D. Cal. 2008) (holding that the Service may lawfully distinguish between hatchery-born fish and wild-born fish, extending the “take” prohibition only to the latter because too many hatchery-born fish entering the habitat may affect the survival of the wild-born fish). In fact, the Service cited *no* conservation-based reasoning for differentiating between captive and wild Canada lynx in its 4(d) Rule.

Rather, the Rule appears to have been designed to carve out a special exception in deference to the financial concerns of *commercial lynx farmers*. As explained above, however,

³ While the definition of “conservation” under the statute does include the “extraordinary” option of “regulated taking,” resorting to such measures must follow a determination that “*population pressures within a given ecosystem cannot be otherwise relieved.*” 16 U.S.C. § 1532(3) (emphasis added); *Sierra Club*, 755 F.2d at 613. That determination has certainly not been made here. Indeed, the legislative history for the definition of “conservation” shows that Congress purposefully meant to cabin the discretion of the Services relating to regulated takings. The Senate version of the bill included a definition of “conservation” that included “*management,*” and “*taking necessary to these ends.*” 119 CONG. REC. 25,681 (1973) (July 24, 1973) (emphasis added). However, the final version of the Act deleted that provision, including instead more limiting language for the regulated taking (“in the extraordinary case...”). 16 U.S.C. § 1532(3).

the Act explicitly *precludes* the Services from taking into account any economic considerations when making listing decisions, such as whether listing the species would cause the holder of any member of the species economic harm. *See N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1284–85 (10th Cir. 2001) (quoting H.R. Rep. No. 97-567, pt. 1 at 29 (1982)). The special 4(d) Rule unlawfully differentiates between captive and wild members of the Canada lynx species, explicitly acknowledging certain facilities that raise captive lynx for commercial purposes. 65 Fed. Reg. at 16,084. Exempting the farming and trade of captive lynx and pelts—without a conservation purpose—unlawfully prioritizes the economic impact of listing on some constituents over the recovery of the species for the benefit of the entire nation. Indeed, the agency itself conceded that the captive-bred specimens of lynx used in the pelt trade have neither a “*positive nor negative effect on the species in the wild.*” *Id.* (emphasis added). In light of this critical concession, the agency cannot possibly claim that allowing the wholesale “take” of the captive members of the species is somehow necessary to “conserve” the wild population.

Moreover, allowing the “take” of captive Canada lynx may actually *harm* the wild members of the species, as the Service also acknowledged in its final rule:

an increase in pelt prices could create a strong incentive to trap wild lynx and export their pelts. Lynx are easy to trap, and the illegal take of lynx would present an enforcement and inspection problem for Service personnel. Since they look the same, captive lynx pelts cannot be effectively differentiated from wild lynx pelts by Service law enforcement and inspection personnel without proper tagging.

65 Fed. Reg. at 16,084.

As demonstrated below, lynx pelts are currently offered for sale for hundreds of dollars. *See infra* at 15–16. Having acknowledged the difficulty of enforcing the illegal “take” of listed wild lynx because “they look the same” as captive lynx, the agency’s decision to nevertheless allow the “take” of captive members does not comport with the purpose of Section 4(d)—to *contribute affirmatively* to conserving wild members of a listed species. *See* 65 Fed. Reg. at 16,084. Indeed, as FWS explained when it eliminated the split-listing of captive versus wild chimpanzees:

If captive [members of the species] have separate legal status under the Act, particularly with no protections under the Act, *the threat of overutilization would potentially increase . . .* Poachers and smugglers would have increased incentive to remove animals from the wild and smuggle them into captive-holding facilities in the United States for captive propagation or subsequent commercial use, because once in captivity there would be no Act restrictions on use of the captive specimens or the offspring.

80 Fed. Reg. at 34,503 (emphasis added); *see also Safari Club Int'l v. Jewell*, 960 F. Supp. 2d 17, 67–68 (D.D.C. 2013) (rejecting the argument that the ESA sought to conserve “species only ‘within their native ecosystems,’” because covering wild and captive members ensures “*no confusion as to the status of a particular animal or animal part that would lead to an increase in illegal trade of the species*”) (internal citations omitted) (emphasis added).

This is of particular concern in light of the fact that Canada Lynx are rare and protected where they occur in south-eastern Canada. Int’l Soc’y for Endangered Cats (ISEC) Canada,

Canada Lynx, <https://wildcatconservation.org/wild-cats/north-america/canada-lynx/> (Exhibit C). In fact, this type of “direct exploitation” and “overexploitation” of animals, including through hunting, has been cited as the second largest driver leading to extinction of terrestrial animals. *The Global Assessment Report on Biodiversity and Ecosystem Services, Summary for Policymakers* 12, IPBES (Exhibit D). The ESA has a clear purpose to protect listed species from such overexploitation, yet allowing captive Canada lynx to be indiscriminately “taken” directly frustrates that purpose.

The captive lynx raised for the fur trade are only one type of “captive” Canada lynx excluded from ESA protections by this 4(d) Rule. As discussed *infra*, Canada lynx in exhibition, of which there are hundreds across the country, along with those bred and sold as pets, are also denied the protections of the ESA’s “take” prohibition because of their status as “captive.” The Final 4(d) Rule makes no mention of lynx in exhibition. But allowing facilities to engage in activities that would otherwise constitute a “take” of Canada lynx in exhibition facilities cannot possibly aid conservation of the species (nor did the Service offer any suggestion that it would), especially when the Service long ago concluded that “education through exhibition” does not suffice as a means of “enhancing the propagation or survival” for purposes of granting a Section 10 permit. 58 Fed. Reg. at 68,323.

On its face, Section 4(d) of the ESA applies only to “species,” defined as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). Trying to circumvent that statutory requirement through the use of a 4(d) Rule functions to create “separate legal status” for captive members of the species versus wild members, which the Services themselves have admitted would be “inconsistent with Congress’ intent for the Act.” 80 Fed. Reg. at 34,506; *see also* 80 Fed. Reg. at 7,388. Again, as the Services themselves have already acknowledged, regulating based on a classification within a given species—e.g., captive versus wild members—is not contemplated by the statute, particularly when it does not directly further the overall conservation purpose of the Act. The Service thus cannot pursue the same outcome as the unlawful split-listing of captive and wild members of a given species through other statutory mechanisms like a 4(d) Rule.⁴

IV. CAPTIVE CANADA LYNX ARE SUFFERING BECAUSE THEY LACK PROTECTION UNDER THE ESA.

A. Captive Canada Lynx Are Being Commercially Exploited.

Hundreds of Canada lynx (also sometimes referred to informally as “Yukon lynx” or “Highland lynx”) are currently kept in captivity in this country for a variety of reasons. As discussed below, these animals are kept as spectacles in roadside zoos and by other exhibitors, as stock to be used for breeding, as “pets” to unwitting buyers who do not have the knowledge or capacity to properly care for them, as props for pseudo-wildlife photographers looking to make a

⁴ The Services have clarified the factors used to determine a “distinct population segment” (“DPS”): (1) “Discreteness of the population segment in relation to the remainder of the species to which it belongs;” (2) “The significance of the population segment to the species to which it belongs;” and (3) “The population segment’s conservation status in relation to the Act’s standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).” 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996). Given these factors, it would also be impossible for “captive” members of the lynx to be listed as a DPS, or to be excluded from a DPS defined only for “wild” members.

name for themselves, and as commodities to be killed so their pelts and fur may be sold for profit.

i. Canada Lynx Exploited in Exhibitions

Since 2019, approximately 200 Canada lynx have been kept in captivity for exhibition to curious onlookers, spread across over at least 32 states.⁵ As United States Department of Agriculture (“USDA”) Inspection Reports reveal, animals kept in these situations are often subject to inappropriate care, including being forced to live in their own excrement, kept in improper and unsafe enclosures, and denied proper nutrition. *See, e.g.*, U.S. Dep’t of Agric. Inspection Report, Zachary Keeler (Aug. 29, 2019) (Exhibit E); U.S. Dep’t of Agric. Inspection Report, Christie Showerman (Mar. 13, 2019) (Exhibit F).

Many so-called “roadside zoos” exhibit Canada lynx. For example, the Sierra Safari Zoo in Reno, Nevada, which one online reviewer described as a “sad little zoo,” has one Canada lynx. Review of Sierra Safari Zoo, TRIPADVISOR (June 19, 2017), https://www.tripadvisor.com/ShowUserReviews-g45992-d259410-r494419347-Sierra_Safari_Zoo-Reno_Nevada.html (Exhibit G). The lynx is kept in a small chain-link metal enclosure, approximately 10 feet by 10 feet, with only a dirt floor. *Id.*; *see also* Exhibit H (image below). The lynx is reportedly overweight—a sign of improper nutrition, environmental enrichment, and exercise. *Id.*



Source: Sierra Safari Zoo (Nevada)—Canada Lynx Exhibit (Aug. 2, 2015), <https://www.zoochat.com/community/media/sierra-safari-zoo-nevada-canadian-lynx-exhibit.316954/> (Exhibit H).

⁵ These numbers are gathered from Inspection Reports issued under the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*

Captive Canada lynx often display circling, pacing, and other repetitive behaviors—known as stereotypes—that typically indicate severe anxiety or other psychological distress and are not displayed by Canada lynx in the wild. *See* Amanda Shyne, *Meta-Analytic Review of the Effects of Enrichment on Stereotypic Behavior in Zoo Mammals*, *Zoo Biology* 25:317–37, 317–18 (2006) (“Stereotypes often arise when a captive animal has prolonged exposure to an ecologically relevant problem that it is incapable of solving within its enclosure.”) (Exhibit I); Kerry Fanson and Nadia Wielebnowski, *Effect of Housing and Husbandry Practices on Adrenocortical Activity in Captive Canada Lynx (Lynx canadensis)*, *Animal Welfare* 2013, 22:159–65, 159 (indicating that certain enclosures and lack of enrichment have a negative impact on captive Canada lynx stress levels) (Exhibit J). Captive Canada lynx have been found to have approximately double the levels of stress hormones as their wild counterparts. Kerry Fanson et al., *Comparative Patterns of Adrenal Activity in Captive and Wild Canada Lynx (Lynx Canadensis)*, 182 *Journal of Comparative Physiology B* 157, 163 (2012) (Exhibit K). “This result is generally attributed to higher levels of stress in captivity.” *Id.*

Canada lynx are kept and exploited by individuals with known track records of mistreating animals. For example, Larry Wallach has been in possession of a number of wild and exotic cat species for at least a decade, including Canada lynx. He has been cited by the USDA for repeated violations of the Animal Welfare Act (“AWA”), and the USDA even brought an official enforcement action—a rare occurrence for the USDA—against this exhibitor for denying animals appropriate veterinary care, failing to provide adequate enclosures, and failing to abide by minimum sanitation requirements. Complaint at 2–6, *In re Larry Wallach*, U.S. Dep’t of Agric., Docket No. 13-0230 (Apr. 26, 2013) (Exhibit L). A consent decision and order was issued in 2013, resulting in a 6 month suspension of Wallach’s AWA license. Consent Decision and Order at 2, *In re Larry Wallach*, U.S. Dep’t of Agric., Docket No. 13-0230 (Dec. 2, 2013) (Exhibit M).

Similarly, Jeff Lowe, who is currently being sued by the federal government for violations of the AWA and ESA, is also in possession of at least one Canada lynx. *See* Complaint, U.S. Dep’t of Agric., *In re Jeffrey Lowe*, AWA Docket Nos. 20-J-0152, 20-J-0153 (Aug. 17, 2020), <https://www.aphis.usda.gov/enforcement/jeffrey-lowe.pdf> (USDA Enforcement Action) (Exhibit N); Complaint at 19, *United States v. Jeffrey Lowe*, No. 20-CV-423 (Nov. 19, 2020) (Department of Justice Civil Suit) (Exhibit O). These animals—including Canada lynx—are living in conditions that both “harm” and “harass” them within the meaning of the ESA and the relevant implementing regulations, if the captive members of the species were not exempted from the “take” prohibition. While the DOJ’s civil suit is ongoing, the USDA has revoked Jeff Lowe’s AWA license. Decision and Order at 17, *In re Jeffrey Lowe*, AWA Docket Nos. 20-J-0152, 20-J-0153, 21-J-0003 (Apr. 1, 2021) (Exhibit P).

ii. *Canada Lynx Bred and Sold as Pets*

Despite not being suitable companion animals—because, although they are in captivity, they are still *wild by nature*—Canada lynx are also bred and sold as “pets” to consumers across the country. *See, e.g.*, *Lynx for Sale*, *Exotic Animals For Sale*, <https://www.exoticanimalsforsale.net/lynx-for-sale.asp> (Exhibit Q). For example, Frazier Farms currently is offering a Canada lynx for sale for \$4,000 (see image below) (Exhibit R).

The screenshot shows the Frazier Farms website. At the top, there is a logo for "FRAZIER FARMS" and a search bar with the text "Have a question?". Below the logo, there is a navigation menu with links: Home, Contact, About, Our Animals, Terms of Service, Shipping Information, Blog, Members, and Forum. The main content area features a product listing for a "2021 Canada Lynx". The listing includes a photograph of a lynx sitting on a brown leather couch. To the right of the photo, the price is listed as "\$4,000.00", the quantity is set to "1", and there is an "Add to Cart" button. The breadcrumb trail at the top of the product page reads "Home / 2021 Canada Lynx".

Frazier Farms has a Canada Lynx currently for sale.

Source: Frazier Farms, 2021 Canada Lynx,

<https://www.frazierfarmsexotics.com/product-page/2020-canada-lynx>

(last visited Apr. 9, 2021).

Bitterroot Bobcat & Lynx, owned by Barbara Roe, operates a breeding facility in Stevensville, Montana. In 2015, the facility was cited by the USDA for lack of sanitation: “All of the pens housing the bobcats and the lynx *have a putty like brown and black buildup of old and recent urine, scent marking, food waste, hair and debris.*” U.S. Dep’t of Agric. Inspection Report, Barbara Roe (Oct. 21, 2015) (emphasis added) (Exhibit S). The photograph below is from that inspection, showing a Canada lynx in one of the unlawful enclosures (Exhibit T).



Canada lynx (visible in the top right) in an enclosure violating AWA standards.
Source: U.S. Dep't of Agric. Inspection Report, Barbara Roe (Oct. 21, 2015).

In addition to being raised and kept in substandard conditions, Canada lynx who are bred in these facilities often suffer from neurological issues as a result of selective breeding and inbreeding that can result in seizures. Many animals also suffer from malnutrition and other human-imposed harms (see *infra*). Many of these captive Canada lynx also exhibit stereotypic behaviors—circling, pacing, and other repetitive movements—resulting from the psychologically harmful conditions of their captivity. See *supra* at 12 (discussing stereotypic behavior). Meanwhile, breeders continue to be licensed by the USDA, making thousands of dollars from selling these Canada lynx as “pets” despite the fact that, again, because they are wild by nature they are completely unsuitable for domesticated life with humans. See *Position Statement: Large Wild and Exotic Cats Make Dangerous Pets*, U.S. Dep't of Agric., Animal and Plant Health Inspection Serv., Misc. Pub. No. 1560 (Feb. 2000), available at <https://bigcatrescue.org/wp-content/uploads/2015/11/USDApositionExoticCats2000.pdf> (Exhibit U); *Why Wild Animals Don't Make Good Pets*, Association of Zoos and Aquariums (Feb. 19, 2009), <https://www.aza.org/aza-news-releases/posts/why-wild-animals-dont-make-good-pets-?locale=en> (Exhibit V).

iii. Canada Lynx Used in Bogus Wildlife Photography

The species is also kept in captivity to be used as props for fake “wildlife” photographers. In these facilities, would-be wildlife photographers pay a fee to have access to the animals in a simulated “wild” environment, allowing the photographers to present their photos as if taken in the wild.

One such operation, Minnesota Wildlife Connection, offers patrons photography sessions with dozens of wild animals, including Canada lynx. *Minnesota Wildlife Connection Inc.*, <https://www.minnesotawildlifeconnection.com/animals> (Exhibit W). The AWA license of the owner, Lee Greenly, was revoked by the USDA in 2012 due to thirty-seven separate violations of the AWA. *In re: Lee Marvin Greenly*, U.S. Dep't of Agric., AWA Docket No. 11-0072, 2012 WL 3877414, at *2, 12 (Aug. 22, 2012) (Exhibit X). His AWA citations included, among others: failing to provide adequate veterinary care; failing to provide adequate environmental enrichment for the animals; failing to handle animals so as to avoid trauma or physical harm; and failing to handle animals in a way that would minimize risk to the public resulting from direct

contact. *Id.* at *2. In fact, there were three separate occasions of injury to members of the public, along with the death of a neighbor’s pet due to an interaction with his animals. *Id.*

In a separate, but related, action, the USDA found Greenly “unfit to hold an Animal Welfare Act license” after he pled guilty to violating the Lacey Act, 16 U.S.C. §§ 3371–78, by submitting false records related to the sale of a bear for slaughter. *In re: Mavin Greenly*, U.S. Dep’t of Agric., AWA Docket No. 11-0073, 2012 WL 3877415, at *2–5 (Aug. 22, 2012) (Exhibit Y). In 2013, the decision to revoke Greenly’s AWA license was affirmed on appeal, and the presiding official additionally assessed a civil fine for the AWA violations. Decision and Order at 6–7, *In re: Lee Marvin Greenly*, U.S. Dep’t of Agric., AWA Docket No. 11-0072 (Aug. 5, 2013) (Exhibit Z); Decision and Order at 5, *In re: Lee Marvin Greenly*, U.S. Dep’t of Agric., AWA Docket No. 11-0073 (July 2, 2013) (Exhibit AA); *see also Greenly v. U.S. Dep’t of Agric.*, No. 13-2882, 576 Fed. App’x 649, 649 (8th Cir., Aug. 22, 2014) (denying Greenly’s petition for review of the revocation).

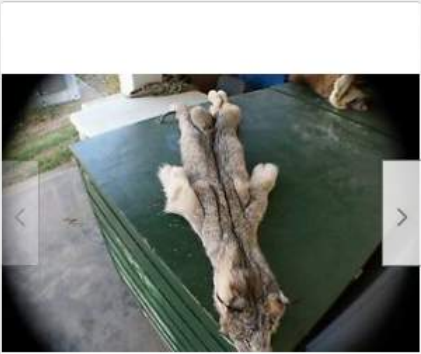
In 2019, the USDA also fined Greenly for exhibiting animals without an AWA license in violation of the Act. Decision and Order at 5–6, *In re: Lee Marvin Greenly*, U.S. Dep’t of Agric., AWA Docket No. 19-J-0075 (July 24, 2019) (Exhibit BB); *see also* Order Denying Respondents’ Petition for Appeal, *In re: Lee Marvin Greenly*, U.S. Dep’t of Agric., AWA Docket No. 19-J-0075 (Nov. 20, 2019) (denying Greenly’s appeal for lack of good cause as to default) (Exhibit CC).

Another facility, Triple “D” Wildlife in Montana, offers “trained animal models for wildlife photography.” *About Us*, Triple “D” Wildlife, <https://triplewildlife.com/triple-d-wildlife/about-us/> (Exhibit DD.1). The facility’s animal “models” include Canada lynx. *Wildlife Models at Triple “D” Wildlife*, Triple “D” Wildlife, <https://triplewildlife.com/wildlife-models-at-triple-d-wildlife/> (Exhibit DD.2). Photographing “primary species,” like Canada lynx, costs \$350/session (about one hour). *Daily Rates*, Triple “D” Wildlife, <https://triplewildlife.com/daily-rates/> (Exhibit DD.3). The facility also hosts a variety of special events involving Canada lynx for which it charges hundreds to thousands of dollars to participate. *Upcoming Events at Triple “D” Wildlife*, Triple “D” Wildlife, <https://triplewildlife.com/events-schedule/> (Exhibit DD.4). The upcoming “Animals in Spring” event—which cost \$1,250 to join—promises that a Canada lynx kitten will be available for photography. *Animals in Spring*, Triple “D” Wildlife, https://triplewildlife.com/wp-content/uploads/twem_event_pdfs/2021/2021_June18-21_Animals_in_Spring.pdf (Exhibit DD.5).

iv. Canada Lynx Raised for Fur

Canada lynx are also kept and killed for their fur. Because the Service drew a distinction between captive and wild animals, it is legal to sell the pelts of Canada lynx, so long as the animals that were killed to obtain the pelts were born in captivity. When the species was listed in 2000, the Service stated that because it did not consider Canada lynx pelts to be particularly valuable, there was little incentive for people to pass the pelts of *wild* lynx off as *captive* lynx. 65 Fed. Reg. at 16,084. However, the Service acknowledged that an increase in prices could change the incentives and put wild Canada lynx at risk. 65 Fed. Reg. at 16,084 (“an increase in pelt prices could create a strong incentive to trap wild lynx and export their pelts.”).

Today, lynx pelts can be sold for as much as \$650 (see images below) (Exhibit EE).



Canadensis Canadian Lynx pelt gorgeous striking color winter prime softest fur

Condition: **New**

Price: **US \$650.00**
[\\$28 for 24 months with PayPal Credit*](#)

Buy It Now

Add to cart


[Add to Watchlist](#)

30-day returns Free shipping Ships from United States

Lynx Canadensis Canadian Lynx pelt tanned gorgeous fur trapper hunter skin/hide. Product Description This is the exact items you see is the exact item you will receive auction. Professionally tanned Canadian lynx pelt. Non threatend Lynx Canadensis Approx. 54 inches tip of nose to back ft tip. Super toughs on ears. QQ Softest beautiful high quality tanned fur. Strikingly beautiful color. free shipping.

Another pelt was recently offered for sale for \$200. *E.g., Premium Label Lynx Pelt—Alaska/Yukon*, Glacier Wear, <https://www.glacierwear.com/premium-quality-lynx-pelt-alaska-yukon.html> (see image below) (Exhibit FF).

Home > Fur Pelts & Hides > Lynx Pelts > PREMIUM LABEL LYNX PELT - ALASKA/YUKON



**PREMIUM LABEL LYNX PELT
- ALASKA/YUKON**

★★★★☆ 1 Review(s) | [Add Your Review](#)

lyx1020

- Alaskan/Yukon Lynx
- Premium Label Semi-Heavy/Heavy Fur*
- Slightly Darker Bellies with Beautiful Black Spots
- Measured from Tip of Nose to Tip of Tail
- Fresh Commercial Tanned
- Very Soft & Stretchy Leather

*GLACIER WEAR PREMIUM LABEL: ONLY THE TOP 5% OF PELTS QUALIFY FOR THIS DISTINCTION, BASED ON QUALITY AND COLOR.

Availability: In stock

~~\$399.95~~ **\$199.95**

Free Shipping on \$100.00*

Source: *Premium Label Lynx Pelt—Alaska/Yukon*, Glacier Wear, <https://www.glacierwear.com/premium-quality-lynx-pelt-alaska-yukon.html> (last visited Apr. 25, 2021) (Exhibit FF).

Fur farms and other facilities that possess Canada lynx can thus kill captive animals to profit off their pelts. For example, Fur-Ever Wild, a combination roadside zoo, fur farm, and captive photography facility, had two Canada lynx in its possession when it was temporarily shut down in response to litigation challenging its treatment of animals in its possession. *See* Erin Adler, *Dakota County Fur Farm Meets Deadline for Moving Wild Animals*, Star Tribune (Apr.

23, 2018), <https://www.startribune.com/dakota-county-fur-farm-meets-deadline-for-moving-animals/480622921/> (Exhibit GG). In the year 2013–2014, the facility’s state license application showed that they had slaughtered a lynx, presumably for its fur. *Notice of Intent to File Suit for Violations of the Endangered Species Act*, Robbins Kaplan (Dec. 2, 2015), 8 (Exhibit HH). The facility was sued under the ESA for its treatment and slaughter of ESA-listed wolves. *Animal Legal Def. Fund v. Fur-Ever Wild*, No. 2017-CV-04496 (D. Minn. 2019); see also *Notice of Intent to File Suit for Violations of the Endangered Species Act*, Robbins Kaplan (Dec. 2, 2015) (Exhibit HH), at 23–43 (deposition transcript of owner admitting to slaughtering listed and protected animals for their fur); *Fur-Ever Wild Agrees to Not Kill Gray Wolves as Lawsuit Settles*, Animal Legal Def. Fund (Dec. 17, 2019), <https://aldf.org/article/fur-ever-wild-agrees-to-not-kill-endangered-wolves-as-lawsuit-settles/> (Exhibit II); Matthew Russel, *This Minnesota ‘Fur Farm’ Has Been Masquerading As An Educational Facility, But the Truth is Coming Out*, The Animal Rescue Site, <https://blog.theanimalrescuesite.greatergood.com/furever-wild/> (last accessed April 11, 2021) (Exhibit JJ).

As our Sanctuary Petitioners can attest, when Canada lynx *are* rescued from fur farms, they often have vision issues, bone abnormalities, and abscesses, sometimes even resulting in the need for amputation of their limbs. Their lives on these farms are short and filled with suffering. For example, George, a Canada lynx who was raised on a fur farm, sold to a private owner, and finally rescued by Petitioner TWS, had to undergo a leg amputation due to an untreated luxated patella he suffered from his time at the fur farm (see images below) (Exhibit KK).



George, a former fur farm resident, after having his leg amputated.

Source: The Wildcat Sanctuary



George after his leg amputation.
Source: The Wildcat Sanctuary

Similarly, Kajeeka arrived at TWS deaf and blind due to malnutrition resulting in a vitamin deficiency from her time at a fur farm. Her eye eventually ruptured, and had to be removed (see images below) (Exhibit LL).



Images of Kajeeka after her eye ruptured.
Source: The Wildcat Sanctuary

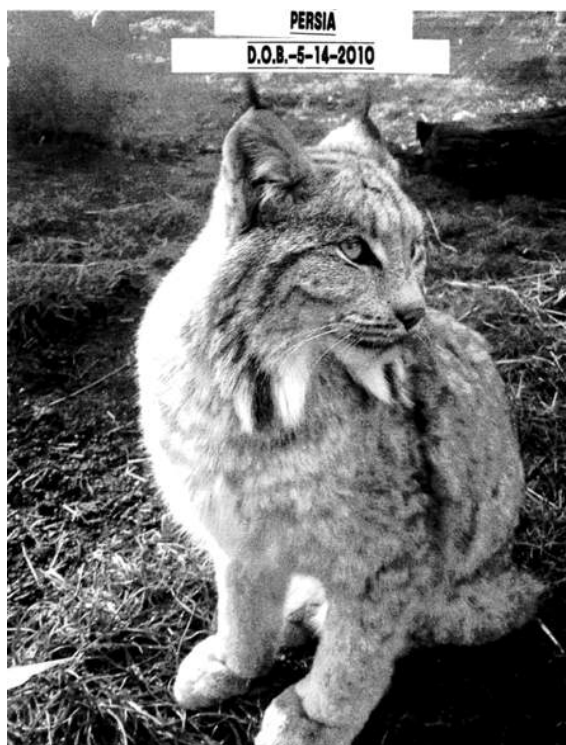
B. These Commercially Exploited Captive Lynx Currently Receive No Protection Under the ESA's Take Prohibition.

Because the Service has drawn a distinction between captive Canada lynx (defined as those “in captivity at the time of the listing,” “born in captivity,” or “lawfully imported or transported into the contiguous United States,” 50 C.F.R. § 17.40(k)(3)) and wild lynx under the ESA, all of these captive lynx—such as those used in exhibition, bred and sold as pets, exploited

in wildlife photography facilities, and raised and slaughtered for their fur—are unprotected by the ESA’s Section 9 “take” prohibition. 50 C.F.R. § 17.40(k)(4) (“You may take lawfully obtained captive lynx without a permit.”). Yet the treatment to which these animals are subjected in captivity often amounts to what would otherwise be an unlawful “take” under the Act if these animals had been born in the wild.

The Special Memories Zoo in Wisconsin—an unaccredited animal exhibition facility—housed two Canada lynx who were kept in tiny, barren, unclean and foul-smelling enclosures, making it impossible for them to engage in their natural behaviors. Complaint at 15–16, *Animal Legal Def. Fund v. Special Memories Zoo*, No. 20-C-216 (E.D. Wis. Feb. 12, 2020) (Exhibit MM). As chronicled by ALDF, this treatment violated multiple provisions of Wisconsin’s animal cruelty and captive wild animal codes. Keeping animals in such unfit enclosures would violate the “take” provision of the ESA if captive members of the species were not unlawfully exempted. Specifically, enclosures that are not a generally accepted means of holding a captive animal and that are not compliant with relevant AWA standards constitutes “harassment” within the meaning of ESA regulations. *See* 50 C.F.R. § 17.3 (defining “harass” under the ESA); 9 C.F.R. § 3.125 (requiring minimum facility standards under the AWA); *id.* at § 3.131 (requiring sanitary conditions for captive animals under the AWA); *see also Kuehl v. Sellner*, 887 F.3d 845, 853–54 (8th Cir. 2018) (holding unsanitary facilities that violate the AWA constitute “harassment” under the ESA). Similarly, conditions that “significantly disrupt [the species] normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering,” would result in prohibited “harassment” if these animals were actually treated as “threatened” like their wild counterparts. *See* 50 C.F.R. § 17.3. The conditions of their confinement also injure the animals and would therefore constitute prohibited “harm” if these animals were treated like wild lynx. *Id.*

In another example, the Olympic Game Farm kept a Canada lynx in its drive-through and walk-through “roadside zoo” in Sequim, Washington. Complaint at 1–2, *Animal Legal Def. Fund v. Olympic Game Farm*, No. 18-CV-06025 (W.D. Wash. Dec. 18, 2018) (Exhibit NN). USDA inspectors had cited the owners for violating the AWA by failing to provide proper veterinary care after they fractured the Canada lynx’s leg with a dart gun. *See id.* at 2. In addition to keeping the Canada lynx in a tiny, filthy enclosure, which, as discussed above, would constitute a “take” under the ESA absent the unlawful and arbitrary disparate 4(d) treatment, the Canada lynx at Olympic Game Farm—named Persia, pictured below—suffered additional harm. The owners, who had not been trained in sedation techniques appropriate for a wild animal like a Canada lynx, shot a dart containing ketamine and diazepam into Persia’s right leg. 30(b)(6) Deposition of Robert Beebe, Olympic Game Farm, No. 18-CV-06025 (W.D. Wash. Jan. 27, 2020) (Exhibit OO). Rather than sedating her, the darting process fractured her leg. *Id.* at 78–79. Breaking Persia’s leg due to lack of training on sedation techniques, combined with the subsequent lack of adequate veterinary care, would undoubtedly constitute a “take” under the ESA because it “harms,” “harasses,” and “wounds” the animal. *See PETA, Inc. v. Wildlife in Need and Wildlife in Deed, Inc.*, No. 17-cv-00186, 2018 WL 828461, at *6–7 (S.D. Ind. Feb. 12, 2018) (reiterating that “harm” includes “actual injury” and “wound” encompasses “the piercing or laceration of skin”).



Persia the Canada lynx at Olympic Game Farm.

Source: OGF-0001821, Discovery in *Animal Legal Def. Fund v. Olympic Game Farm*.

Indeed, because it is not clear whether Persia was born in captivity or in the wild, a key aspect of ALDF’s litigation involves whether or not she is even subject to the 4(d) “take” exemption. The impossibility of determining whether a particular lynx—like Persia—was in fact born in the wild or in captivity highlights the enforcement problem inherent in distinguishing between captive and wild members of a species who share a similar appearance, as the Service rightly observed when it issued its Final Listing Rule. *See* 65 Fed. Reg. at 16,084 (noting the difficulty of distinguishing captive from wild lynx pelts).

Further, many private purchasers of Canada lynx opt to deal with the wild cats’ natural aggression by declawing them. *E.g.*, *Aria*, The Wildcat Sanctuary, <https://www.wildcatsanctuary.org/resident/aria/> (Exhibit PP) (highlighting a Canada lynx at TWS who had been declawed in an attempt to deal with her natural behaviors). Declawing is a painful procedure—akin to surgically removing human fingernails back to the first knuckle—that has specifically been held to constitute an unlawful “take” under the ESA. *PETA, Inc. v. Wildlife in Need*, 2018 WL 828461, at *6 (“declawing harms, harasses, and wounds the Big Cats, [thus] the court finds that Defendants have committed a ‘take’ within the meaning of the ESA.”); *see also* U.S. Dep’t of Agric., Animal Care, *Information Sheet on Declawing and Tooth Removal* (Aug. 2006) (stating that declawing “is no longer considered to be appropriate veterinary care” when “performed solely for handling or husbandry purposes since they can cause considerable pain and discomfort to the animal and may result in chronic health problems.”) (Exhibit QQ). Cleo, another Canada lynx who was rescued by TWS, arrived with a severe back injury and claw regrowth into her paw pads resulting from a botched declaw procedure (see images below) (Exhibit RR).



Images of Cleo's claw growing back into her paw.

Source: The Wildcat Sanctuary

In countless examples, captive Canada lynx—who endure poor enclosure conditions, lack of sanitation, feces buildup, declawing procedures, lack of nutritious food, algae-filled water containers, inadequate veterinary care, physical harm incurred during transport, or actual slaughter for pelts—are not protected by the ESA's statutory take prohibition, despite the fact that the harm to these animals would constitute a “take” under the ESA if the *same actions* were done to a wild member of the *same species*.

C. Sanctuaries Must Expend Resources to Rescue and Care for Captive Canada Lynx.

The lucky ones among the captive-born Canada lynx will eventually find themselves at a sanctuary capable of providing proper species-specific care. These animal sanctuaries are not-for-profit organizations that exist solely to help animals in need of a proper home who have previously been deprived of appropriate socialization, housing, veterinary care, nutrition, and enrichment. These sanctuaries—like Petitioners TWS, BCR, and PAWS—must then use their financial and personnel resources, limited sanctuary space, and advocacy efforts to care for these animals for the remainder of their lives.

Many Canada lynx are surrendered after people purchase them as pets over the internet, only to become frustrated when the cats begin showing natural aggression as they grow out of their kitten age (at about 6 months). Shalico, for example, was surrendered by a college student who had bought him online from a breeder in Montana. *Shalico – In Memory*, The Wildcat Sanctuary, <https://www.wildcatsanctuary.org/resident/shalico/> (Exhibit SS). Another Canada lynx, Ramsey, came to TWS in 2007 after his owner, who bought him as a pet from Bitterroot Bobcat & Lynx (a pet breeder mentioned above), surrendered him. *Ramsey*, The Wildcat Sanctuary, <https://www.wildcatsanctuary.org/resident/ramsey/> (Exhibit TT).

Canada lynx often arrive at sanctuaries in need of intensive veterinary care, resulting from malnutrition, trauma, or neglect. For example, Shay, who had been owned by an exhibitor before arriving at a sanctuary, had suffered blunt force trauma to her face (evident from a crooked and broken jaw). She also eventually went deaf and blind, most likely from a vitamin deficiency she suffered in her early years at the exhibitor's hands, as TWS has reported. *Shay—In Memory*, The Wildcat Sanctuary, <https://www.wildcatsanctuary.org/resident/shay-in-memory/> (Exhibit UU).



Shay at The Wildcat Sanctuary.
Source: The Wildcat Sanctuary

While sanctuaries accept Canada lynx from others who have rescued or surrendered them, they and animal protection groups are also sometimes involved in the actual rescue of these animals. For example, Petitioner BCR worked with the Humane Society of the United States to rescue three bobcats, two Canada lynx, and a Serval, among other animals, from a backyard menagerie in Kansas. *Abandoned Exotic Cats Seized by Kansas Authorities*, Big Cat Rescue (May 5, 2013), <https://bigcatrescue.org/most-daring-rescue-ever/> (Exhibit VV); see also images below (Exhibit WW). The owner was arrested for animal cruelty and other charges under the state Dangerous Regulated Animals Act. *Id.* The Canada lynx and other animals were living in tiny enclosures full of mud and feces, with bits of meat, bones, and fur strewn about. *Id.* The cage for one Canada lynx was so small that rescuers could not even enter the enclosure to get access to the animal in order to transport him. *Gilligan*, Big Cat Rescue (July 8, 2020), <https://bigcatrescue.org/gilligan/> (Exhibit XX).⁶ Sanctuaries like BCR have to spend additional resources on rescuing, transporting, providing remedial veterinary care, and ultimately safeguarding these animals.

⁶ It bears repeating that under the Service's current special 4(d) Rule, none of these inhumane conditions are prohibited by the Endangered Species Act's statutory prohibition against take, simply because the Canada lynx were born in captivity.



Canada lynx in captivity in Atchinson, Kansas before rescue.
 Source: Big Cat Rescue (Ex. WW)



Petitioner BCR relocated Gilligan the Canada Lynx from a backyard menagerie in Kansas to their sanctuary.
 Source: Gilligan, Big Cat Rescue (July 8, 2020), <https://bigcatrescue.org/gilligan/>.

V. CONCLUSION

As demonstrated above, there is no legal justification for excluding the captive members of this species from the protections of the ESA and its implementing regulations, particularly the prohibition against the “take” of any listed species. As also established, because these animals currently do not receive such protection, they are being commercially exploited, harmed, harassed, and even killed. Therefore, for all of the foregoing reasons, Petitioners respectfully request that FWS amend its special 4(d) Rule for Canada lynx to eliminate the exceptions that allow prohibited activities with respect to captive members of the species. Only *that* action—rather than the current exceptions—will actually serve to “conserve” this magnificent species as required by the ESA.