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May 10, 2023

Sent via electronic and certified mail

The Honorable Deb Haaland, Secretary
U.S. Department of the Interior
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The Honorable Martha Williams, Director
U.S. Fish and Wildlife Service
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Re: 60-day Notice of Intent to Sue for ESA Violations

Dear Secretary Haaland and Director Williams:

This letter serves as a 60-day notice of intent to sue you in your official capacities as the Secretary of the U.S. Department of Interior, Director of the U.S. Fish and Wildlife Service (USFWS), and your respective Department and Service. We provide this notice pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g) and implementing regulations.

Absent USFWS action to correct the violations of the ESA identified below, we intend to file suit to enforce the provisions of the ESA, as well as other applicable federal laws.

The listing of grizzly bear of the conterminous (lower 48) United States on the List of Endangered and Threatened Wildlife (50 CFR 17.11(h)) is an ongoing unlawful federal action because it exceeds USFWS' statutory authority under the ESA. This listing unlawfully applies the ESA's protections to an entity that is not a "species" as defined by the Act (16 U.S.C. § 1532(16)).

On March 9, 2022, Idaho sought administrative remedy of this wrong by formally petitioning USFWS for delisting to remove the unlawful listing. However,

on February 6, 2023, USFWS made an arbitrary, unsupported, and unlawful negative “90-day” determination on Idaho’s request. 88 Fed. Reg. 7,658.

The continuing violation of the ESA by a listing that exceeds USFWS’ statutory authority injures Idaho’s sovereign interests, as does USFWS’ unlawful 90-day determination. For example, these violations injure Idaho’s sovereign interests in management of our resident wildlife, particularly where robust, expanding grizzly populations are involved increasingly in human-bear conflict. Idaho’s rural communities face increasing public safety risks and property damage with limited recourse under federal law. Furthermore, the ESA carries criminal and civil liability for the take of grizzly bears in defense of agricultural and other domestic animals and other private property. Idaho officials are currently defendants in an ESA citizen suit seeking to hold Idaho officials vicariously liable for potential take of grizzly bears by private individuals engaged in activities allowed under Idaho law. *See Center for Biological Diversity v. Little*, Case No. 1:21-cv-00479-CWD (D. Idaho). Idaho Fish and Game officials have also received a 60-day notice of intent to bring an ESA citizen suit related to Idaho’s authorization for its lethal removal of a grizzly bear sow with cubs that had been hazed out of Yellowstone Park, later relocated by Montana officials, and then entered Idaho where it became a public safety risk in a rural Idaho subdivision.

The unlawful “lower-48” listing also interferes with the state’s sovereign interests in the proper function of the ESA and in the allocation and prioritization of limited state conservation resources. Idaho, our rural communities, effective conservation of robust grizzly bear populations, and conservation of legitimate species actually warranting ESA protections, deserve the righting of this unlawful listing.

Idaho’s March 9, 2022 petition sought delisting on the basis that the “lower 48” listed entity is not a “species” as defined by the ESA. Idaho’s petition relies primarily on USFWS’ own documents, including the USFWS’ 2021/2022 status assessment and 5-year status review for grizzly bear in the “lower-48” listed entity. It is unfathomable how USFWS could determine its prior documents do not constitute “substantial information” that would lead a reasonable person to conclude that the delisting sought by Idaho’s petition may be warranted. 50 C.F.R. § 424.14(h)(i).

USFWS has directly acknowledged error of the “lower-48” listing for well over a decade, and has made various findings supportive of a determination that the lower-48 listing does not meet the ESA definition of “species” (16 U.S.C. § 1532(16)).

The lower-48 grizzly bear listing is indisputably not a biological (taxonomic) species or a biological (subspecies). Grizzly bear (*Ursus arctos horribilis*) is a subspecies of brown bear (*Ursus arctos*), and most of the world's roughly 50,000-60,000 grizzly bears (inhabiting western Canada and Alaska), and the world's roughly 200,000 brown bears, are not ESA-protected because of their relative security (Figure 1 is from USFWS' status assessment depicting current and historic range of the grizzly bear subspecies taxon).

SSA for Grizzly Bear in the Lower-48 States

January 2022

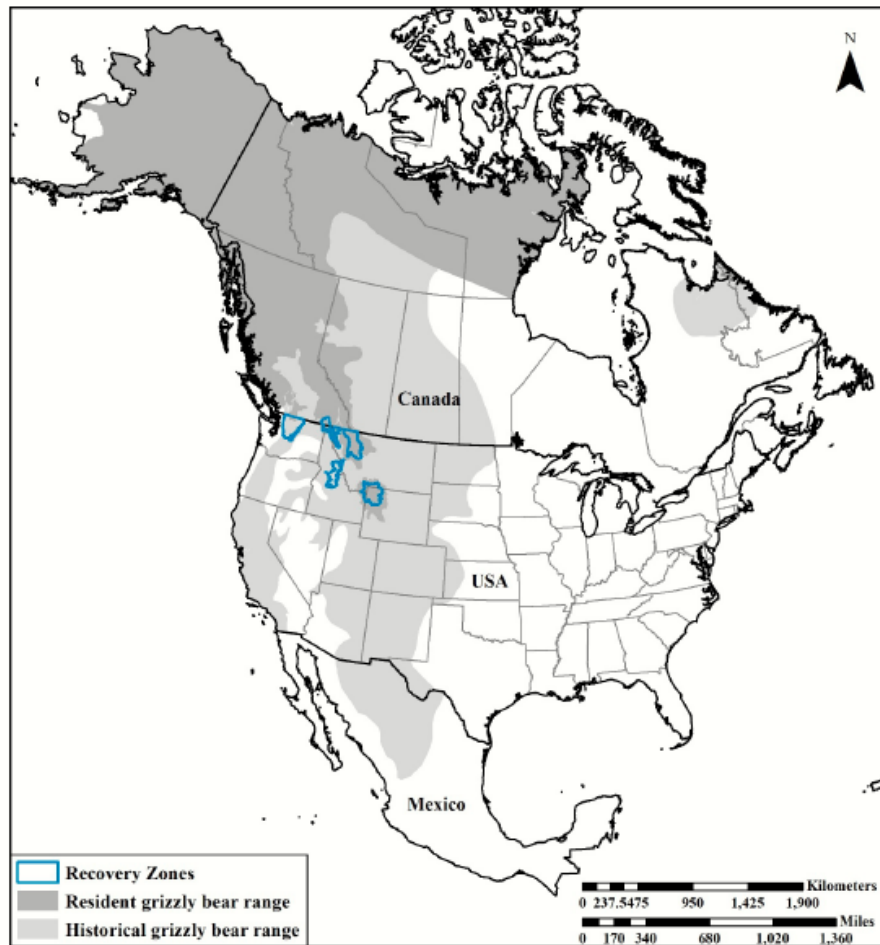


Figure 1. Map of historical and current grizzly bear range in North America and the six recovery zones for grizzly bear in the lower-48 States. Currently, grizzly bears primarily exist in four ecosystems: the Northern Continental Divide (NCDE), Greater Yellowstone (GYE), Cabinet-Yaak (CYE), and Selkirk (SE) ecosystems. There are currently no known populations in the North Cascades and Bitterroot (BE) ecosystems and no known populations outside these defined ecosystems, although we have documented bears, primarily solitary, outside these ecosystems. Ecosystems are generally considered to be the larger area surrounding the recovery zones in which grizzly bears may be anticipated to occur as part of the same population.

There is therefore only one category other than taxonomic species and taxonomic subspecies to which ESA protections may apply, namely a “distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” In 1996, NOAA and USFWS issued a Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act (61 Fed. Reg. 4,722) (1996 DPS Policy). The 1996 DPS Policy notes that “Congress has instructed the Secretary to exercise this authority with regard to DPS’s “* * * sparingly and only when the biological evidence indicates that such action is warranted.” (61 Fed. Reg. at 4,722, citing Senate Report 151, 96th Congress, 1st Session).

In addition to the requirement that a DPS “interbreed when mature,” the 1996 DPS Policy applies requirements for population “discreteness” and “significance” relative to the taxonomic species/subspecies for identifying DPSs. Applying the statutory and regulatory definitions, the 1996 DPS Policy, USFWS’ own documents, and other documents readily available to USFWS, should result in the conclusion that the lower-48 listing does not identify a DPS, and is therefore not a “species” to which ESA listing status may lawfully apply.

USFWS’ dismissive findings to the contrary in its denial of Idaho’s petition exemplify arbitrary and capricious agency action, and violate the legal standards for the ESA and APA.

ESA implementing regulations require the Secretary to make any listing/delisting determination based solely on the basis of the best available scientific and commercial information regarding a species’ status. 50 CFR 424.11(b). The regulations also impose a duty on the Secretary/USFWS to delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available that the listed entity does not meet the statutory definition of a species. 50 CFR 424.11(e)(3).

USFWS’ “90-day Finding Petition Review Form” itself admits that the current range of the “lower 48” listing only includes “portions of Washington, Idaho, Montana, and Wyoming.” The form also admits that historical range only included all or portions of 18 states.” Below is an excerpt from the Form:

Evaluation of a Petition to Delist the Grizzly Bear in the Lower-48 States Under the Act

Species and Range

Does the petition identify an entity for delisting that is currently listed under the Act (i.e., the petitioned entity is identical to the entity currently listed)?

- Yes
 No

- Grizzly bear (*Ursus arctos horribilis*): Lower-48 States
- Historical range: throughout all or portions of Washington, Oregon, California, Idaho, Montana, Wyoming, Nevada, Colorado, Utah, New Mexico, Arizona, North Dakota, South Dakota, Minnesota, Nebraska, Kansas, Oklahoma, and Texas
- Current range: portions of Washington, Idaho, Montana, and Wyoming

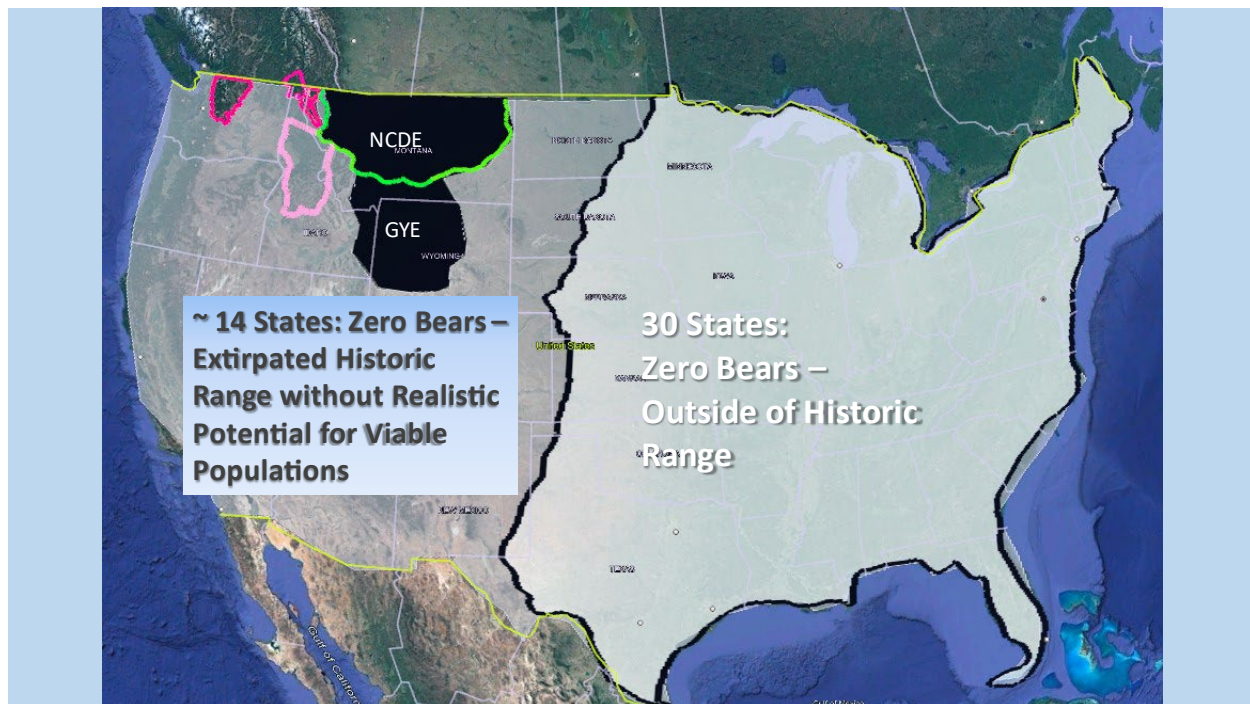
The Form also references USFWS' 2021 status assessment, which reflects that grizzly bear natural recolonization is "almost impossible" in any areas of the 14 states with historic range that that are now outside of current range (i.e., states containing only extirpated historic range). This Assessment also found that even if a population were reintroduced in remaining suitable grizzly habitat in these 14 states, "there is a very low likelihood of natural linkage to existing populations needed to maintain long-term fitness and become self-sustaining" (2021 Assessment, pages 54-55).

In making findings on Idaho's petition, USFWS stated that "[t]he Act does not require the Service to make an explicit finding of interbreeding among various groups of organisms that make up a DPS." USFWS' interpretation in this regard is arbitrary and capricious and in violation of the ESA. The ESA and its implementing regulation include the words "interbreeds when mature" specific to "distinct population segment." USFWS' interpretation unreasonably renders the express use of "interbreeding" specific to DPSs in the statute superfluous, resulting in "interbreeding" being the same for taxonomic species, subspecies, and DPSs. In addition, USFWS' interpretation is erroneous and inconsistent with DPS policy, which indicates DPSs and "populations" are below the "subspecific level" and logically must "be circumscribed in some way that distinguish [them] from other representatives of the species." 61 Fed. Reg. 4,724.

USFWS' own documents do not describe grizzly bear in the "lower-48" states as a discrete population. Instead, they reflect that they listed "lower-48" entity defines an area that largely never supported a grizzly bear population or is now incapable of supporting a viable, self-sustaining grizzly bear population:

- 30 states of the 48 states are outside of grizzly bear current and historic range entirely.

- 14 states consist of a combination of unoccupied/extirpated historic range and areas outside of historic range.
- 4 states with current range that also include areas of unoccupied/extirpated historic range and areas outside of historic range (such as the high desert areas of Idaho and Washington).



USFWS’s own documents, including the contemporaneous 90-day findings on other grizzly bear delisting petitions, describe portions of the 4 states south of Canada with grizzly bears (Idaho, Montana, Washington, Wyoming) as encompassing 6 “Ecosystems” or “Recovery Areas.” These areas do not form a single interbreeding distinct population segment. Instead, USFWS’ own findings have described two of these Ecosystems as extirpated populations that are discrete or “wholly separate” from the other four Ecosystems with current grizzly bear populations. USFWS has also made various findings that the other four Ecosystems (or at least three of them) are discrete from each other. USFWS findings also call into question the “significance” to the subspecies taxon of Ecosystems identified with limited carrying capacity of 50 to 350 bears.

As referenced in Idaho’s petition, USFWS has made various findings that all 6 (or at least 5) of these recovery areas “may” warrant or have warranted differing ESA status (see, e.g., 82 Fed. Reg. 57,699):

- USFWS has previously determined that the Greater Yellowstone Ecosystem identifies a discrete population, reproductively isolated from other populations, supporting its identification as a DPS independent from the lower-48 listed entity. USFWS has twice issued delisting rules identifying this ecosystem as a DPS for purposes of delisting. E.g., 82 Fed. Reg. 30,502-633 (2017); *see also* 83 Fed. Reg. 18,741

After analysis in response to the court remand of the 2007 and 2017 rules, on February 6, 2023, USFWS made a favorable “90-day” petition finding that identifying and delisting a Greater Yellowstone Ecosystem DPS “may be warranted.” 88 Fed. Reg. 7,660. This area is shown in black on the preceding map (tri-state area in Wyoming, Montana, and Idaho).

- On February 6, 2023 USFWS made a favorable “90-day” petition finding that identifying and delisting the grizzly bear population in the NCDE as a DPS “may be warranted.” Delimitation of the petitioned DPS was based on its discreteness from other grizzly bear populations south of Canada and bounded by the international US-Canada border on the north (with Montana bears not actually physically discrete from those in Canada). This area is shown in black on the preceding map in Montana. 88 Fed. Reg. 7,7659-60.
- USFWS has previously identified the North Cascades Ecosystem as a discrete extirpated population, that even if reintroduced would be discrete and reproductively isolated from all other US populations. In 2022 USFWS revived a previous proposal to reintroduce a small number of bears to this Ecosystem as a nonessential, experimental population because of the absence of a grizzly bear population and the “geographically separate” nature of this Ecosystem from other nonexperimental populations. 87 Fed. Reg. 68,190.
- USFWS has previously identified the Bitterroot Ecosystem as a discrete extirpated population. In 2000, USFWS identified an Experimental Population Area as suitable for reintroduction of nonessential, experimental population because of the absence of population and its “geographically separate” nature from other nonexperimental populations. 65 Fed. Reg. 69,624; *see also* 83 Fed.

Reg. 18,739-40 (“the [Bitterroot Ecosystem] is unoccupied and isolated from other populations...”). A district court decision has recently ordered USFWS to supplement the 2000 EIS prepared for 2000 10j rulemaking. *See Alliance for the Wild Rockies v. Cooley*, Case No. 21-136-M-DWM.

- USFWS has previously identified the Selkirk Ecosystem and Cabinet-Yaak Ecosystems at times as a single discrete population delineated at the U.S. – Canada border (with U.S. bears not actually physically discrete from those in Canada). E.g., 64 Fed. Reg. 26,275 (1999). At other times USFWS has identified the Selkirk and Cabinet-Yaak as two populations discrete from each other. E.g., 82 Fed. Reg. 57,699. USFWS has made various findings that uplisting of these Ecosystems as single DPS or a combined DPS was warranted (but precluded), in part based on of the Ecosystems’ physical discreteness from other U.S. populations. E.g., 64 Fed. Reg. 26,725. USFWS’ Grizzly Bear Recovery Office has at times recognized that the small carrying capacity of these Ecosystems (as well as the North Cascades and Bitterroot) might preclude them from qualifying as significant relative to the subspecies taxon. E.g., USFWS Administrative Record for the 2017 GYE Delisting Rule, *Crow Indian Tribe v. United States*, Consolidated Case No. 9:17-cv-00089-DLC, FWS_Del Doc_52870-2871; FWS_Del Em_00000150105-6 (describing DPS policy compliance issues).

USFWS’ response to Idaho’s petition fails to provide reasonable explanations for the parade of previous and contemporaneous USFWS findings, which are inconsistent with its 90-day determination on Idaho’s petition regarding the lower-48 listed entity. USFWS’ determination also fails to provide a reasonable explanation as to how it is consistent with the requirements for an ESA designation as a distinct population segment which interbreeds when mature.

The bar for favorable 90-day determinations that a petitioned listing/delisting action “may be warranted” is supposed to be low. However, on February 6, 2023, USFWS made an arbitrary, unsupported, and unlawful negative “90-day” determination. USFWS ignored ample information supportive of the petitioned action presented in Idaho’s petition, USFWS’ own documents, and other documents readily available to USFWS. USFWS failed to provide a reasonable explanation for this decision, including its inconsistency with the 1996 DPS Policy, past determinations, and contemporaneous findings on petitions to identify major portions of the “lower 48” listing as independent DPSs.

USFWS' inconsistent determinations and findings support a determination that USFWS has violated its statutory and regulatory duties to make delisting decisions based on best available scientific and commercial information, and to delist entities that do not meet the statutory definition of species.

In the absence of administrative action to retract USFWS' negative determination on Idaho's petition and action to remove the unlawful "lower-48" listing, and the associated ESA listing of an experimental nonessential "10j" population, Idaho is prepared to bring suit.

Idaho does not send this notice lightly. We prefer to invest the resources of federal and state conservation agencies on actual conservation, rather than on lawsuits. However, the current listed entity does not meet the ESA definition of "species," and we have robust grizzly bear populations that continue to cause conflict in our rural communities and injure Idaho's sovereign interests in managing our resident wildlife and conservation resources.

Idaho has analyzed the ESA, implementing regulations, USFWS' ESA policies, and a tangled web of court decisions interpreting "lower-48" listings and DPS designations. Idaho determined the reasonable course of action is to address the primary cause of judicial concern with the "lower-48" listing at its source: remove the erroneous 1975 listed entity that was not based on taxonomy, actual populations, or biology from the beginning, and that is not an entity on which current ESA jurisdiction may be based.

Addressing this violation is not merely a matter of legal compliance, it is a matter of restoring the statutory priorities and purpose of the ESA. Although well-intentioned, the 1975 listed entity of grizzly bears of the conterminous lower-48 states is not a "species" under the ESA, and continuing to consider it to be one means that ESA resources are being focused on something that is not a "species" at all. Protecting a non-species comes at the expense of protecting imperiled entities that are species. As the 1996 DPS Policy recognized, the ESA "is not intended to establish a comprehensive biodiversity conservation program, and it would be improper for the Services to recognize a potential DPS as significant and afford it the Act's substantive protections solely or primarily on these grounds." 61 Fed. Reg. 4,724.

If there were a DPS of grizzly bears that interbreeds when mature, that is discrete and significant relative to the taxon, and that does warrant listing as an endangered or threatened species consistent with Congress' directive to use DPSs

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“sparingly,” then the ESA makes it incumbent on the USFWS to follow the administrative process specified for listing.

Please contact Mike Edmondson, Administrator Idaho Governor's Office of Species Conservation at (208) 332-1552 or Jim Fredericks, Director Idaho Department of Fish and Game, if you wish to discuss the scientific basis regarding this matter further. Idaho's Office of the Attorney General is also available to discuss the legal aspects of this matter with your Solicitor's Office or with your Department's representatives at the U.S. Department of Justice.

Sincerely,



BRAD LITTLE
Governor
State of Idaho



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State of Idaho