Via email and U.S. Mail

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May 8, 2023

RE: 60-Day Notice of Intent to Sue under the Endangered Species Act:
State of Montana Wolf-Furbearer Trapping Program

You are hereby notified that the Flathead-Lolo-Bitterroot Citizen Task Force (Notifier) intends to file a citizen suit pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g) for violations of the ESA, 16 U.S.C. § 1531 et seq. Notifier will file suit after the 60 day period has run unless the violations described in this notice are remedied. The name, address and phone number of the Notifier giving notice of intent to sue is as follows:

Patty Ames, President
Flathead-Lolo-Bitterroot Citizen Task Force
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Tel: 415-535-3440

The name, address, and phone number of counsel for the notifier is as follows:

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STATEMENT OF LAW

The grizzly bear was listed pursuant to the Endangered Species Act (ESA) (16 U.S.C. § 1531 et seq.) in the lower 48 states as a threatened species in 1975. 40 FR 31,734 (1975). A "threatened" species is "any species which 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 ESA provides for the "conservation of the ecosystems upon which threatened and endangered species depend." Id. §1531(b) "Conservation" means "the use of all methods and procedures which are necessary to bring any ... species to the point at which the measures provided pursuant to this chapter are no longer necessary." Id. § 1532(3).

The ESA requires that all federal agencies work toward recovery of listed species, and it contains both a procedural requirement and a substantive requirement for that purpose. Substantively, it requires that federal agencies ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the adverse modification of critical habitat for such species. 16 U.S.C. § 1536(a)(2). To carry out the duty to avoid jeopardy and adverse modification of critical habitat, ESA § 7 sets forth a procedural requirement that directs an agency proposing an action (action agency) to consult with an expert agency, in this case, the U.S. Fish & Wildlife Service (FWS), to evaluate the consequences of a proposed action on a listed species. 16 U.S.C. § 1536(a)(2).

If FWS concludes that the action will not result in jeopardy but may incidentally "take" or "harm" a protected species, the expert agency has authority to provide the action agency with an "incidental take statement." This statement must specify the impact of such incidental taking on the species, set forth "reasonable and prudent measures" that the expert agency considers necessary to minimize such impact, and include the "terms and conditions" that the action agency must comply with to implement those measures. 16 U.S.C. § 1536(b)(4). If the action agency adopts such measures and implements their terms and conditions, the resulting level of incidental take authorized in the incidental take statement is excepted from the ESA's ban on take. During this assessment process, the agencies must use the best available science.

The U.S. Court of Appeals for the Ninth Circuit holds that this regulatory language "admit[s] of no limitations" and that "there is little doubt that Congress intended to enact a broad definition of agency action in the ESA . . ." *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). Thus, ESA consultation is required for individual projects as well as for the promulgation of land management plans and standards. Id.

The procedural consultation requirements in the ESA are judicially enforceable and strictly construed: If anything, the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements [than the provisions of the National Environmental Policy Act], because the procedural requirements are designed to ensure compliance with the substantive provisions. If a project or program is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible. *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

LEGAL VIOLATIONS

1) violations ESA §9 prohibitions on taking;
2) violations of ESA §10;
3) failure to analyze the nexus between illegal takings of grizzly bears and strategic level grizzly bear recovery contained in the Grizzly Bear Recovery Plan, the Grizzly Bear Conservation Strategy and requirements of the federal court ruling in *Crow Tribe et al. vs. U.S.*

Illegal takings under ESA § 9.

FWS and the State of Montana are in violation of ESA §9 by allowing unregulated illegal takings of grizzly bears in Montana as a result of wolf and furbearer trapping seasons administered by the State of Montana's Department of Fish, Wildlife & Parks (2022). No required Incidental Take Statement (ITS) has been prepared and no required Incidental Take Permit (ITP) has been issued.

FWS and the State of Montana are in violation of §10 by failing to develop an approved Conservation Plan with required mitigation to offset impacts including but not limited to habitat restoration and land acquisition and by failure to seek an ITP.

The ESA definition of "take" is "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." See 16 U.S.C. §1532(19). Incidental take is an unintentional, but not unexpected taking which is also illegal. For example, in cooperation with FWS, agencies must prepare an Incidental Take Statement which estimates the amount of allowable incidental take resulting from activities authorized by their Plans, Projects and Programs. This baseline is not to be exceeded. Trap bycatch of grizzly bears resulting in wounds and potential death is an increasing source of additional prohibited take under the precluded actions of "harm, wound, trap, capture, kill" that must be accounted for by FWS and the State of Montana, and FWS and the State of Montana must take actions to prevent or at least reduce it.

Under §9, it does not matter how many total animals are taken or how many are injured, any unpermitted takings are illegal. *See*, e.g., *Animal Welfare Inst. v. Martin*, 588 F.Supp.2d 70, 98

(D.Me. 2008) (holding that "even if a lynx is harmlessly trapped, it has been subject to a prohibited take under the [ESA]").

Montana has a central role in the recovery of grizzly bears. All or part of four Grizzly Bear Recovery Zones are located within Montana, as are all of both Demographic Connectivity Areas established in the Grizzly Bear Conservation Strategy. Most of the other potential connectivity areas identified by scientists in peer-reviewed publications are located within Montana (Peck et al. 2017, Sells et al. 2022). Almost all of the western half of Montana is within the known distribution and may be present areas for grizzly bear (see Figure 1).

The Recovery Zones are an artifact of history with the bounds set in the 1993 Recovery Plan which has not been updated. Since that time scientific research has established that none of the Recovery Zones are capable of independently supporting a viable population of grizzly bears. The federal courts ruled in *Crow Tribe et al. vs. U.S.* that a plan to connect the isolated populations is required. In two of the Recovery Zones in Montana a larger Demographic Monitoring Area, along with the two Demographic Connectivity Areas, have been defined as the area within which population monitoring and habitat protections shall occur. Overall, grizzly bears within Montana occupy and are present outside of Recovery Zones in a geographic area that is larger than the Recovery Zones (see Figure 1).

Therefore, any voluntary actions by the State of Montana within Recovery Zones are insufficient both to prevent illegal unauthorized taking of grizzly bears and to prevent unauthorized illegal takings outside the Recovery Zones within the Demographic Monitoring Areas, Demographic Connectivity Areas and other habitats used by bears.

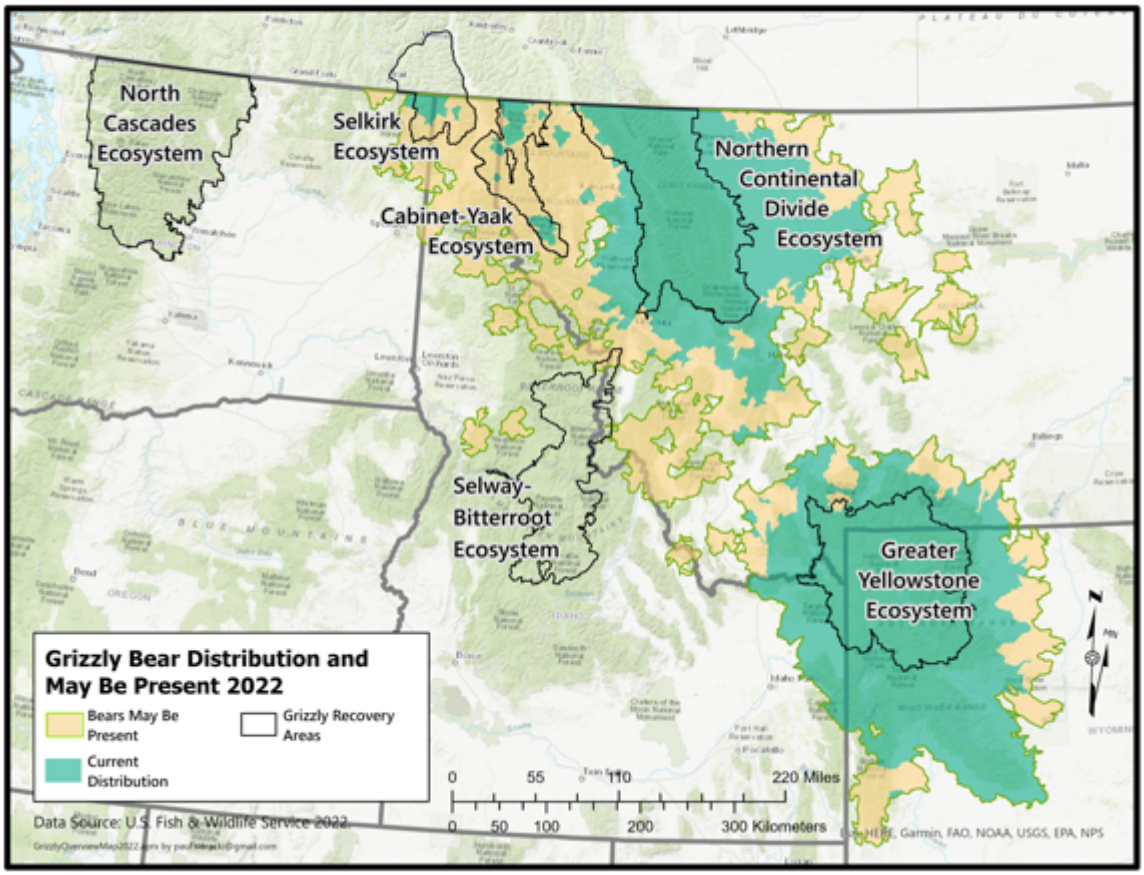

Figure 1. Grizzly Bear Range 2022. Data Source: U.S. Fish & Wildlife Service.

Dr. Christopher Servheen and 34 other wildlife professionals (2022) say it is a certainty that grizzly bears in Montana will be maimed and killed by traps set for wolves. In fact, the Montana Department of Fish, Wildlife & Parks reported that between 2012-2022 six grizzly bears were non-target captures of traps including one grizzly caught in a leg-hold trap set for wolves. At least two other grizzly bears suffered foot injuries prior to release. However, these records are incomplete. Other incidents in Montana include the Rogers Pass area where traps set for coyotes and baited with dead foxes caught 2 grizzly bears including a grizzly bear cub that was released. The other grizzly was seen running off with a trap on its foot. In the upper Blackfoot Valley a leghold trap set for bobcats was found with grizzly bear toes and claws in it (pers. comm. with James Jonkel, Montana Fish, Wildlife & Parks Region 2 Bear Manager). These three takings occurred outside of the NCDE Recovery Zone.

These are only the reported or detected known takings of grizzly bears in Montana. In a case dealing with illegal taking of lynx in Idaho, FWS biologists estimated that "for every reported incidental take of lynx, one incidental take remains unreported due to the fact that many trappers will not report bycatch of threatened and endangered species." *Center for Biology Diversity v. C.L. Otter et al.,* 2016 WL 233193 (D. Id., Jan. 8. 2016). In fact, most trap related injuries remain undetected unless the bear is subsequently trapped for research or management (Lamb et

al. 2022). There are reasons to believe it may be even higher for grizzly bears which have far higher numbers and in a far larger geographic area of Montana than lynx.

Cattet et al. cited explanations for why mortalities may not be detected including that scavengers or predators consume carcasses, animals die in concealed places, carcasses decompose quickly, radio transmitters malfunction, or animals fitted with radio transmitters emigrate from the study area.

The current political administration in Montana and the Montana Fish and Wildlife Commission enacted wolf (*Canis lupus*) regulations that allow year-round trapping on private lands, hunting at night, spotlighting, trapping with baits and snares and even cancelling all setbacks from public trails and campgrounds in two counties. These policies have been called draconian, unsporting and a violation of fair chase principles by wildlife biologists and groups.

Takings of grizzly bears have also been reported in States and Provinces adjacent to Montana and may have affected bears that live part time in Montana. A grizzly bear very close to the northwest Montana border had a snare embedded in its neck and would have died without intervention (pers. comm. with Wayne Kasworm, FWS grizzly bear recovery manager; see Figure 2).

Figure 2. Grizzly with snare cable embedded in its neck. Photo Wayne Kasworm.

At least 5 grizzly bears in southeast British Columbia are known to have been caught in foothold traps set for wolves and several more in adjacent study areas and a grizzly bear in Wyoming was caught in a snare set for wolves (Lamb et al. 2022). McLellan et al. (2018) report one grizzly bear killed after being caught in a snare in an area close to Montana in British Columbia. In Wyoming, at least four grizzly bears have suffered injuries including trail cam pictures in 2022 showing a grizzly with an amputated left foot (Figure 3) and a female grizzly with cubs missing two toes on her left foot. In 2017 an adult grizzly was photographed with a conibear trap attached

to its right front paw and in 2015 a grizzly cub was caught in a conibear trap set for marten. (wyominguntrapped.org).

Figure 3. Grizzly with missing front paw. Photo wyominguntrapped.org

The FWS has been aware that taking of grizzly bears by trap bycatch is common yet the true level of taking in Montana is not known because the FWS has taken no action to require an ITS and ITP. Many furbearers are trapped using body-gripping traps designed to kill quickly and humanely—for the target species. Body-gripping traps, especially those set for marten and weasel, are a threat to grizzly bears causing serious injury including amputation of feet and toes, bone loss and death. A study in British Columbia (Lamb et al. 2022) found that ≈ 7% of all grizzlies in their study sample had missing toes on front paws.

Figure 4. Grizzly missing front foreleg.

A major cause was bears sticking their feet into baited body-grabbing traps for marten. This is not a rare or isolated occurrence. The study found the same pattern in a review of other studies including 5% of grizzly bears surveyed in the Purcell Mountains in British Columbia and several grizzly bears observed walking around with traps still attached to one of their front feet. These include a photograph from Wyoming and a grizzly killed by a hunter in British Columbia with traps on their feet. Lamb et al.'s photographs of bears with amputated feet/toes suggested that traps had been on their feet for weeks or months. The lack of circulation caused necrosis and the injured portion of the foot eventually sloughed off.

The International Standards Technical Committee rated amputation of three or more digits and any amputation above the digits as Severe Trauma (cited in Lossa et al. 2007). A grizzly bear

who has lost claws, toes or a front foot will have reduced capability of digging for food and for excavating a viable winter den. This can reduce health, reproduction and survival.

Left: Photos show grizzly bears with missing claws and toes discovered through research. Right: Photos show mutilation of grizzly bear feet due to being caught in a trap. Source: Lamb et al. (2022).

Along with body-gripping traps, snares and foot and leg-hold traps for wolves, coyotes and other canids are a direct threat to grizzly bears. Snares, whether restraining or killing types, were found to be inhumane and their use never justified (Rochlitz 2010). Ten states have banned or restricted their use on public lands including the western states of Colorado, Arizona, New Mexico, Washington and California. However, in Montana there have been efforts to allow snares in all

areas outside Recovery Zones. The use of snares has been increasing due to their low cost (around $1 each) and light weight, allowing a trapper to carry 20 snares with ease.

Cattet et al. (2008) reported that one grizzly died approximately 10 days after being captured by a leghold snare of capture myopathy which is a physical reaction to the stress and trauma associated with snaring. FWS (2021) reported the death of a subadult male grizzly from exertional myopathy after being trapped in 2019 (Status Assessment for Grizzly Bear at 151).

Cattett et al. also found that 70% of grizzly bears captured by leg-hold snares had elevated levels of serum indicating some level of trauma and muscle injury with mobility reduced for up to a month or more. Multiple captures have an effect on body condition with reduced potential for growth, reproduction and survival.

In Montana, snares for most species are required to break loose with more than 350 pounds (approx.159kg) of dead pull strength) while for wolves this requirement is 1,000 pounds (Montana Department of Fish, Wildlife & Parks 2022). However, Lamb, et al. (2022) found that on average an adult grizzly bear has about 342 pounds (155kg) of dead pull strength, not enough to break free. Cubs and sub-adults with less pull strength are particularly vulnerable. While bears can generate more pull strength with a running start up to 20 feet, this is not recommended due to the elevated risk of severe injury and damage to or loss of traps. Lamb et al. also tested traps and could only free trapped adult grizzly bear feet about 20% of the time.

In addition to physical injury, trapped grizzly bears are also vulnerable to being killed by other grizzly bears and Lamb et al. report one cub was killed while its mother was trapped.

Montana Fish, Wildlife & Parks (2022) recommends: “use baits and lures that attract target species but not other animals.” However, Lamb et al. found that baited traps definitely attracted grizzly bears with younger bears more vulnerable.

To prevent bears from having their feet caught in traps set for marten, Lamb et al. recommend that the elevated cubby boxes have openings large enough to pass a marten but too small for a bear to fit a whole foot through. By regulation, in southeast British Columbia this dimension is no larger than 3.5 inches (8.9cm). In Montana, there are no regulations or recommendations specific to preventing bycatch of grizzly bears. There is a non-binding recommendation that cubby boxes have a closed front with an opening of 2.5 x 2.5 inches to prevent bycatch of fisher but the regulations for ground sets allow openings up to 52 square inches which is many times the recommended opening.

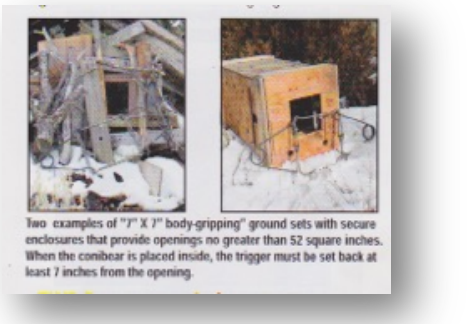

Figure 5. Montana trapping regulations allow openings too large to prevent takings of grizzly bears.

Conibear "body-gripping" traps are allowed in grizzly bear habitat if they have a jaw spread less than or equal to 5" and can be elevated at least 48" above the surface. These are well within the reach of even a subadult grizzly bear and wide enough to catch a front foot.

Another issue is trap-checking requirements. To prevent serious injury or death to a grizzly bear, it must be released within 24 hours (Cattett et al. 2008). Wolf traps are required to be checked every 48 hours but for all other species Montana Fish, Wildlife & Parks only recommends checking traps at least once every 48 hours but does not require it. Many traplines are only checked once a week meaning grizzly bear bycatch could go undetected for days and lead to mortality.

Failure to analyze the nexus between illegal incidental take and strategic level grizzly bear recovery contained in the Grizzly Bear Recovery Plan and the Conservation Strategy.

On page 47 the Grizzly Bear Conservation Strategy states:

> *Population Connectivity*
> Connectivity among grizzly bear populations mitigates genetic erosion and increases resiliency to demographic and environmental variation. One way to mitigate potential impacts from climate change is through well-connected populations of grizzly bears in the lower-48 States and Canada. This Conservation Strategy envisions the NCDE serving as a "source population" for grizzly bear populations in the CYE, BE, and GYE. Attaining habitat connectivity between these areas would benefit multiple wildlife species and would be consistent with the USFWS Grizzly Bear Recovery Plan (USFWS 1993), the Grizzly Bear Management Plan for Western Montana (Dood et al. 2006), the Grizzly Bear Management Plan for Southwestern Montana (MFWP 2013), the interagency statement of support for the concept of linkage zones signed by the State wildlife agencies in Montana, Washington, Idaho, and Wyoming and the USFS, USFWS, USGS, NPS.

The Ninemile Demographic Connectivity Area is the only area than can link the NCDE, Cabinet-Yaak and Bitterroot Grizzly Bear Recovery Zones, which would greatly decrease the risk of extinction to the species by providing demographic and genetic aid. This area on the Lolo National Forest was designated as a Demographic Connectivity Area in the Conservation Strategy for Grizzly Bears in the NCDE (FWS 2018) to provide habitat for female grizzly bears and their cubs. It plays a significant role in regional recovery planning.

FWS will also prepare a new EIS on Bitterroot Recovery as per the ruling in *Alliance for the Wild Rockies v. Cooley*, CV-21-136-M-DWM, (D. Mont. Mar. 15, 2023) and estimates it will be completed over the next four years (Frazer declaration). At this time the strategy for this Recovery Zone is natural immigration through historically occupied habitats.

In *Crow Tribe et al. v. U.S.* the FWS was required to produce a plan for genetic connectivity with the currently isolated Yellowstone population. The White House Council on Environmental Quality issued a policy on habitat connectivity on March 21, 2023. This policy directs federal agencies to work with the States to reduce adverse impacts on connectivity.

The State of Montana Furbearing Trapping Season and Regulations represent an illegal taking of bears outside Recovery Zones and threaten natural connectivity of grizzly bear populations required for long term viability and sustained recovery.

CONCLUSION

The agency has ignored its duties under the ESA, 16 U.S.C. §1531 et seq., to ensure that its actions do not jeopardize threatened and endangered species, that their actions do not result in unauthorized take of these species of wildlife, and that their actions promote conservation and recovery of these species. An Incidental Take Statement is required that calculates both the known and likely level of grizzly bear take from Montana's trapping program but also considers the effects of taking from trapping bycatch on total mortality of grizzly bears in Montana. An approved Conservation Plan must be completed and only then can an Incidental Take Permit be issued to the State of Montana. The agency's actions in this matter represent an unlawful departure from its legally binding mandate to protect and recover threatened species and their habitats. If the violations of law described above are not cured within 60 days, Notifier intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

/s/ Timothy M. Bechtold
Counsel for Notifier