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Via Certified U.S. Mail Return Receipt Requested

July 15, 2024

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Re: Sixty-Day Notice of Intent to Sue to Remedy Violations of the Endangered Species Act in Idaho's authorization of black bear hunting and the use of baiting sites in Grizzly Bear (*Ursus arctos horribilis*) Habitat.

Dear Governor Little, Director Fredericks, and Fish and Wildlife Commissioners:

On behalf of WildEarth Guardians, Western Watersheds Project, Friends of the Clearwater, and Wilderness Watch, we hereby provide official notice, pursuant to the Endangered Species Act, 16 U.S.C. § 1540(g) of our intent to file suit against you, in your official capacities, for increasing the risk of and actually causing the take of grizzly bears by your authorization of black bear hunting, including allowing baiting sites, in violation of Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B). Most recently, this take occurred with the killing of a grizzly bear at a black bear baiting site, in June 2024.¹

Idaho's authorization of black bear hunting including baiting sites in Idaho's grizzly bear habitat, and where grizzly bears may be traveling through or dispersing into (which includes the Panhandle, Clearwater, Salmon, and Upper Snake regions), has increased the risk of incidental take, caused incidental take, and is likely to continue to cause incidental take of threatened grizzly bears. This take includes both direct take by black bear hunters (both allegedly defensive and mistaken identity killings) of grizzly bears, and also indirect take via causing the habituation of grizzly bears to humans and human food sources, which results in increased human-bear conflict events – the greatest cause of grizzly bear mortalities.

Unless the State takes action in the next 60 days to remedy this violation, the undersigned organizations will seek judicial enforcement of the ESA's take prohibition.

I. The Grizzly Bear²



¹ <https://www.ktvb.com/article/news/local/hunter-kills-grizzly-bear-mistaken-black-bear-panhandle-region/293-7a3b3749-8b69-4367-b457-def027ffe5d9> (article dated June 15, 2024; last visited June 28, 2024).

² Photo courtesy of U.S. Fish and Wildlife Service, photographer Terry Tollefsbol.
<https://www.flickr.com/photos/usfwshq/5584759129>

The grizzly bear “is one of the American West’s most iconic wild animals.” *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1019 (9th Cir. 2011). Before the arrival of Europeans, grizzlies roamed the western United States and most of Alaska, numbering approximately 50,000 individuals. *Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Species*, 82 Fed. Reg. 30,502, 30,508 (June 30, 2017). Subsequently, human settlement and government bounty programs extirpated 31 of 37 grizzly populations, leaving grizzlies in less than two percent of the species’ historical range in the lower 48 states. *Id.*

In the conterminous 48 States, the grizzly bear once “occupied suitable habitat in much of the western United States, but is now confined to a relatively small area in Montana, Wyoming, and Idaho.” *Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species*, 40 Fed. Reg. 31734 (July 28, 1975).

Specifically in Idaho, grizzly bears historically lived in every part of the state, but now are found primarily in the northern part of Idaho (the Selkirk Mountains in northwest Idaho and northeast Washington; and the Cabinet-Yaak Mountains in northwest Montana and northeast Idaho) and in east/central Idaho (the Greater Yellowstone Ecosystem in southwest Montana, northwest Wyoming and eastern Idaho; the Bitterroot Mountains, where grizzly bears have been documented³, in western Montana and central Idaho). *U.S. Fish and Wildlife Species 2022 Species Status Assessment for Grizzly Bear in the Lower-48 States* (hereafter “SSA”), at p. 4.⁴ Bears are increasingly reported in more areas as they begin to return to more of their historic habitat.⁵

The grizzly bear was listed as threatened with extinction under the ESA in 1975 by the U.S. Fish and Wildlife Service (“FWS”) in response to dwindling numbers in the lower 48 states. 40 Fed. Reg. at 31,734. One factor FWS cited in its decision to list grizzlies is “overutilization for...sporting...purposes,” because “many [people] consider these bears as dangerous vermin,” resulting in a “continual loss of animals through indiscriminate illegal killing.” *Id.*

To aid grizzly bear recovery, FWS designated six areas as grizzly recovery zones in 1982. *Ctr. for Biological Diversity v. Little*, 622 F. Supp. 3d 997, 1000 (D. Idaho 2022). Idaho encompasses portions of four designated recovery zones in the Selkirk, Cabinet-Yaak, Greater Yellowstone, and Bitterroot ecosystems. *Id.* See map of Grizzly Bear Recovery Zones and Estimated Distributions from the Interagency Grizzly Bear Committee.⁶

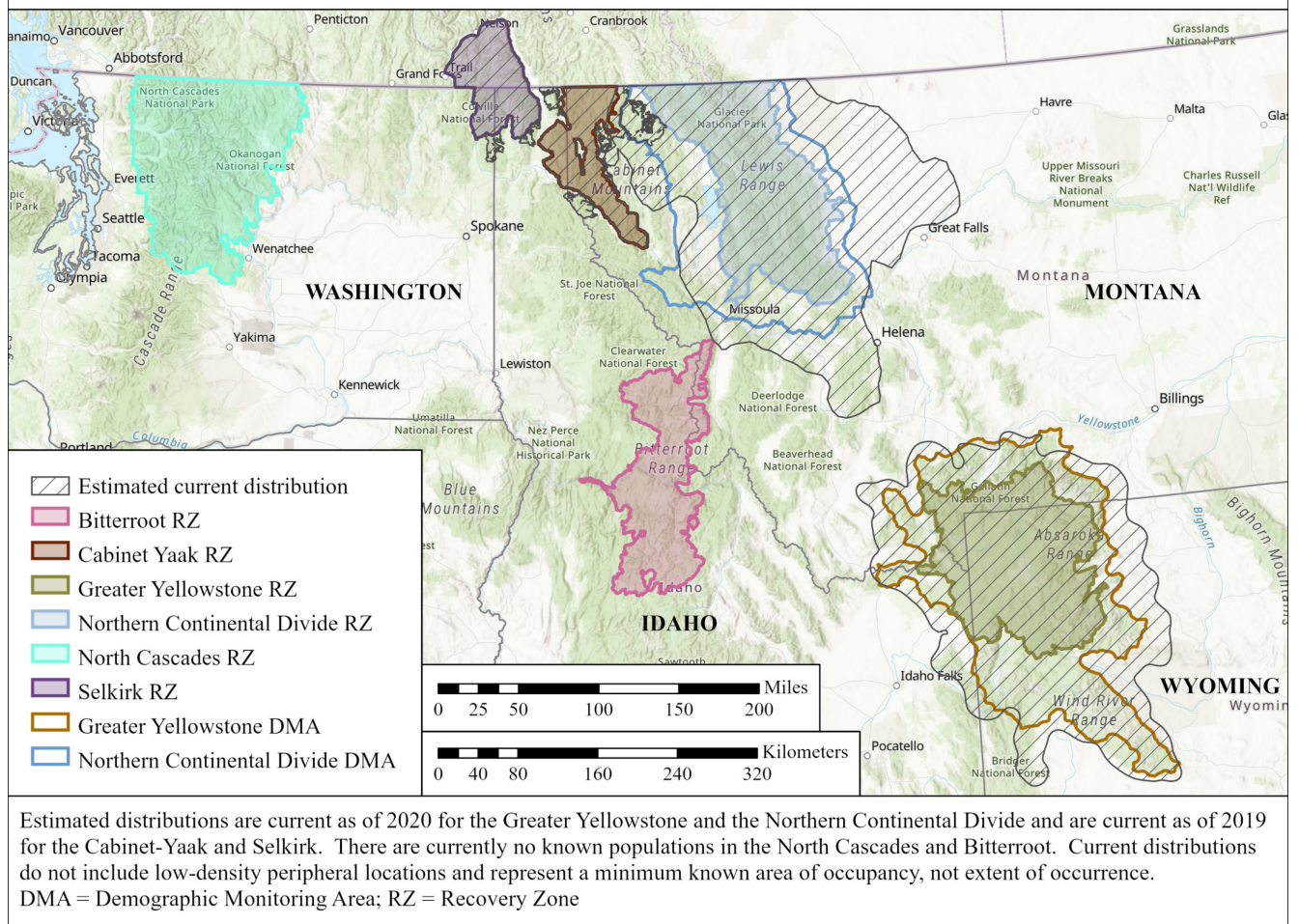
³ FWS 2024 press release regarding potential reintroduction into the Bitterroot Ecosystem: <https://www.fws.gov/press-release/2024-01/usfws-initiates-process-evaluate-restoration-grizzly-bears-bitterroot>

⁴ <https://ecos.fws.gov/ServCat/DownloadFile/213247>

⁵ <https://idfg.idaho.gov/conservation/grizzly-bears> (last visited June 28, 2024). See also 2024 WL 1178565, at *1 (D. Idaho Mar. 19, 2024).

⁶ <https://igbconline.org/> (last visited July 12, 2024).

Grizzly Bear Recovery Zones and Estimated Distributions



FWS has found that the movement and survival of grizzlies between recovery ecosystems is deeply important to the genetic health of grizzlies within populated ecosystems, and also to any recolonization of areas such as the Bitterroot Ecosystem. 82 Fed. Reg. at 30,535; 65 Fed. Reg. at 69,644. FWS “recognize[s] the GYE grizzly bear population could be a possible source population to re-colonize the Bitterroot Ecosystem to the west.” 82 Fed. Reg. at 30,536. In 2021, FWS noted “the NCDE and [Bitterroot Ecosystem] are less than 5 km (3 mi) apart and multiple verified sightings have occurred” between them. SSA at p. 55.

FWS has further found that “[t]he primary factors affecting grizzly bears at both the individual and ecosystem levels are excessive human-caused mortality and human activity that reduces the quality and quantity of habitats, which increases the potential for human-caused mortality, both directly and indirectly.” SSA at p. 7.

II. The ESA Prohibits Incidental Take of Grizzly Bears

The ESA makes it unlawful to violate any regulation pertaining to endangered or threatened species. 16 U.S.C. § 1538(a)(1)(G). Section 9 also prohibits any person to “take” an endangered species. 16 U.S.C. § 1538(a)(1)(B). To “take” means to harass, harm, pursue, *hunt*, *shoot*, wound, *kill*, trap, capture, or collect, or attempt to engage in any such conduct. *Id.* §

1532(19) (emphasis added). “Take” includes direct as well as indirect harm and need not be purposeful. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 (1995). In fact, an accident may be the cause of take. *See National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994). The term “person” includes “any officer, employee, agency, department, or instrumentality...of any State, municipality, or political subdivision of a State...[or] any State, municipality, or political subdivision of a State...” *Id.* § 1532(13).

Accordingly, the ESA “not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. [A] governmental third party pursuant to whose authority an actor directly exacts a taking...may be deemed to have violated the provisions of the ESA.” *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (holding that by issuing licenses and permits authorizing gillnet and lobster pot fishing, activities known to incidentally injure Northern right whales, Massachusetts officials had exacted a taking). *See also Ctr. for Biological Diversity v. Little*, 622 F. Supp. 3d 997 (D. Idaho 2022) (holding that vicarious liability may be imposed upon the State under the ESA for state and local licensing and regulatory activities, even if the activity is conducted by independent actors).

The Section 9 prohibition on take applies equally to threatened species, unless otherwise indicated by a species-specific rule promulgated by the FWS pursuant to ESA § 4(d). *See* 50 C.F.R. § 17.31(a). The species-specific rules for grizzly bears allow for no exception to the prohibition of take in the hunting context. *See* 50 C.F.R. § 17.40(b). Grizzly bears are fully protected from take or attempted take under the ESA, including by a state agency.

III. Idaho’s black bear hunting and bear baiting regulatory scheme is causing and will continue to cause the direct and indirect incidental take of grizzly bears

Currently, Idaho allows the hunting of black bears including the use of baiting sites in the majority of the Game Management Units (GMUs) in Idaho. *See* Idaho Code § 36-409; Idaho’s Fall 2024/Spring 2025 rules caution that grizzly bears may be encountered in 23 of the units. *See* Rules: <https://idfg.idaho.gov/sites/default/files/seasons-rules-big-game-2024.pdf#page=69>. Of those 23 units the agency identified as having grizzly bears, bait is prohibited only in 3 GMUs and part of a 4th (GMUs 1, 62, 62A, and parts of Unit 61 prohibit the use of bait). *Id.*, at pp. 69-71.

As the State of Idaho is well aware, grizzly bears also occur in areas outside of those 4 units where baiting is prohibited- as evidenced by the June, 2024 killing of a grizzly bear in Hunting Unit 6 in the Panhandle, where the Idaho Fish and Game Department cautions hunters that grizzly bears may be present but allows the use of baiting.⁷

At bait sites, grizzly bears can be and have been mistaken for black bears, causing them to be killed by black bear hunters.⁸ The FWS has found that hunting over bait “can be a source of

⁷ <https://idfg.idaho.gov/article/remind-grizzly-bears-can-frequent-any-game-management-unit-panhandle-and-eastern-idaho>.

⁸ <https://www.ktvb.com/article/news/local/hunter-kills-grizzly-bear-mistaken-black-bear-panhandle-region/293-7a3b3749-8b69-4367-b457-def027ffe5d9> (article dated June 15, 2024; last visited June 28, 2024). *See also* June 2023 mistaken identity killing by black bear hunter: <https://www.spokesman.com/stories/2023/jun/13/hunter->

mortality (due to mistaken identity killings) and conflicts (due to conditioning to human foods).” SSA at p. 126. In fact, in the June 2024 event, the black bear hunter at a baiting site in GMU 6 asked Idaho Fish and Game for assistance in identifying a bear, and an Idaho Fish and Game staffer misidentified a grizzly bear as a black bear, resulting in that bear’s killing. In addition to mistaken identity killing, black bear hunters have killed grizzly bears due to human-bear conflict.⁹ Such “incidental take” violates the ESA’s prohibition against take of protected species.

Hunting black bears where threatened grizzly bears are or may be, including using bait in those areas, creates additional risks that grizzly bears will be taken by black bear hunters even beyond immediate killing, whether due to mistaken identity or conflict. The additional risks result from causing bears to become habituated to humans and to human food- which increases the likelihood of conflict at subsequent times, which often results in removal of grizzly bears. Indeed, FWS has noted that “[m]anagement removal of nuisance bears, particularly food-conditioned bears, has been the second highest cause (31 percent) of human-caused mortalities in the [GYE] from 1992 to 2001.” *November 25, 2003 Letter from USFWS to Bridger-Teton Forest Supervisor re: a Food Storage Order*, at p. 2.

The Idaho Department of Fish and Game is in violation of ESA § 9 when it issues licenses to black bear hunters who kill or otherwise take grizzly bears. Indeed, § 9 liability attaches “to acts by third parties that allow or authorize acts that exact a taking and that, but for the permitting process, could not take place.” *Strahan*, 127 F.3d at 163.

A hunter in Idaho, acting in accordance with Idaho laws and regulations recently killed a grizzly bear. The fact that this individual did not intend to hunt and kill a grizzly bear is inconsequential. The “relevant inquiry [under the ESA] is whether it is possible for [hunters] to [hunt] in the manner Idaho permits without risk of violating the ESA by exacting a taking.” *Ctr. for Biological Diversity v. Little*, 2024 WL 1178565 at *15 (D. Idaho Mar. 19, 2024) (challenging the state’s wolf trapping and hunting for its taking of grizzly bears). As the court noted in *Little*, the inquiry is whether Idaho has increased the likelihood that grizzly bear will be killed by a licensed black bear hunter using a baiting site, even when they comply with all of Idaho’s laws and rules, and not whether it is possible to avoid a taking if the laws and rules are followed. *Id.* The standard is not one of absolute certainty and courts need not wait until an Idaho black bear hunter, complying with all Idaho laws and regulations, reports taking a grizzly bear. *Id.*

Here, there is ample evidence that black bear hunters, complying with Idaho’s laws and regulations, have taken grizzly bears, including in the last month. The State of Idaho’s regulatory scheme and continued licensing of black bear hunters, including bait sites, where grizzly bears occur or may occur has caused take and will continue to increase the risk of take of grizzly bears.

[mistakenly-kills-grizzly-bear-north-of-prie/](#) and see 2022 Annual Report from Interagency Grizzly Bear Study Team at p. 29: Forty of the 46 known and probably mortalities during 2022 were attributed to human causes. Among these 40, twenty (50%) were related to anthropogenic site conflicts. 3 (7.5%) were reported self-defense kills in hunting-related incidents (including 1 female accompanied by 1 cub) and 3 (7.5%) were from mistaken identity kills by black bear hunters. <https://igbconline.org/grizzly-bear-study-team/>.

⁹ See e.g. 2022 black bear hunters killed grizzly bears due to conflict: <https://www.ktvb.com/article/news/regional/idaho-hunters-shoot-grizzly-bear-self-defense/277-cca93bc6-7d3b-4cee-9e53-c76eb0b5dc69>.

IV. Conclusion

WildEarth Guardians, Western Watersheds Project, Friends of the Clearwater, and Wilderness Watch are concerned about the future effects on grizzly bear recovery from the killing of grizzly bears in Idaho. To prevent the parties from initiating litigation in federal court pursuant to the ESA, the parties to this notice letter request that Idaho take action to prevent any additional future take of the ESA-protected grizzly bear resulting from its licensing of black bear hunting including the use of baiting in grizzly habitat.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions.

Sincerely,



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