

## BECHTOLD LAW FIRM, PLLC

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PO Box 7051  
Missoula, Montana 59807  
406-721-1435

June 17, 2024

Via email and U.S. Mail

Deborah Haaland  
Secretary of the Interior  
1849 C Street NW  
Washington, DC 20240  
execsec@doi.gov

Martha Williams, Director  
U.S. Fish & Wildlife Service  
1849 C Street NW  
Washington, DC 20240  
martha\_williams@fws.gov

Hilary Cooley, Grizzly Bear Recovery Coordinator  
U.S. Fish & Wildlife Service  
hilary\_cooley@fws.gov

Greg Gianforte, Governor  
Montana State Capitol  
1301 East Sixth Avenue  
Helena, MT 59601  
Governor@mt.gov

Dustin Temple, Director  
Montana Fish Wildlife & Parks  
1420 East Sixth Avenue  
Helena, MT 59601  
dustin.temple@mt.gov

**RE: 60-Day Notice of Intent to Sue under the Endangered Species Act:  
State of Montana Grizzly Bear Augmentation 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  
P.O. Box 9254  
Missoula, Montana 59807  
Tel: 415-535-3440

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

Timothy Bechtold  
Bechtold Law Firm, PLLC  
PO Box 7051  
Missoula, MT 59807  
Tel: 406-721-1435

### **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 (9<sup>th</sup> Cir. 1985).

This action is ripe for judicial review because the State of Montana has hired staff to implement the augmentation program with the full knowledge of the FWS. However, based on information and belief, the FWS has not announced any agency position on the augmentation plan.

The purpose of the 60-day notice requirement is designed to encourage the parties to come to an agreement short of litigation.

### **LEGAL VIOLATIONS**

- 1) Violations of ESA §9 prohibitions on taking;
- 2) failure to prepare an Environmental Impact Statement or Environmental Assessment with alternatives as per prior precedent;
- 3) failure to use the best available scientific and commercial information as required by the ESA.

#### **Illegal takings under ESA §9.**

FWS and the State of Montana are in violation of ESA §9 by authorizing the taking through capture and removal of grizzly bears from the Northern Continental Divide Ecosystem (NCDE) for translocation into the Greater Yellowstone Ecosystem (GYE). Grizzly bears in both of these ecosystems are listed as threatened under the ESA.

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 that estimates the amount of allowable incidental take resulting from activities authorized by their Plans, Projects and Programs. This baseline must not be exceeded. However, the State's brief 7-page summary of the project states that the removals may result in exceeding the allowable grizzly bear mortality.

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 in 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 in Montana (Peck et al. 2017, Sells et al. 2022).

### **Failure to Prepare an Environmental Impact Statement or Environmental Assessment**

FWS is the agency with management authority for grizzly bears in the lower 48 states. Its plan to augment the Cabinet Mountains grizzly bear population with grizzly bears from the NCDE had an Environmental Assessment with public comment (FWS 1990). Grizzly bears in both the NCDE and the Cabinet-Yaak (CYE) are listed as threatened. Transplanted bears are recorded as mortalities for the NCDE.

FWS is required to prepare a discrete environmental document with alternatives and must reveal and discuss impacts on the source population of the augmentation scheme. It may not rely on a draft assessment in which the augmentation program is a seven-page appendix with one literature citation. No alternatives to the proposed action were discussed or considered nor were potential impacts to the source population analyzed and revealed. The draft is not an impact assessment.

The State's Draft Management Plan does not actually protect any habitat so it cannot be construed to be a Habitat Conservation Plan for the purposes of obtaining an Incidental Take Permit under ESA Section 10.

Moreover, the State of Montana made a decision to implement the plan without releasing a final EIS by hiring two staff to work on the augmentation program in 2024 (McDonald, IGBC meeting). McDonald also announced bears would be moved as soon as Summer of 2024. There is no indication that the State has prepared a Habitat Conservation Plan or received an Incidental Take Permit. In fact, no authority for this action has been cited at all.

Conservation Strategies are post-delisting documents and have no legal effect at this time (Cooley, response to 60-day NOI, 2023) and thus cannot supply legal authority for the augmentation program.

Many issues have not been analyzed and revealed, including the cumulative impacts of using the NCDE as a translocation source for the Cabinet Mountains augmentation program, the North Cascades reintroduction, and potentially a Bitterroot reintroduction in addition to the GYE augmentation plan. The North Cascades plan required a full EIS. The Bitterroot is undergoing an EIS process.

The GYE augmentation plan does not consider other alternatives to the action, such as natural immigration through protected habitat and highway passages, which are likely the true long term solutions to genetic concerns in the GYE population.

To the extent that the FWS has authorized the State of Montana to proceed, it is in violation of the ESA requirement to use the best available scientific information as well as FWS's own obligations to produce an EIS or EA with public comment.

There is no Federal Register Notice authorizing the augmentation program, yet the State has obligated taxpayer funds to implement the augmentation by hiring staff dedicated to the augmentation program, and these staff members are currently working to identify source bears in the NCDE. This Notice therefore does not address a speculative future occurrence, but rather an actual commitment of resources implementing the augmentation program.

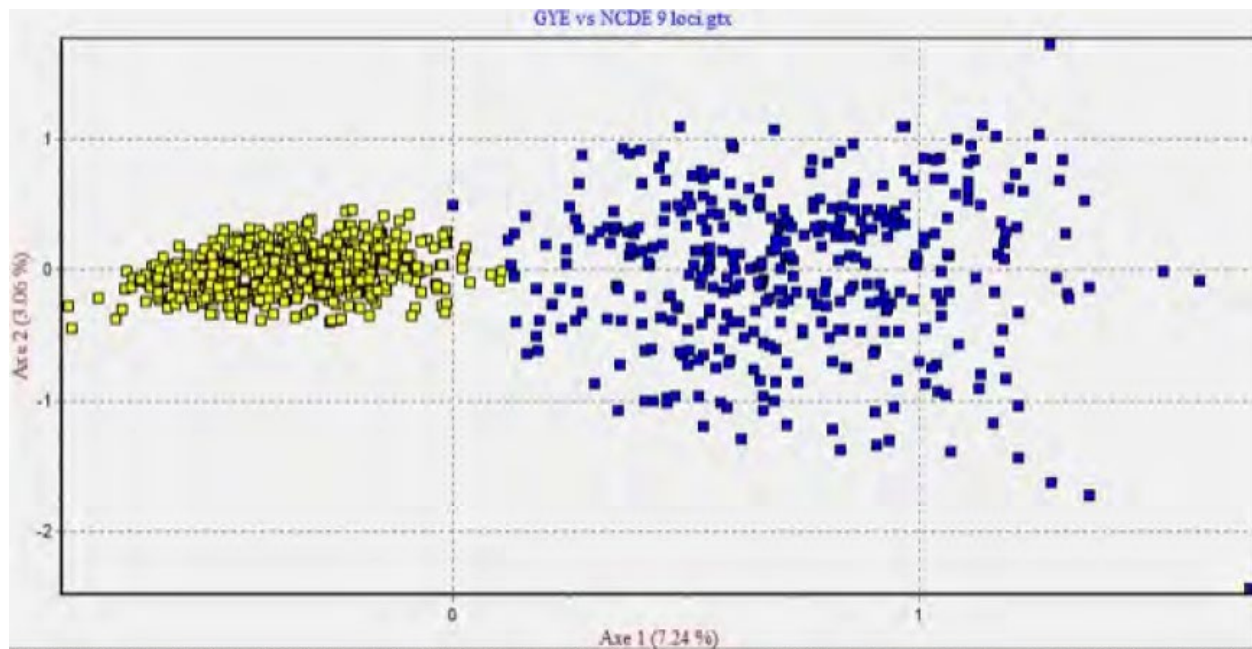
### **Illegal Delisting of Individual Grizzly Bears**

The State of Montana represents that grizzly bears removed from the NCDE will be recorded as mortalities, as with the Cabinet Mountains augmentation. However, while the grizzly bears transplanted to the Cabinets retain their full ESA status as a threatened species, the State of Montana represents that grizzly bears transplanted to GYE will be considered "experimental" and will not have ESA protection (MTFWP, Draft Statewide Grizzly Bear Management Plan; McDonald, public statements 2023, 2024).

### **There is a Scientific Controversy**

The need for an augmentation program is highly questionable. Dr. Frank van Manen, the leader of the Greater Yellowstone Grizzly Bear Study Team said "genetics are not an immediate issue."

The State of Montana does not dispute that Montana FWP biologists have stated publicly that interchange between the Northern Continental Divide Ecosystem grizzly bears and the Greater Yellowstone Ecosystem grizzly bears "isn't a matter of if but when" and that it is "inevitable." Defendants' Answer to Interrogatory No. 7. *Flathead-Lolo-Bitterroot Citizen Task Force et al. v. State of Montana*. The graph below (Costello 2023) shows that loci from the two populations have geographically passed each other.



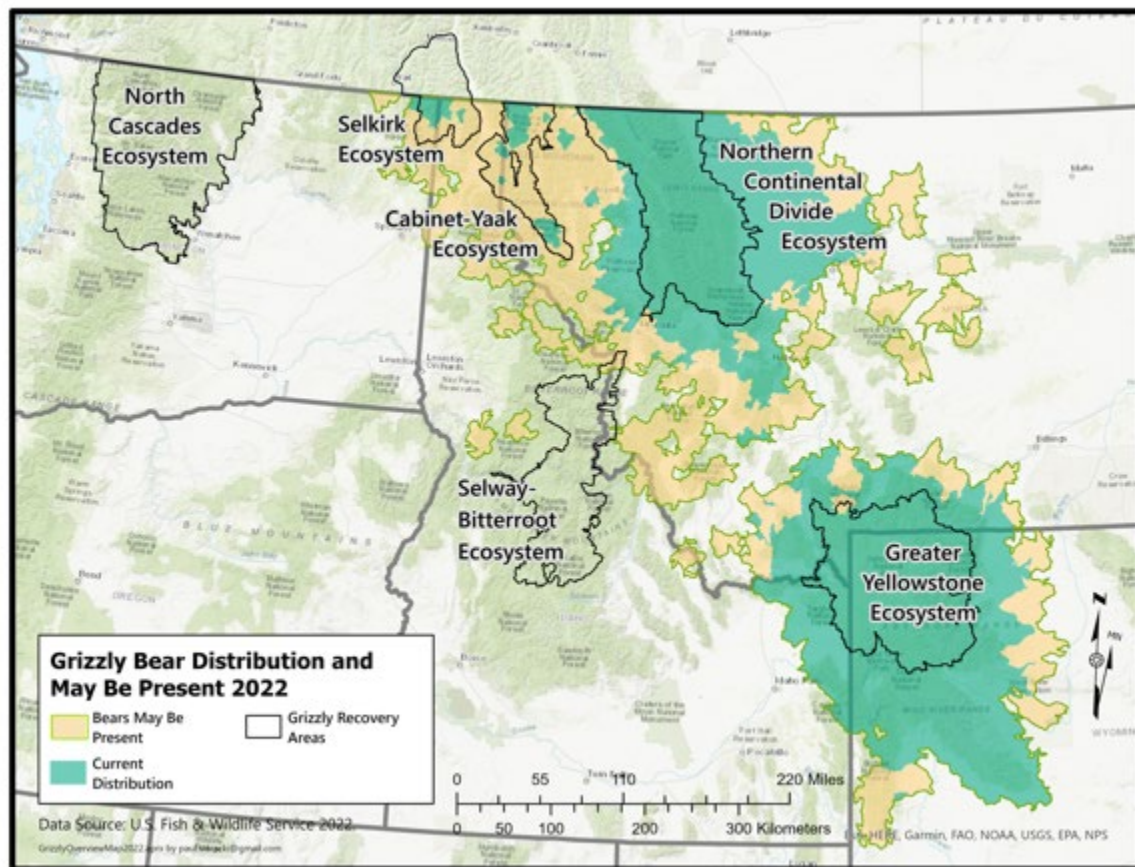
Grizzly bears observed in the Big Hole area have been identified as coming from the NCDE population. Thus, the May Be Present areas mapped by FWS show the NCDE and GYE bears are just miles apart.

In fact, the Draft Montana Plan states regarding the GYE:

“...heterozygosity and allelic diversity are lower than most other North American grizzly bear populations for which data are available. However, these 2 metrics of genetic diversity declined very slowly if at all from 1985 to 2010. The rate of inbreeding has been very low since 1985, and no physiological, behavioral, or demographic effects indicative or associated with inbreeding have been detected. Importantly, estimates are that effective population size (the summary metric best suited to consider genetic effects) has increased over the estimates of 1910-1960, continued to increase during 1985-2007, and is well above the level where the short-term effects of reduced genetic diversity (i.e., inbreeding, genetic drift) would be expected.”

The Draft Plan in Appendix states: “The rate of inbreeding has been very low (0.2% over 25 years), and no inbreeding effects have been detected. Additionally, effective population size has increased well above the level where short-term genetic effects would be expected...”

The Draft Plan states that genetic diversity in GYE is not an issue in the immediate future and that levels of heterozygosity ( $H_o$ ) have actually increased in recent years. Thus, there has been no immediate purpose and need shown for the augmentation plan and certainly nothing so urgent requiring bypassing the legal requirements of the ESA.



The Plan is purely political in nature and there has been no scientific analysis in support of it, nor has there been disclosure of potential impacts on the NCDE source population and the likelihood of success versus natural connectivity. The Plan's Appendix A makes no reference whatsoever to key scientific publications that discuss potential problems and failures of translocations. These include Miller et al. (1990). Milligan et al. (2018) found translocations in Alberta were only 30% successful with a weak definition of success (survival for one year without returning to trap site).

There are several key things that must occur for an attempted genetic augmentation to succeed. First, the grizzly bear has to stay and not return due to homing instinct. Next, the grizzly bear has to survive. Then it has to breed successfully. The resultant offspring must also survive to reproductive age and themselves breed. Any interruption in the sequence results in failure. This is a weak chain compared to what has been described as the "imminent" occurrence of genetic interchange via natural movements.

Protecting demographic connectivity areas that fully connect the isolated recovery areas is a viable strategy already seeing results.

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. It did not order transplanting grizzly bears from the NCDE to the GYE, nor did it excuse the agencies from their obligations under the ESA.

### **CONCLUSION**

The agencies have ignored their duties under the ESA, 16 U.S.C. §1531 et seq., to ensure that their 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. The agencies' actions in this matter represent an unlawful departure from their 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

Miller, B, K Ralls, RP Reading, JM Scott, J Estes. 1999. Biological and technical considerations of carnivore translocation: a review. *Animal Conservation* (2): 59-68.

Milligan, S, L Brown, D Hobson, P Frame, G Stenhouse. 2018. Factors affecting the success of grizzly bear translocations. *Journal of Wildlife Management* 82(3): 519-530.

U.S. Fish and Wildlife Service. 1990. Final environmental assessment - grizzly bear population augmentation test, Cabinet-Yaak ecosystem. U.S. Fish and Wildlife Service, Missoula.