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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

SAVE THE YELLOWSTONE GRIZZLY,
Plaintiff

Plaintiff, v.

UNITED STATES FISH AND WILDLIFE
SERVICE—MARTHA WILLIAMS, Director;
Defendant; and

JIM FREDERICKS, Director of Idaho
Department of Fish & Game; MATT PIERON,
Regional Supervisor of Idaho Department of
Fish & Game; CURTIS HENDRICKS,
Regional Wildlife Manager of Idaho
Department of Fish & Game;
Defendants.

Case No. 4:23-cv-00363-DCN

IDAHO OFFICIALS'
ANSWER, COUNTERCLAIMS,
and CROSSCLAIMS FOR
DECLARATORY AND
INJUNCTIVE RELIEF

I. INTRODUCTION

200.¹ Grizzly bears indisputably pose safety risks that deserve caution in any potential interaction with people, whether involving female bears with protective instincts for their young, or any bear focused on food resources that might view children, adults, pets, and other domestic animals as a potential prey or threat.

201. Plaintiff's Complaint mischaracterizes Idaho Department of Fish and Game officials (Idaho) as emboldened violators of the ESA (*see Ps' Complaint* ¶ 106). In reality, Idaho devoted considerable resources to pursuing non-lethal solutions to address the public safety threat posed by a female bear and two offspring frequenting a residential area near Tetonia, Idaho at fall denning time. A few weeks earlier, these same three bears had been hazed out of Yellowstone National Park and trapped and moved from adjacent Gardiner, Montana because they showed little fear of people. Idaho sought outcomes where the bears would have denned away from people in suitable habitat and woken up ravenous the next spring to brave nature's perils, instead of next to someone's house or barn. However, Idaho's pursuit of a range of non-lethal options did not achieve that desired result. The three grizzly bears remained among people and their homes on private lands at denning time. Their persistence in this location posed a high risk of injurious encounters with people, whether by surprise or otherwise.

202. It may be emotionally appealing to require extensive, indefinite governmental babysitting of individual grizzly bears frequenting or denning in backyards of people's homes, or to leave people to their own devices in walking from their homes to the barn or the mailbox, and

¹This response to Plaintiff's Complaint by Idaho Officials brings crossclaims against the Federal Defendant and counterclaims. This response begins paragraph numbering for those paragraphs with allegations supporting Idaho's claims with 200, and uses numbering from 1 to 108 to identify those paragraphs answering corresponding numbers in Plaintiff's Complaint.

hope that any encounters end with all unharmed. However, that is not the role of public safety and wildlife management agencies. It is also not what the ESA requires of agencies for protection of public safety from a robust population of grizzly bears.

203. A review of the legal and factual aspects of this matter will show that Idaho complied with—and took measures well beyond—the ESA’s regulatory requirements for the lethal removal of three grizzly bears presenting a demonstrable safety risk near Teton. *See* 50 CFR 17.40(b)(1)(i)(C). Plaintiff fails to recognize the ESA regulatory distinction between grizzly bears on non-federal lands (private, state, tribal) and grizzly bears on federal lands in areas identified as suitable habitat in the Greater Yellowstone Ecosystem. Interagency Guidelines referenced in the 50 CFR regulation for removal of nuisance bears apply only to federal lands (National Park Service, BLM, or National Forest System lands), for which the Guidelines provide direction based on categories referred to as “management situations”.

204. In addition, the Greater Yellowstone grizzly bear population is now robust, thanks to decades of efforts by Idaho, its sister states, and a wide array of other agencies, organizations, and individuals. The most recent population estimate (2022) for the Greater Yellowstone Demographic Monitoring Area (DMA) — the area identified as suitable habitat — is 965 bears. Grizzly bears in the DMA have reaching carrying capacity — with population densities at levels where bears get into conflict with other bears or disperse to find unoccupied territory. The grizzly bear subspecies as a whole is also secure. Estimates for the subspecies number 60,000 bears, the vast majority of which are in western Canada and Alaska where they are not ESA-listed.

205. Imposing a residential area requirement for government babysitting would be counter not only to the ESA and its regulations, but also to the intent of the ESA to prioritize resources to protect truly imperiled species.

206. Idaho also contends that the current listing of grizzly bears in the “lower-48” United States exceeds ESA statutory jurisdiction. The listing does not comport with the definition of “species” that are subject to ESA’s protections.

207. USFWS has repeatedly acknowledged the “lower-48” listing for grizzly bears is geographically erroneous. USFWS has also been unable or unwilling to reconcile case law, its formal policies, and its past and concurrent identification of independent grizzly bear “distinct population segments,” that differ from the lower 48 listing for purposes of ESA listing/delisting status. There is ample evidence that the current “lower 48” listing does not qualify as a species subject to ESA protection.

208. On February 6, 2023, USFWS unaccountably, belatedly, and unlawfully, denied Idaho’s petition (dated March 9, 2022) to delist the lower-48 listed entity because it is not a species subject to ESA protection. Idaho complied with the 60-day notice required to bring suit to challenge unlawful agency action under the ESA (notice sent May 10, 2023).

209. As set forth below, Idaho answers Plaintiff’s Complaint (*Dkt. 1*) and brings a counterclaim against Plaintiff for declaratory relief related to: (1) the “lower-48” grizzly bear ESA listing not constituting a species subject to ESA jurisdiction; and (2) the proper legal interpretation of 50 CFR 17.40(b)(1)(i)(C) for state agency removal of nuisance grizzly bears, including the limited application of the referenced 1986 Interagency Guidelines to only federal lands. Idaho also brings these same claims as crossclaims against USFWS Director Williams and makes an additional crossclaim for declaratory and injunctive relief as to USFWS’ unlawful

denial of Idaho's petition to remove the "lower 48" listing of grizzly bears because it is not a species.

II. FACTUAL BACKGROUND

210. In October 2022, a female grizzly bear and her two offspring (estimated at 70-100 pounds each) were frequenting the Mammoth Hot Springs residential area of Yellowstone National Park, moving out of the area only after several days of being hazed by staff from the Park and the state of Montana. But the three bears did not stay away from human development. They quickly moved to the community of Gardiner, Montana, where they again showed little aversion to humans, foraging in town near residences, on the high school football field and at a school bus stop. They did not leave town despite again being hazed over several nights with paintballs, cracker rounds and rubber bullets. On October 17, Montana Fish Wildlife and Parks trapped the bears and transported them to a national forest site near the Idaho border south of West Yellowstone. The bears did not linger there and made their way to rural subdivisions near Teton, Idaho around October 28. Even with these bears' history of persistence in being around people, Idaho made considerable efforts to pursue non-lethal options to move the bears away.

211. Idaho staff put in long hours and sleepless nights in freezing and snowy conditions of fall in eastern Idaho. They alerted over 100 individual homeowners and other residents to secure bear attractants and otherwise discourage the bears' presence. Idaho tried to trap the bears again, but the bears had apparently learned to avoid culvert traps due to their recent experience in Montana. Release sites in the Greater Yellowstone portion of Idaho were not available due to a combination of snow conditions, current bear occupancy, and proximity to other unsuitable habitat. Idaho asked USFWS to identify available placement sites in case trapping was successful. However, there were only clear declines from Yellowstone National

Park and noncommittal, wavering possibility from elsewhere. USFWS Recovery Office staff indicated a preference for non-lethal alternatives but did not identify any definitive, ready-to-go placement sites.

212. Idaho's independent inquiries also failed to identify alternative placement in the wild or in captivity. When non-lethal efforts did not succeed, Idaho turned to lethal removal with the concurrence of USFWS Recovery Office staff located in Montana. On November 9, Idaho shot the adult female and one of the young bears, with the second young bear remaining at large. USFWS repeated its preference for non-lethal options for the remaining bear, but USFWS still could not identify any actual placement site. USFWS also did not make it clear to Idaho that USFWS would consider lethal removal of the second young bear to be unauthorized if non-lethal methods were unsuccessful.

213. Idaho moved a trap to the location where the adult female was killed, and spent another night trying to capture the remaining young bear. In addition, the remaining bear did not have a telemetry collar and was not readily visible. With the use of tracking hounds, Idaho located the remaining bear on November 10, 2023, with it taking a position high in a cottonwood tree. Despite freezing temperatures and additional risk, an Idaho employee, trained and experienced in tranquilizer dart use, climbed an adjacent tree and made multiple attempts to make a difficult upward shot through branches to free dart the young bear (i.e., shooting a dart containing tranquilizing drugs without trapping it first). These additional efforts for a non-lethal alternative were not successful, and Idaho shot the young bear. The lethal outcome, necessary for the protection of public safety, was emotionally draining for those Idaho staff involved.

214. A demonstrable public safety threat existed from potential encounters between the grizzlies, children, adults, pets, and other domestic animals in residential areas near Tetonia.

These threats are heightened during the fall period in which bears are extremely hungry as they add calories before denning, and when they emerge from denning. The bears near Tetonia were not moving toward suitable habitat for denning away from human development. They were also exhibiting behaviors that caused Idaho concern that the bears might attempt to den in or adjacent to the residential area, which would heighten public safety threats at the time of den emergence or in the event of den disturbance.

215. Recent and historic examples illustrate near-miss, injurious, and fatal consequences for people in surprise and other encounters with female grizzly bears with young. These three bears had posed risk warranting USFWS and Montana's concurrence in hazing the bears out of Yellowstone Park, and in relocating the bears from Gardiner, Montana to unfamiliar territory, despite the proximity of the denning period.

216. After the bears came to the Tetonia area, there was at least one charge by the adult female involving a dog, and other dangerous situations involving residents or their animals were reported or observed by Idaho staff.

217. The three grizzly bears in the residential area near Tetonia, were outside the identified Greater Yellowstone Demographic Monitoring Area (DMA). The DMA consists of more than 19,000 square miles (an area larger than 8 of the 50 states), identified by the Interagency Grizzly Bear Study Team (IGBST) as suitable grizzly bear habitat. Areas within the DMA are used to monitor continued achievement of objectives for the Greater Yellowstone grizzly population and its distribution. The IGBST delineated the DMA to exclude those areas where long-term grizzly bear occupancy or expansion is unlikely to be sustained.²

² See 82 Fed. Reg. 30,505, 30,510-1, Fig. 1 (2017 final delisting rule for the Greater Yellowstone Ecosystem DPS, which was vacated on other grounds).

III. COUNTERCLAIM & CROSSCLAIMS

218. Pursuant to Fed. R. Civ. P. 13(b), Idaho makes a counterclaim against Plaintiff for: (1) declaratory relief as to the exceedance of ESA statutory jurisdiction related to the lower-48 listing; and (2) the interpretation and application of 50 CFR 17.40(b)(1)(i)(C), including the 1986 Interagency Grizzly Bear Guidelines, as to Idaho agency removal of nuisance grizzly bears on non-federal lands (and federal lands not categorized as Management Situation 1 or 2 under the Guidelines).

219. Pursuant to Fed. R. Civ. P. 13(g), Idaho also makes these two claims as crossclaims for declaratory and injunctive relief against Director Williams. Idaho also makes an additional crossclaim for injunctive and declaratory relief as to Director Williams' unlawful denial of Idaho's petition to delist grizzly bears in the lower-48 states because the listing does not qualify as a "species" under the ESA.

A. Counterclaim/CrossClaim for Declaratory Relief: Exceedance of ESA Jurisdiction

220. Idaho hereby realleges and incorporates all above paragraphs by reference.

221. This Court has jurisdiction over this claim under 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201-2202 (declaratory judgments) and 16 U.S.C. 1531 *et seq.* (Endangered Species Act). Idaho has complied with the 60-day notice requirement to bring suit alleging violation of the ESA, by notifying Director Williams, along with Secretary Haaland on May 10, 2023. In addition, the Court has general equitable powers to issue further relief.

222. Although well-intentioned, the ESA listing of grizzly bear of the conterminous ("lower 48") United States in 1975 is an unlawful expansion of federal jurisdiction exceeding ESA statutory authority.

223. Under the ESA, the identification of a “species” is a threshold legal issue, determinative of whether there is federal jurisdiction over a group of animals. Since 1978, an ESA “species” must be either: (1) a biological (taxonomic) species, (2) a biological/taxonomic subspecies, or (3) for vertebrates only, a “distinct population segment . . . which interbreeds when mature” (DPS). 16 U.S.C. § 1532(16).

224. The ESA precludes USFWS from recognizing something other than a “species” as a “threatened species” or “endangered species.” *See* 16 U.S.C. §§ 1532(6), (20). This is important relative to the ESA’s conservation purpose to prioritize federal resources toward the conservation of biological resources at risk of extinction. *See* 16 U.S.C. § 1531. USFWS has recognized that the ESA is not intended to be a general biodiversity statute, or to provide perpetual protection without regard to the risks of extinction. 61 Fed. Reg. 4,724 (1996).

225. The “lower-48” grizzly bear listing is indisputably not a biological species or subspecies. The taxonomic species (*Ursus arctos*, or brown bear) encompasses approximately 200,000 animals in portions of North America, Europe, and Asia. The taxonomic subspecies (*Ursus arctos horribilis*, or grizzly bear) encompasses approximately 60,000 animals in portions of the United States and Canada. Roughly 58,000 grizzly bears in western Canada and Alaska are not ESA-listed.

226. The lower 48 listing also does not identify a DPS. USFWS has repeatedly acknowledged the “lower-48” listing to be geographically erroneous. Instead of identifying an interbreeding population of grizzly bears that is discrete and significant to the grizzly bear subspecies or brown bear species, the “lower-48” listing is overwhelmingly comprised of geography that never hosted grizzly bear populations, or is now unoccupied historic range that lacks suitable habitat to support viable, self-sustaining grizzly bears populations.

227. USFWS regulations for implementing the ESA define population as “a group of fish or wildlife in the same taxon below the subspecific level in common spatial arrangement that interbreed when mature.” 50 CFR 17.3.

228. As to the portions of the only four states (Idaho, Montana, Washington, and Wyoming) in the lower 48 that do host grizzly bear populations, USFWS has made various findings that indicate there are multiple (5 to 6) current or extirpated populations that are discrete from one other for purposes of DPS analysis. USFWS findings indicate these areas either: (1) qualify as independent DPSs based on discreteness and significance to the subspecies, (2) are extirpated/unoccupied areas, which are not populations and do not qualify as DPSs; or (3) are so limited in scope/size they likely do not qualify as DPSs because they lack “significance” to the subspecies for purposes of DPS analysis. As a result, it is clear the “lower-48” listing does not itself identify an interbreeding DPS. The listing thus exceeds USFWS’ statutory authority under the ESA and does not properly confer federal jurisdiction.

229. In addition, the Ninth Circuit’s decision in *Crow Indian Tribe*, 965 F.3d 662 (9th Cir. 2020), changed the understanding of the procedural implication of the lower-48 listing. Before this decision, USFWS, Idaho, and other agencies understood that USFWS could readily identify and delist robust distinct population segments (DPSs) of grizzly bear whose geography overlapped with the lower-48 listing, based on a DPS’s population and habitat criteria and protective regulatory mechanisms. The *Crow Indian Tribe* decision vacated and remanded the 2017 rule that identified and delisted the Greater Yellowstone Ecosystem DPS from the lower-48 listing. The Ninth Circuit found that USFWS could not partially delist a listed entity by identifying and delisting an independent DPS unless USFWS determines that the remaining listing identified a sufficiently distinct and protectable remnant population. Because USFWS had

not analyzed the effect of the “partial delisting” of the DPS on the remainder of the lower-48 listing, the rule was remanded to USFWS for further examination as to the effects of “partial” delisting of a DPS on the “remnant” that would remain ESA-listed. *Id.* at 681.

230. In light of the *Crow Indian Tribe v. United States* and other case law, USFWS’s failure to remove the erroneously listed “lower-48” “species” has created an ESA Catch-22.³ If the erroneous listing remains in place, the fate of future any “partial delisting” depends on a dubious task—demonstrating population viability for the remainder of an entity that does not meet the ESA definition of “species” in the first place. This Catch-22 seemingly prevents delisting of robust grizzly bear populations because of non-existent and never-existent grizzly bear populations. Such a result is inconsistent with Congressional intent by thwarting the ESA’s goals to remove the ESA’s protections when they are not needed for robust populations, and to prioritize resources for recovering truly imperiled species. Such a result is also inconsistent with effective conservation in general.

231. ESA implementing regulations require the Secretary to delist a species “if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available... [t]he listed entity does not meet the statutory definition of a species.” 50 CFR 424.11(e)(3).

232. The ESA and its implementing regulations do not define “distinct population segment that interbreeds when mature.” *See* 61 Fed. Reg. 4,722. However, Congress instructed that USFWS exercise its authority for ESA protection regarding DPSs “sparingly” and “only when the biological evidence indicates that such action is warranted.” *Id.*

³ This phrase originated with a novel by Joseph Heller, titled “Catch-22,” and means a paradoxical situation from which an individual cannot escape because of contradictory rules or limitations.

233. In 1996, USFWS and NOAA adopted a Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy). *Id.*

234. The DPS Policy identified requirements that a DPS be “discrete” and “significant” and further defined these two terms. The DPS Policy referred to the scientific concept of “population,” to interpret the term “distinct population segment,” which is not commonly used in scientific discourse. *Id.* The DPS Policy indicated that USFWS should consider “discreteness” and “significance” relative to the taxon (i.e., biological species and subspecies) to which a potential DPS belonged. *Id.*

235. The DPS Policy gave scant attention to the “interbreed when mature” language contained in the statute relative to DPSs.

236. According to the biological species concept, taxonomic species and subspecies inherently encompass individuals that are capable of interbreeding and producing viable offspring. The implementing DPS policy states that DPSs and “populations” are below the “subspecific level” and logically must “be circumscribed in some way that distinguish it from other representatives of the species.” 61 Fed. Reg. 4,724; see also 50 C.F.R. 17.3. To avoid rendering “interbreed when mature” in the ESA and implementing regulations superfluous relative to “population” and “distinct population segment,” it is thus reasonable to identify an interbreeding requirement specific to identifying a DPS. This interpretation is consistent with Congressional direction to exercise authority over DPSs sparingly. It is also consistent with the canon of statutory interpretation against superfluity. *Shoner v. Carrier Corporation*, 30 F.4th 1144 (9th Cir. 2022). By contrast, it is unreasonable to interpret “interbreeding when mature” relative to DPSs in a way that makes this term entirely superfluous and redundant with the

delineation of taxonomic species/subspecies based on animals' capability of interbreeding and producing viable offspring.

237. For more than 20 years, USFWS has defined a grizzly bear "population" as two or more reproductive females or one female reproducing during two separate years. USFWS' longstanding definition is reflected on page 54 of the agency's January 2022 *Species Status Assessment for the Grizzly Bear (*Ursus arctos horribilis*) in the Lower-48 States*.⁴ USFWS' Assessment identifies grizzly bear populations in only 4 of its 6 currently delineated "Recovery Areas" in Idaho, Montana, Washington, and Wyoming.

238. The delineation of a grizzly bear DPS that overwhelmingly does not contain any grizzly bear population at all does not comport with the ESA's definition of "species."

239. USFWS' 2022 Species Status Assessment (pp. 53-55) also continued to reaffirm key conclusions of the 2021 status assessment relied upon by Idaho's petition. For example, USFWS found that natural recolonization of grizzly bear populations in any areas of the 14 states of extirpated historic range is "almost impossible." This Assessment (pp. 54-55) also found that even if a population were reintroduced to either of the two largest remaining areas of suitable grizzly habitat in these 14 states (the Sierra Nevada of California/Nevada or the San Juans of Colorado), "there is a very low likelihood of natural linkage to existing populations needed to maintain long-term fitness and become self-sustaining." The Assessment (p. 55) also found that other smaller areas, such as the Unita and Mogollon Mountains in the southwestern U.S., could not support self-sustaining populations.

⁴ The 2022 Status Assessment may be viewed at: <https://ecos.fws.gov/ServCat/DownloadFile/213247> (viewed on September 27, 2023). This Assessment is an update to the 2021 Species Status Assessment cited in Idaho's petition, which also applied this definition.

240. As described in the DPS Policy, a DPS should be listed for protection under the ESA sparingly, based on the potential DPS's discreteness and significance to the taxon (i.e., biological species or subspecies) to which the potential DPS belongs. 61 Fed. Reg. 4,722. There is no grizzly bear population in 44 of the 48 states. USFWS has also not identified establishment or reestablishment of viable, self-sustaining grizzly bear populations of any areas in the currently unoccupied 44 states as necessary for ESA purposes related to the brown bear species or grizzly bear subspecies.

241. The following Figure 1 (highlighting added for emphasis) from USFWS' 2022 Species Status Assessment illustrates why the lower-48 listing does not qualify as a taxonomic species or taxonomic subspecies, and does not qualify as a distinct population segment.

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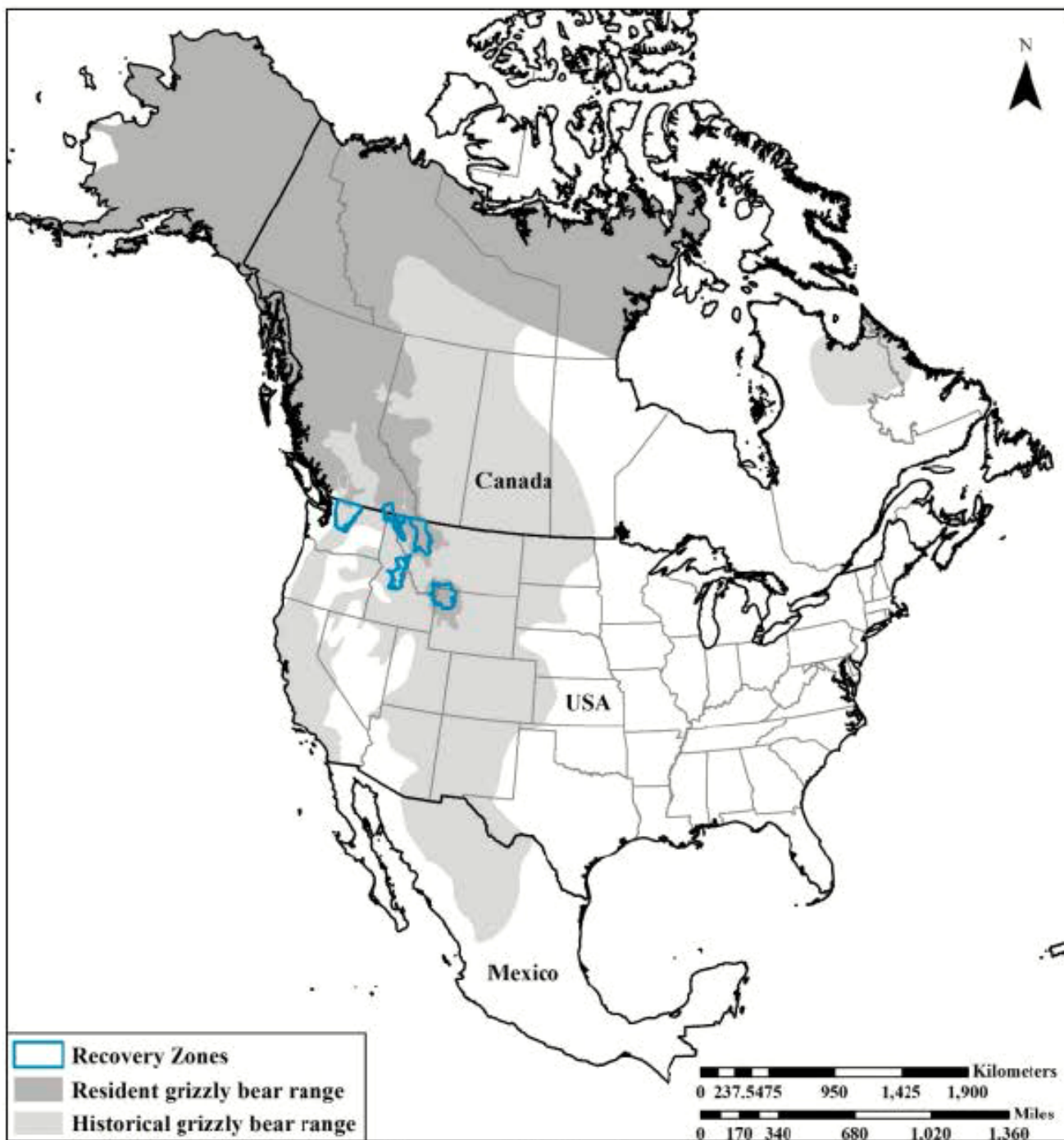


Figure 1. Map of historical and current grizzly bear range in North America and the six recovery zones for grizzly bear in the lower-48 States. Currently, grizzly bears primarily exist in four ecosystems: the Northern Continental Divide (NCDE), Greater Yellowstone (GYE), Cabinet-Yaak (CYE), and Selkirk (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.

242. As shown in Figure 1:

- a. The current range of the grizzly bear taxonomic subspecies extends outside of the ESA-listed area through western Canada to Alaska.
- b. 30 or more of the lower-48 states are outside of grizzly bear historic range (i.e., they have never contained a grizzly bear population).⁵
- c. 44 states of the lower-48 have no current grizzly bear populations.
- d. As of January 2022, USFWS identified only 6 “recovery areas,” and they fall entirely within 4 states. Two of these recovery areas, the North Cascades and Selway-Bitterroot, do not contain grizzly bear populations. USFWS has previously described four, five, or sometimes all six of these current or extirpated populations as discrete or geographically separate from each other.

243. USFWS has previously found that sufficient evidence exists to support multiple independent DPSs of different statuses for each of the populations it has identified in the lower-48 states. E.g., Fed. Reg. 57,698 (2017). USFWS has made findings that uplisting (to a listed as an endangered species) was warranted-but-precluded for three of the 6 recovery areas—the Selkirk and Cabinet-Yaak individually or in combination, and the North Cascades, implying that USFWS treated these areas as potential DPSs distinct from the lower-48 listing. E.g., 79 Fed. Reg. 72,487-8 (2014) (some findings vacated and remanded by *Alliance for the Wild Rockies v. Zinke*, 265 F.Supp.3d 1161, (D. Mont. 2017)); 81 Fed. Reg. 87,264 (2016).

⁵USFWS has acknowledged that action was warranted to address 30 states included in the lower-48 listing in error, but USFWS has never taken such action.

244. Concurrently with denying Idaho’s delisting petition (February 2023), USFWS found delisting action “may be warranted” to identify and delist one or more DPSs incorporating the Greater Yellowstone and Northern Continental Divide Ecosystems. 88 Fed. Reg. 7,658.

245. In 2000, USFWS designated an Experimental Population Area around the population-less Selway-Bitterroot Area for reintroduction as a “nonessential, experimental population” under § 10(j) of the ESA. USFWS based this determination on the lack of existing population and geographic separation and isolation from other grizzly bear populations. 65 Fed. Reg. 69,627.

246. In November 2022, USFWS and the National Park Service announced their intent to resume review of a proposal to reintroduce grizzly bears to the North Cascades as a “nonessential experimental population” under § 10(j) of the ESA, with an initial population goal of 25 bears. 86 Fed. Reg. 68,190 (2022). USFWS had previously issued a draft environmental impact statement (EIS) that analyzed a similar proposal in 2017. This EIS indicated that a reintroduced population of grizzly bears in the North Cascades Ecosystem would remain isolated from other populations in the lower-48. Aspirational connectivity with other grizzly bear populations would only occur with adjacent populations to the north in British Columbia.

247. USFWS’s 2022 Species Status Assessment again describes the currently unoccupied North Cascades Ecosystem as one that would remain isolated from other U.S. populations, even were reintroduction to occur, because of unsuitable fragmented habitat (i.e., the settled Okanogan Valley of Central Washington and southern British Columbia) between the North Cascades and the nearest grizzly bears in the Selkirk Mountains. In addition, USFWS identified population objectives for reintroduction to the North Cascades that are well below the minimum 400 for short-term genetic fitness, and independent population viability.

248. The failure of the lower-48 listed entity to delineate an interbreeding DPS is obvious from a scientific, biological, geographical, and legal standpoint, given USFWS' various prior and concurrent determinations and applicable ESA statutory and regulatory definitions.

B. Crossclaim for Declaratory Relief and Injunctive Relief Relative to USFWS' Unlawful Denial of Idaho's Petition to Delist the Listing of Grizzly Bears in the "Lower-48" United States as a Non-Species

249. Idaho hereby realleges and incorporates all above paragraphs by reference.

250. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201-2202 (declaratory judgments), 5 U.S.C. §§ 701-706 (APA) and 16 U.S.C. §§ 1533(b)(3)(C)(ii), 1540(g)(1) (ESA). The Court may issue further necessary relief pursuant to its general equitable powers.

251. Section 4 of the ESA provides that a negative 90-day finding on a petitioned listing action is subject to judicial review. 16 § 1533(b)(3)(C)(ii).

252. On March 9, 2022, Idaho sought administrative remedy concerning the lower-48 listing's exceedance of ESA statutory authority and jurisdiction. Idaho formally petitioned USFWS to remove the unlawful listing of an entity that is not a species (i.e., a "delisting" action) from the federal List of Endangered and Threatened Wildlife. Despite the scientific information presented in Idaho's petition, which largely relied on USFWS' own documents, on February 6, 2023, USFWS made an arbitrary, unsupported, and unlawful negative "90-day" determination on Idaho's request. 88 Fed. Reg. 7,658. USFWS' negative 90-day determination on Idaho's petition is final agency action, and is reviewable under the standards of the APA. 5 U.S.C. §§ 704, 706.

253. Defendant Martha Williams is the Director of the USFWS, acting in her official capacity and is responsible for performing the duties of the Secretary of the Interior in carrying out the ESA and its implementing regulations relative to listing and delisting actions. Defendant

Williams signed the Notice of Petition Findings, which made a negative “90-day” finding on Idaho’s delisting petition. 88 Fed. Reg. 7,658-7660 (February 6, 2023). USFWS is a federal agency within the meaning of the ESA and APA. *See* 5 U.S.C. § 551(1). USFWS is responsible for the exercise of federal jurisdiction under the ESA and in performing the duties of the Secretary of the Interior in carrying out the ESA and its implementing regulations relative to listing and delisting actions.

254. Section 4 of the ESA and implementing regulations require USFWS to make any listing/delisting determination based solely on the best available scientific and commercial information regarding a species’ status. 50 CFR 424.11(b). The regulations also direct the Secretary/USFWS to delist a species if the Secretary finds, 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).

255. Any interested person may submit a written petition to USFWS requesting that one of the actions described in 50 CFR §424.10, which includes delisting action, be taken for a species. 50 CFR 424.14(a).

256. To the maximum extent practicable, within 90 days of receiving a petition to add a species to the List, remove a species from the Lists, or change the listed status of a species, USFWS will make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action *may* be warranted. 50 CFR 424.14 (h)(1).

257. In this context, “‘substantial scientific or commercial information’ refers to credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted.” 50 CFR 424.14(h)(1)(i).

258. USFWS must apply the “substantial scientific or commercial information” standard in light of any prior reviews or findings USFWS has made on the listing status of the species that is the subject of the petition. 50 CFR 424.14 (h)(iii).

259. Idaho supported its March 9, 2022 petition with credible scientific and commercial information that the lower-48 grizzly bear listing did not qualify as a “species.” Idaho’s petition primarily relied on USFWS’ own documents and analyses. For example, Idaho’s petition referred to documents in which USFWS had explicitly or implicitly acknowledged that the “lower-48” listing is largely erroneous in its geographic delineation of a grizzly bear “species.”

260. Idaho’s petition also refers to recent and prior status assessments in which USFWS acknowledged that the entirety of 14 other states encompassing historic grizzly bear range: (1) contained “no known populations of grizzly bear;” (2) were likely incapable of supporting viable and self-sustaining grizzly bear populations in the future; and (3) were not areas whose recolonization was required for ESA purposes. USFWS had also directly or indirectly made similar findings for portions of the four states in the lower-48 that do have grizzly bears.

261. Idaho’s petition also referred to prior USFWS determinations that identify 5 to 6 of identified “Recovery Areas” as independent DPSs discrete from other another with independent determination of status.

262. Nearly eleven months after receiving Idaho’s petition, USFWS issued a cursory negative 90-day determination on February 6, 2023. 88 Fed. Reg. 7,658. This determination and accompanying Petition Response Form failed to provide a rational explanation for its denial.

263. USFWS summarily ignored its awareness of at least some major aspects of the erroneous nature of this listing for well over a decade, and a parade of prior and concurrent findings inconsistent with USFWS’ determination. Notably, 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 of portions of 18 states.” Below is an excerpt from the Form.⁶ *See also* ¶ 239, *supra* (impossibility of natural recolonization of 14 states in historic range).

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

264. The failure of the lower-48 listed entity to delineate an interbreeding DPS is obvious from a scientific, biological, geographical, and legal standpoint, given USFWS’ various prior and concurrent determinations and the applicable statutory and regulatory definitions.

265. In addition, the standard for favorable 90-day findings on ESA petitions presents a “low bar.”⁷ Idaho’s petition met this standard by presenting credible and scientific information, with which USFWS is quite familiar, to justify why a “reasonable person” would conclude that the lower-48 listed entity *may* not qualify as a “species” under the ESA.

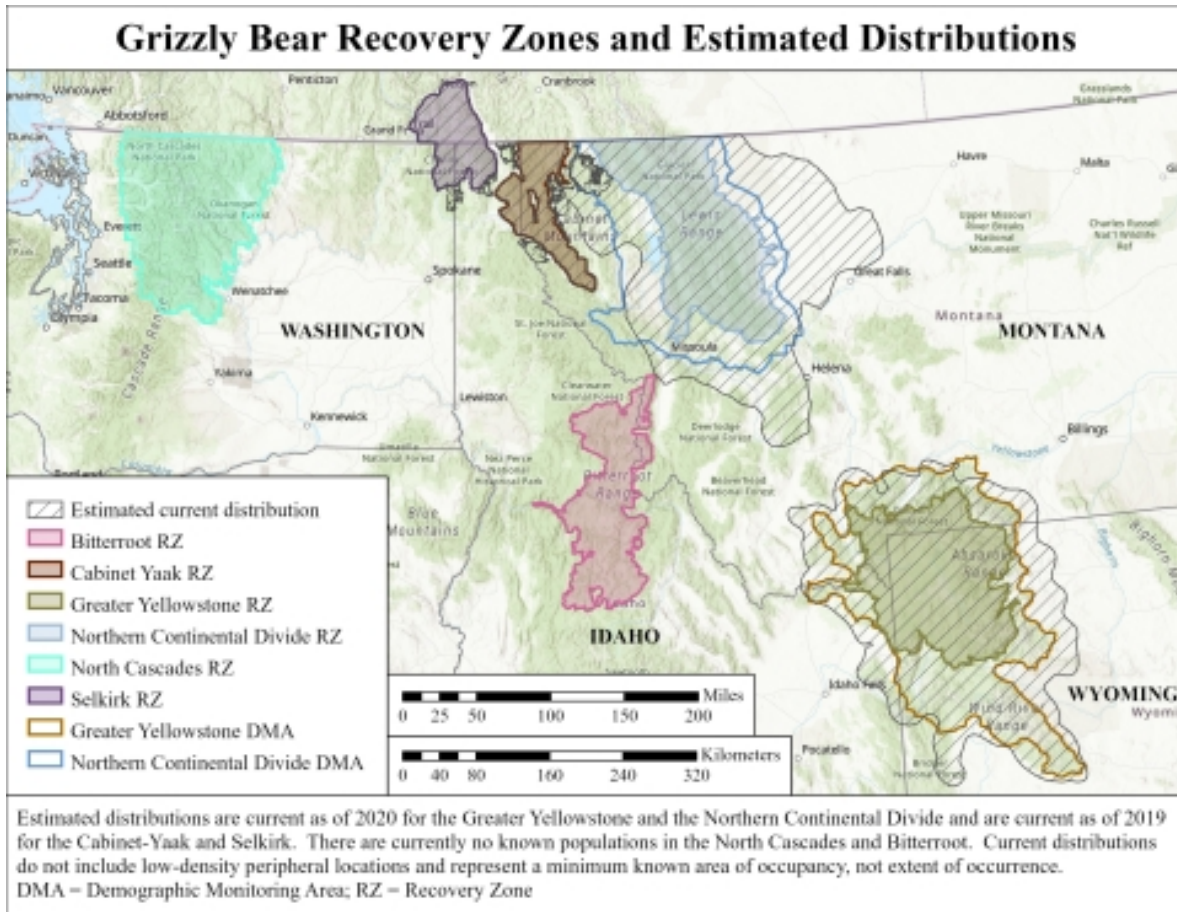
⁶The Petition Response Form is available via: <https://www.regulations.gov/document/FWS-R6-ES-2022-0150-0002> (viewed September 26, 2023).

⁷USFWS acknowledged the “low bar” standard in its media release announcing its “90-day” determinations on February 6, 2023. *See* <https://www.fws.gov/press-release/2023-02/service-initiate-grizzly-bear-status-review-northern-continental-divide> (viewed September 26, 2023). However, USFWS failed to properly apply this standard in its review of Idaho’s petition.

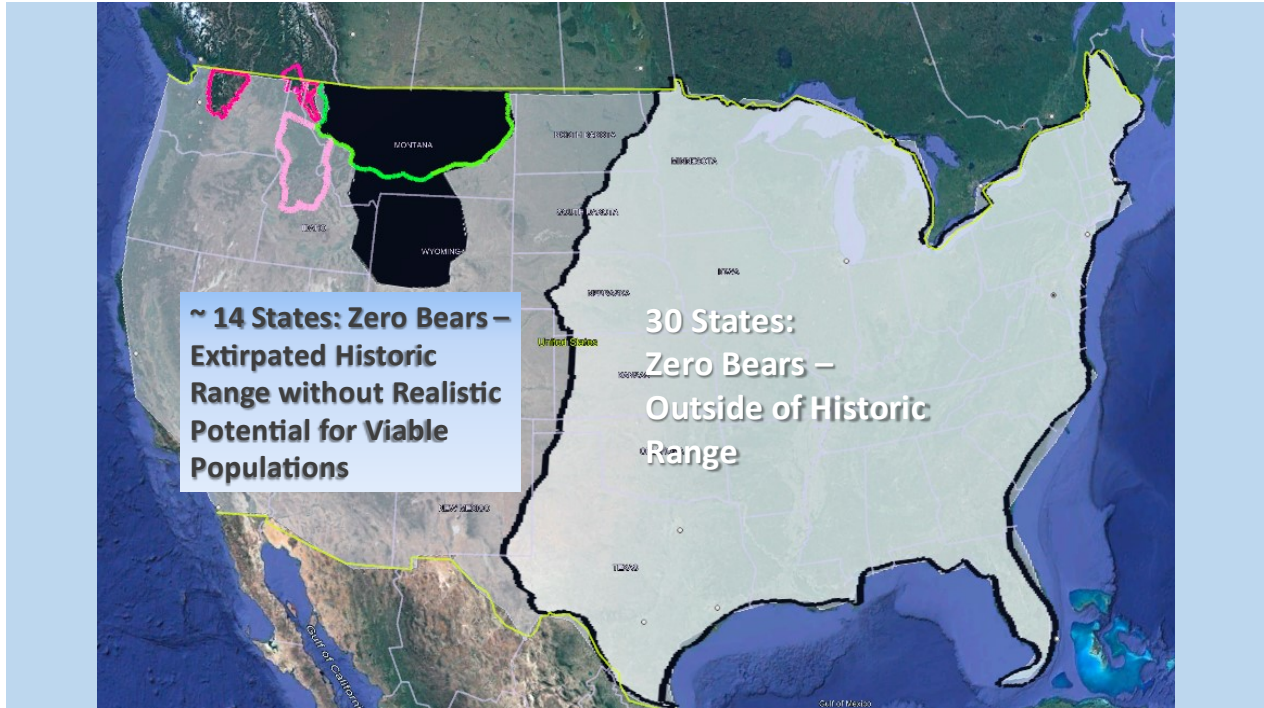
266. USFWS unreasonably rejected Idaho’s petition by holding the petition to a higher standard than the ESA requires. USFWS also ignored best available science and failed to explain the inconsistencies in USFWS’s own prior and concurrent determinations. USFWS also made unreasonable and otherwise unlawful interpretations of the ESA, implementing regulations, and USFWS and NOAA’s 1996 Policy on DPSs.

267. For example, USFWS failed to provide a rational explanation for the inconsistencies between its denial of Idaho’s petition and USFWS’s concurrent favorable 90-day findings on delisting actions separately petitioned by the states of Wyoming and Montana. USFWS found delisting actions “may be warranted” for potentially identifiable DPSs in the tri-state Greater Yellowstone area and Montana’s Northern Continental Divide, as extracted from the lower-48 listing. 88 Fed. Reg. at 7,658.

268. In its February 2023 announcement of findings on the three states’ petitions, USFWS presented the following map, which it has regularly used to portray information on grizzly bear distribution and the potential scope of recovery under the ESA. Notably, USFWS’ map ignores the remaining 44 states erroneously included in the listed entity, as well as the portions of Idaho, Montana, Wyoming, and Washington where habitat is no longer suitable for grizzly bears due to human occupancy.



269. The following map further illustrates the arbitrary and capricious nature of USFWS’ denial of Idaho’s petition, and why the “lower-48” listing exceeds statutory authority and should be delisted. As referenced in Idaho’s petition, the “44-plus” states outside of USFWS’ map are areas that USFWS has acknowledged: (1) never contained a grizzly bear population, (2) are unlikely to contain any viable and self-sustaining grizzly bear population in the future, or (3) whose recolonization is unnecessary for ESA purposes.



270. The Greater Yellowstone and Northern Continental Divide Areas whose delisting “may be warranted” as independent DPSs (88 Fed. Reg. 7,659-60) are shown in black on the above map. Of the remaining four “ecosystems” or “recovery areas,” USFWS has indicated that the North Cascades (central Washington) and Selway-Bitterroot (Idaho) do not contain populations and are geographically distinct or discrete from the other existing populations. USFWS has previously identified the other two small recovery areas (Selkirk and Cabinet-Yaak) as warranting separate status as one or two DPSs.

271. There has been other recognition by USFWS of how the 1996 DPS Policy’s may apply to the small southward extensions of Canada grizzly bear populations into the U.S. and to non-existent populations :

A strict application of the 1996 DPS policy could lead to the determination that the existence and recovery of smaller grizzly bear populations in the Cabinet-Yaak, Selkirk, North Cascades, and Bitterroot ecosystems were “not significant” to the taxon (*Ursus*

arctos horribilis in North America), with a subsequent determination that these populations should be delisted because they do not meet the definition of a “listable entity”.⁸

272. In denying Idaho’s petition, USFWS failed to proceed with delisting the “lower-48” non-species and unreasonably rejected the path required by the ESA and APA—that of a reasonable person conducting an impartial scientific review examining a listing USFWS has itself admitted is flawed. Instead, USFWS illogically defended the delineation of a DPS that is mostly not now—and never will be in the future—a grizzly bear population by USFWS’ own definitions and conclusions.

273. Section § 706 (2)(C) of the APA requires a reviewing court to hold unlawful and set aside agency action, findings, and conclusions found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” 5 U.S.C. § 706(2)(C).

274. Under the APA, a final agency action may be held unlawful and set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 USC § 706(2)(A).

275. An agency action must be reversed when the agency has “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Center for Biological Diversity v. Zinke*, 868 F.3d 1054, 1057 (9th Cir. 2017) (citation omitted).

⁸ *E.g.*, FWS_Del Doc_52870-2871 (dated September 2, 2014), from FWS Deliberative Documents produced in *Crow Indian Tribe v. United States*, Consolidated Case No. 9:17-cv-00089-DLC.

276. USFWS’ 90-day finding rejecting Idaho’s petition was unlawful because it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the ESA and other law, as exemplified by the following:

- a.** USFWS failed to apply its “low bar” standard for a 90-day finding. *See* ¶266, *supra*.
- b.** USFWS failed to properly apply the ESA’s implementing regulation definition of “population” in determining whether the “lower-48” listed entity may not qualify a “distinct population segment” and thus may not qualify as a “species” for ESA purposes.
- c.** USFWS failed to apply the “best available science” to its delisting determination, or to otherwise provide a reasonable explanation as to the inconsistency of its denial of Idaho’s petition with USFWS’ previous and recent findings regarding:
 - o erroneous inclusion of 30 states lacking historic grizzly bear populations;
 - o absence of grizzly bear populations outside of four “ecosystems” in four states; and
 - o recolonization of grizzly bear populations outside of these four states is nearly impossible and unnecessary for ESA purposes.
- d.** USFWS provides no rational explanation of what “experimental conditions” or “ideal natural group” apply to justify the inconsistency of its finding on Idaho’s petitions with USFWS’ prior determinations of what do—and do not—qualify as grizzly bear populations or potentially viable, self-sustaining populations.
- e.** USFWS unreasonably determined 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.” *See* ¶236, *supra*.
- f.** As USFWS has acknowledged, it failed to apply its DPS policy at all in its 5-year status review in 2021. The prior “5-year” review in 2011 did not properly apply the DPS policy,

and reached internally inconsistent findings as to discreteness and significance relative to the subspecies of the “lower 48” listing entity and the six ecosystems. USFWS also ignored the findings of its DPS analysis in 2011 that action was warranted to address the erroneous inclusion of 30 states because these states were entirely outside of DPS range. The 2011 DPS analysis preceded other USFWS determinations and recent appellate court decisions that indicate USFWS’ conclusory 2011 DPS analysis was untenable. Idaho’s petition described the flaws in USFWS’ 2011 analysis, but USFWS failed to discuss or address these errors in its 90-day determination.

g. USFWS unreasonably identified more restrictive regulatory measures in the United States as a reason to delimit a DPS at an international boundary in considering a DPS for listed status. Delimiting a DPS at an international border to support ESA listing of an area with stronger conservation measures is an unreasonable interpretation of Congress’ direction to use DPSs “sparingly” for ESA protections.

h. USFWS failed to reconcile the inconsistencies of its determination on Idaho’s petition for delisting the lower-48 listing with USFWS’ concurrent and prior findings relative to identification of DPSs *within* the geography of the lower-48 listing. At various times, USFWS has found different statuses (e.g., uplisted to endangered, delisted, designation as a 10(j) population) were “warranted” or “may be warranted” for all 6 of the individual recovery areas identified by USFWS. For the “low bar” applicable to the 90-day determination on delisting decisions, these past and concurrent USFWS findings on new DPSs, discrete from each other and extracted from the larger lower-48 listing, are more than sufficient to reach a determination that the lower-48 listing is itself not an interbreeding DPS.

C. Counterclaim and Crossclaim for Declaratory Relief relative to Compliance with 50 CFR Take Regulations for Agency Removal of Nuisance Grizzly Bears

277. Idaho hereby realleges and incorporates all above paragraphs by reference.

278. This Court has jurisdiction over this claim under 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201-2202 (declaratory judgments) and the ESA (16 U.S.C. 1531 *et seq.*). The Court has general equitable powers to issue further relief.

279. The plain language of 50 C.F.R. 17.40(b)(1)(i)(C) authorizes the taking, to include lethal removal, of nuisance bear(s) by state, federal or tribal authority, provided certain conditions are met.

280. If conditions are met, the terms of this regulation do not require additional USFWS authorization on a bear-specific basis before bear removal.

281. 50 CFR 17.40(b)(1)(i)(C) allows the taking of a grizzly bear “constituting a demonstrable but non-immediate threat to human safety or committing significant depredations...” only if:

- (1) It has not been reasonably possible to eliminate such threat or depredation by live-capturing and releasing unharmed in a remote area the grizzly bear involved; and
- (2) The taking is done in a humane manner by authorized Federal, State, or Tribal authorities, and in accordance with current interagency guidelines covering the taking of such nuisance bears; and
- (3) The taking is reported within 5 days of occurrence to the appropriate U.S. Fish and Wildlife Service law enforcement office, as indicated in paragraph (b)(1)(i)(B) of this section, and to appropriate State and Tribal authorities.

282. As described *supra* (¶¶210-215), the three bears near Tetonia had been hazed and relocated because of their activities in the residential areas of Yellowstone National Park, and Gardiner, Montana. A female and two offspring that continued to show little aversion to people and remained in and among yards and driveways at fall denning time posed a demonstrable threat to public safety.

283. In addition to the prior live capture and release in Montana, Idaho made repeated efforts to haze and re-trap the three bears, and to free dart the young bear on November 10, 2023. These efforts were not successful.

284. The State of Idaho has been a member of the Interagency Grizzly Bear Committee (IGBC) since 1983. The IGBC consists of representatives of USFWS, federal land management agencies, and representatives of the States of Idaho, Montana, Wyoming, and Washington.

285. The “current interagency guidelines covering the taking of such nuisance bears,” referenced in 50 CFR 17.40(b)(1)(i)(C), are the Interagency Grizzly Bear Guidelines approved by the IGBC in 1986 (Guidelines).⁹ The Guidelines apply on “National Forest System, Bureau of Land Management, and National Park System lands throughout grizzly bear ecosystems in the States of Idaho, Montana, Washington, and Wyoming.” Guidelines, Preface; *see also id.* at 1.

286. The 1986 Guidelines and the related Federal Register notice make it clear that the Guidelines apply only to lands in federal ownership; the Guidelines do not apply to lands in state, tribal, private, or other non-federal ownership. In describing comments about concerns with preventing problem grizzly-human conflicts, the 1986 Federal Register Notice clearly distinguishes federal lands from adjoining private lands. 51 Fed. Reg. 42,865.

287. The 1986 Guidelines have varying application based on the identification of five different classes of “Management Situations” on federal lands. For example, Management Situation 1 refers to areas on federal lands that contain “grizzly population centers (areas key to the survival of grizzlies where seasonal or year-long grizzly activity, under natural, free-ranging conditions is common).” 51 Fed. Reg. 42,865.

⁹ The 1986 Guidelines are available at <https://igbconline.org/document/1986-grizzly-bear-guidelines/> (viewed September 27, 2023).

288. By contrast, the 1986 Guidelines describes Management Situation 3 on federal lands as:

Population and habitat conditions. Grizzly presence is possible but infrequent. Developments, such as campgrounds, resorts or other high human use associated facilities, and human presence result in conditions which make grizzly presence untenable for humans and/or grizzlies. There is a high probability that major Federal activities or programs may affect the species' conservation and recovery.

Management direction. Grizzly habitat maintenance and improvement are not management considerations. Grizzly-human conflict minimization is a high priority management consideration. Grizzly bear presence and factors contributing to their presence will be actively discouraged. Any grizzly involved in a grizzly-human conflict will be controlled. Any grizzly frequenting an area will be controlled.

51 Fed. Reg. 42,866.

289. Plaintiff brings this action against federal and Idaho officials under ESA citizen suit provisions. Under the *Ex Parte Young* doctrine, a private Plaintiff can only seek prospective declaratory and injunctive relief against agency officials for alleged ongoing or likely ESA future violations. *See Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000). *Ex Parte Young* does not permit judgments against state officers declaring that they violated federal law in the past. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.* 506 U.S. 139, 146 (1993). However, based on regulatory misinterpretation, Plaintiff insists that future ESA violations by Idaho are likely related to agency removal of nuisance grizzly bears.

290. In contrast to Plaintiff, the United States and its agencies have enforcement authorities under the ESA for past violations. 16 U.S.C. 1540(a), (b). It is Idaho's understanding that USFWS' Acting Idaho Field Office Manager asked for a federal law enforcement investigation regarding Idaho's lethal removal of the second young bear on November 10, 2022. The requested investigation was apparently based in part on a misunderstanding of the

requirements of 50 CFR 17.40(b)(1)(i)(C), particularly as applied to private (non-federal) land, and on an incorrect assertion that USFWS had clearly and directly revoked Idaho's authorization for removing the third bear.

291. It is Idaho's understanding that the USFWS-requested investigation is inactive. The statute of limitations applicable to these events has not expired. Idaho has met with U.S. Fish and Wildlife Service to improve communications and clarify regulatory authorization and agency concurrence for removal of nuisance grizzly bears in the future. However, the USFWS Recovery Office and USFWS management have repeatedly misinterpreted the 1986 Guidelines to apply to non-federal lands, or to federal lands in a way that does not correspond to the variation in Management Situations identified by the Guidelines.

292. Idaho continues to undertake the physically, emotionally, and socially demanding responsibilities for addressing grizzly bear – human conflicts in suitable and unsuitable habitat for bears. Idaho seeks declaratory relief to end misinterpretations of ESA implementing regulations for removal of nuisance grizzly bears, including the applicability—and inapplicability—of the 1986 Guidelines, which misinterpretations result in unnecessary additional burden to Idaho.

D. Harm to Idaho from Unlawful USFWS Action and Redressability

293. USFWS' exceedance of ESA statutory authority, by the continued listing of an entity that is not a species, harms the procedural and substantive sovereign interests of Idaho, its officials and agencies, and the collective interests of its citizens. USFWS' unlawful 90-day negative finding on Idaho's petition and USFWS' failure to delist a non-species likewise harm these interests. The misapplication of ESA implementing regulations for take of nuisance grizzly

bears, including the misapplication to non-federal lands of the 1986 guidelines, also harms these interests.

294. The “lower-48” grizzly bear listing essentially divests Idaho of its sovereign authority to manage grizzly bears without USFWS interference. Such divestment injures Idaho by inhibiting the state’s ability to manage and regulate its wildlife. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (“States have important interests in regulating wildlife and natural resources within their borders”). The ESA listing also inhibits Idaho’s ability to enforce its legal codes. *See Maine v. Taylor*, 477 U.S. 131, 137 (1986) (“a State clearly has a legitimate interest in the continued enforceability of its own statutes”).

295. Continuation of an unlawful listing effectively preempts the statutes, rules, and management plans that Idaho has in place for grizzly bear management under state authority without federal preemption. 16 U.S.C. § 1538(a)(1)(B) (ESA prohibitions against take of listed species without federal authorization); *see also* 16 U.S.C. § 1532(19) (defining “take”); 50 C.F.R. § 17.40(b) (restricted allowance for grizzly bear take). *See also, e.g.*, Idaho Code § 103; Idaho Code §§ 36-1107 and 36-1109 (authorizing control of grizzly bears molesting or attacking livestock and compensation for property damage from grizzly bears). Federal interference with these sovereign interests is sufficient to confer standing. *See Maine v. Norton*, 257 F. Supp. 2d 357, 374 (D. Me. 2003) (ESA listing “injures the State by interfering with its sovereign interests in managing its own natural resources and enacting and enforcing its own legal code”).

296. State sovereign interests in wildlife are recognized in the ESA itself. *See* 16 U.S.C. § 1532(3), (18) (defining “conservation” and “state agency”); 16 U.S.C. 1535 (federal agency cooperation with states). Idaho has interests in the proper, successful implementation of the ESA, such that properly identified threatened or endangered species receive the protections

of the ESA, and entities that are not threatened or endangered—or that are not species at all—are managed under state sovereign authorities without federal preemption.

297. The ESA carries criminal and civil liability for the unlawful take of grizzly bears. This lawsuit and other citizen lawsuits seeking to hold Idaho officials directly and vicariously liable for take of a listed “non-species” cost Idaho time and resources. The exceedance of ESA jurisdiction results in the diversion of resources from Idaho’s management of wildlife under its state authorities.

298. Idaho’s interests are also harmed by USFWS’ lack of procedural compliance with the APA in taking final agency actions under the ESA.

299. Idaho has suffered legal wrong or is otherwise adversely affected and aggrieved by: USFWS’ exceedance of statutory authority under the ESA; USFWS’ failure to perform its duty to delist a listed entity that is not a species; USFWS’ unlawful 90-day determination on Idaho’s petition for delisting; and Plaintiff’s and USFWS’ misapplication of ESA implementing regulations, including Interagency Guidelines.

300. The Court can redress Idaho’s injuries under the ESA, APA, Declaratory Judgment Act, and the Court’s equitable powers.

IV. ANSWER TO PLAINTIFF’S COMPLAINT & DEFENSES

A. ANSWER TO PLAINTIFF’S INTRODUCTION

Idaho answers Plaintiff’s Complaint as follows, using paragraph numbering corresponding to the numbering in the Complaint.

1. The allegations in Paragraph 1 contain Plaintiff’s characterization of their lawsuit and legal conclusions to which no response is required.

2. Idaho admits that Idaho staff shot and killed a female grizzly bear and the bear's two offspring in November 2022, because of public safety risk. Idaho denies any violation of the ESA.

3. Idaho admits that Idaho staff took a female grizzly bear and the bear's two offspring, as authorized by ESA implementing regulations. Idaho denies the remainder of the Paragraph.

4. Idaho admits the taking of the second young bear near Tetonia, as authorized by ESA implementing regulations. Idaho denies the remainder of the Paragraph.

5. The allegations in Paragraph 5 contain Plaintiff's characterization of their lawsuit to which no response is required.

6. The allegations in Paragraph 6 contain Plaintiff's characterization of their lawsuit and legal conclusions to which no response is required.

7. The allegations in Paragraph 7 contain Plaintiff's characterization of their lawsuit and legal conclusions to which no response is required.

8. The allegations in Paragraph 8 contain Plaintiff's characterization of their lawsuit and legal conclusions to which no response is required.

B. ANSWER TO PLAINTIFF'S INTRODUCTION

9. The allegations in Paragraph 9 are legal conclusions to which no response is required.

10. The allegations in Paragraph 10 are legal conclusions to which no response is required.

11. Idaho admits that Plaintiff provided 60-days' notice of intent to bring suit. The remainder of the Paragraph contains legal conclusions to which no response is required.

C. ANSWER TO PLAINTIFF'S PARTIES

12. Idaho is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 12 and denies them on that basis.

13. Idaho is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 13 and denies them on that basis.

14. Idaho is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 14 and denies them on that basis.

15. The allegations in Paragraph 15 contain Plaintiff's characterization of their lawsuit and legal conclusions to which no response is required. To the extent a response is required, Idaho denies the allegation in the Paragraph.

16. The allegations in Paragraph 16 contain Plaintiff's characterization of their lawsuit and legal conclusions to which no response is required. To the extent a response is required, Idaho denies the allegation in the Paragraph.

17. Idaho admits the allegations in Paragraph 17, with the clarification that USFWS authorization of take of grizzly bears may take various forms (e.g., implementing regulation, section 6 permit, incidental take statement).

18. Idaho admits that Martha Williams is USFWS Director. The other allegations in Paragraph 18 contain Plaintiff's characterizations of their lawsuit and legal conclusions to which no response is required.

19. Idaho admits that Jim Fredericks is IDFG's Director and was previously a Deputy Director of IDFG. The other allegations in Paragraph 19 contain Plaintiff's characterizations of their lawsuit and legal conclusions to which no response is required.

20. Idaho admits that Matt Pieron is Regional Supervisor of IDFG's Upper Snake Region. The other allegations in Paragraph 20 contain Plaintiff's characterizations of their lawsuit and legal conclusions to which no response is required.

21. Idaho admits that Curtis Hendricks is Regional Wildlife Manager of IDFG's Upper Snake Region. The other allegations in Paragraph 21 contain Plaintiff's characterizations of their lawsuit and legal conclusions to which no response is required.

22. The allegations in Paragraph 22 contain Plaintiff's characterization of their lawsuit and legal conclusions to which no response is required.

D. ANSWER TO PLAINTIFF'S LEGAL BACKGROUND

23. The allegations in Paragraph 23 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

24. The allegations in Paragraph 24 characterize a case interpreting the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to this document's plain language, meaning, or context.

25. The allegations in Paragraph 25 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

26. The allegations in Paragraph 26 characterize the ESA and its implementing regulations, which speak for themselves and are the best evidence of their own content. Idaho denies any allegations contrary to their plain language, meaning, or context.

27. The allegations in Paragraph 27 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

28. The allegations in Paragraph 28 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

29. Idaho admits grizzly bears in the Greater Yellowstone Ecosystem are a population that is within the "lower-48" geographic area listed as a "threatened species" under the ESA. Idaho denies this population is a "sub-population." Idaho also contends that the current "lower-48" listing does not qualify as a species and is an unlawful listing.

30. The allegations in Paragraph 30 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

31. The allegations in Paragraph 31 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

32. The allegations in Paragraph 32 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

33. The allegations in Paragraph 33 characterize an implementing regulation and associated rulemaking published in the Federal Register, which speak for themselves and are the best evidence of their own content. Idaho denies any allegations contrary to their plain language, meaning, or context.

34. The allegations in Paragraph 34 characterize an ESA implementing regulation, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the regulation’s plain language, meaning, or context.

35. Idaho admits the allegations in Paragraph 35.

36. The allegations in Paragraph 36 characterize an ESA implementing regulation, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the regulation’s plain language, meaning, or context.

37. The allegations in Paragraph 37 characterize an ESA implementing regulation, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the regulation’s plain language, meaning, or context.

38. The allegations in Paragraph 38 characterize an ESA implementing regulation, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the regulation’s plain language, meaning, or context. For example, Idaho denies that 50 CFR makes any reference to compliance with “Grizzly Bear Conflict Response Protocol,” and denies that the linked document has the application alleged by Plaintiff.

39. The allegations in Paragraph 39 characterize the current (1986) Interagency Grizzly Bear Guidelines, which document speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the Guidelines’ plain language, meaning, or context. For example, the Guidelines do not appear to contain the word “strike.” In addition, Idaho denies that the guideline referenced in Paragraph 39 has the application alleged by Plaintiff. The 1986 Guidelines apply only to federal lands (National Forest System, BLM, and National Park System lands); they do not apply to non-federal lands. The Guidelines have varying application on federal lands, based on specified “Management Situations” identified by geography.

40. The allegations in Paragraph 40 characterize the current (1986) Interagency Grizzly Bear Guidelines, which document speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the Guidelines' plain language, meaning, or context. Idaho incorporates by reference its response to Paragraph 39.

E. ANSWER TO PLAINTIFF'S STATEMENT OF FACTS

41. The allegations in Paragraph 41 characterize the 1993 Recovery Plan, which document speaks for itself and is the best evidence of its own content. Idaho admits that grizzly bears inhabited much of the western United States (south of Canada) before European settlement, and that estimates for population in the western United States exceeded 50,000. Idaho clarifies that population estimates would be higher with the inclusion of western Canada and Alaska, where the population continues to exceed 50,000 animals.

42. Idaho admits the allegations in Paragraph 42 on a historical basis.

43. Idaho denies the allegations in Paragraph 43 because the percentages alleged do not include grizzly bears in western Canada and Alaska in determining the relative number of grizzly bears between 1850 and 1950.

44. Idaho denies the allegations in Paragraph 44 because they do not reflect the extensive occurrence of grizzly bears from the Northern Continental Divide through western Canada to Alaska. Idaho admits that the Greater Yellowstone Area has been isolated from other grizzly bear populations to the north.

45. Idaho denies the allegations in Paragraph 45 because they do not reflect the extensive occurrence of grizzly bears from the Northern Continental Divide through western Canada to Alaska. Idaho admits that the number of grizzly bears in the United States south of Canada in 1975 was likely fewer than 1,000 individuals.

46. Idaho admits the allegations in Paragraph 46, with the clarifications that the size of the Greater Yellowstone grizzly bear population is sufficient for genetic fitness, and that Montana, Idaho, and Wyoming wildlife agencies have also agreed to make translocations from other populations to the Greater Yellowstone as necessary for continued genetic fitness.

47. Idaho admits the allegations in Paragraph 47, with the clarification that the Recovery Plan has been further amended since 1993.

48. Idaho admits the allegations in Paragraph 48.

49. The allegations in Paragraph 49 characterize a Recovery Plan, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the plan's plain language, meaning, or context. Page 133 of the Recovery Plan states "Ensure that control of nuisance bears is accomplished according to 50 CFR 17.40 and the Guidelines."

50. Idaho admits that the IGBC Guidelines require a determination that a bear is a nuisance on federal lands identified as Management Situations 1 and 2 before they can be controlled. Idaho denies that the Guidelines impose this requirement on federal lands not designated as Management Situation Areas 1 or 2, and denies that the Guidelines apply to non-federal lands.

51. The allegations in Paragraph 51 characterize the 2007 delisting rule, which was vacated. The rule speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the rule's plain language, meaning, or context. Idaho denies that the present (2023) Yellowstone grizzly bear population is at levels below those recommended for evolutionary success. Idaho avers the size of the Greater Yellowstone population is sufficient for genetic fitness. Idaho also avers that Montana, Idaho, and Wyoming wildlife agencies have

agreed to make translocations from other populations to the Greater Yellowstone as necessary for continued genetic fitness.

52. Idaho denies the allegations in Paragraph 52, and avers its actions were authorized by, and complied with, 50 C.F.R. 17.40(b)(1)(i)(C).

53. Idaho denies the allegations in Paragraph 53.

54. Idaho does not interpret “natural” food sources to include foraging on lawns, school football fields, yard fruit trees, and crops such as alfalfa. Idaho denies the first sentence of Paragraph 54. Idaho admits that IDFG’s biologist made the statement alleged in the second and third sentences of Paragraph 54.

55. Idaho admits that the bears were foraging in proximity to human residences but denies the remaining allegation in Paragraph 55. Idaho avers there was reporting of conflict and reporting or observation of “near miss” and other dangerous potential encounters.

56. Idaho admits the allegations of Paragraph 56.

57. Idaho admits the allegations in Paragraph 57, with the clarification that the bears were relocated because the grizzly bears were persistent at staying in areas close to humans, including residences, schools, and a school bus stop, despite multiple days of hazing efforts.

58. The allegations in Paragraph 58 characterize a press release, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the press release’s plain language, meaning, or context.

59. Idaho admits the allegations in Paragraph 59.

60. Idaho admits the allegation in Paragraph 60.

61. Idaho lacks sufficient knowledge as to the allegations in Paragraph 61 regarding a statement by USFWS and denies them on that basis. Idaho admits that the bears were in

locations close to houses in Idaho. Idaho also clarifies that portions of the riparian corridors are close to homes.

62. Idaho admits that Matt Pieron sought USFWS concurrence to lethally remove Grizzly 1089 and her two offspring.

63. Idaho admits that Ben Jimenez concurred with removal of Grizzly 1089 and her two offspring despite expressing reservations.

64. Idaho admits the allegations in Paragraph 64.

65. Idaho admits that Ben Jimenez concurred with the lethal removal of Grizzly 1089 and two offspring despite expressing reservations. Idaho denies that the alleged statements operated as conditions in addition to those established by 50 CFR 17.40(b)(1)(i)(C). Idaho avers that Matt Pieron asked USFWS about relocation to Yellowstone or Teton National Parks or other federal lands, and USFWS could not identify any ready placement site approved by the federal land management agency, or any other ready placement site.

66. Idaho admits the allegations in Paragraph 66.

67. Idaho lacks sufficient knowledge as to the allegations in Paragraph 67 and denies them on that basis.

68. Idaho lacks sufficient knowledge as to the making of statements alleged in Paragraph 68 and denies them on that basis.

69. Idaho admits the allegations in Paragraph 69.

70. Idaho lacks sufficient knowledge as to the alleged email by Hilary Cooley in Paragraph 70 and denies the allegations on that basis.

71. Idaho lacks sufficient knowledge as to the alleged email in Paragraph 71 and denies the allegations on that basis. Idaho also denies that USFWS ever identified a definite,

approved alternative placement. Idaho also denies that USFWS clearly or definitively communicated to Idaho that USWS would consider taking of the third bear to be unauthorized.

72. Idaho admits that USFWS staff communicated disagreement of the public safety threat posed by the bear. Idaho denies that USFWS clearly or definitively communicated to Idaho that USWS would consider taking of the third bear to be unauthorized.

73. Idaho denies the allegations in Paragraph 73.

74. Idaho admits that Idaho killed the third bear on November 10, 2022, after efforts to free dart it were unsuccessful. Idaho avers that its removal action was authorized and compliant with 50 CFR 17.40(b)(1)(i)(C).

75. Idaho lacks sufficient knowledge as to the alleged communication between USFWS officials in Paragraph 75 and denies them on that basis. Idaho further denies that the action was unauthorized. Idaho avers that its removal actions were authorized and compliant with 50 CFR 17.40(b)(1)(i)(C).

F. ANSWER TO PLAINTIFF'S FIRST CLAIM FOR RELIEF

76. The allegations in Paragraph 76 incorporate by reference all previous paragraphs and, therefore, no response is required. To the extent that a response is required, Idaho incorporates by reference its answers to all previous paragraphs.

77. The allegations in Paragraph 77 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

78. The allegations in Paragraph 78 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

79. The allegations in Paragraph 79 characterize a case interpreting the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the document's plain language, meaning, or context.

80. The allegations in Paragraph 80 characterize an ESA implementing regulation, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the regulation's plain language, meaning, or context.

81. The allegations in Paragraph 81 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

82. The allegations in Paragraph 82 are a legal conclusion to which no response is required. Idaho notes that the allegations fail to recognize provisions of the ESA and implementing regulations that allow take of listed species.

83. The allegations in Paragraph 83 are a legal conclusion to which no response is required. Idaho notes that the allegations fail to recognize provisions of the ESA and implementing regulations that allow take of listed species.

84. The allegations in Paragraph 84 characterize an ESA implementing regulation, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the regulation's plain language, meaning, or context. The allegations are a legal conclusion to which no response is required. To the extent a response is required, Idaho denies the allegations in Paragraph 84, and avers that Idaho's taking of an adult female grizzly bear and one young bear on November 9, 2023, complied with 50 C.F.R. 17.40(b)(1)(i)(C).

85. Idaho denies the allegations in Paragraph 85.

86. Idaho denies the allegations in Paragraph 86.

87. Idaho denies the allegations in Paragraph 87.

88. The allegations in Paragraph 88 characterize an ESA implementing regulation and the Guidelines, which speak for themselves and the best evidence of their contents. Idaho denies any allegations contrary to their plain language, meaning, or context. The first sentence of Paragraph 88 contains a legal conclusion to which no response is required. Idaho denies the second sentence in Paragraph 88. Idaho avers that the bears had been hazed multiple times, captured and released in Montana, and unsuccessful attempts were made in Idaho to again capture and release the bears prior to their lethal removal. Idaho also notes that the grizzly bears were frequenting privately owned lands to which the 1986 Guidelines do not apply.

89. The allegations in Paragraph 89 characterize the 1986 Interagency Grizzly Bear Guidelines, which document speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the Guidelines' plain language, meaning, or context. For example, the Guidelines do not contain the word "strike." In addition, Idaho denies that the guideline referenced in Paragraph 89 has the application alleged by Plaintiff. The 1986 Guidelines apply only to federal lands, where they have varying application, based on specified "Management Situations."

90. The allegations in Paragraph 90 characterize the 1986 Interagency Grizzly Bear Guidelines, which document speaks for itself and is the best evidence of its own content. The link provided in Plaintiff's allegation is not the 1986 Guidelines. Idaho denies any allegations contrary to the Guidelines' plain language, meaning, or context. Idaho denies that the guideline referenced in Paragraph 90 has the application alleged by Plaintiff. The 1986 Guidelines apply only to federal lands, where they have varying application, based on specified "Management Situations."

91. The allegations in Paragraph 91 are a legal conclusion to which no response is required. To the extent a response is required, Idaho denies the allegations.

92. The allegations in Paragraph 92 are a legal conclusion to which no response is required. To the extent a response is required, Idaho denies the allegations.

93. The allegations in Paragraph 93 are a legal conclusion to which no response is required. To the extent a response is required, Idaho denies the allegations.

94. The allegations in Paragraph 94 are a legal conclusion to which no response is required. To the extent a response is required, Idaho denies the allegations, and denies that Plaintiff is entitled to any relief whatsoever.

G. ANSWER TO PLAINTIFF'S SECOND CLAIM FOR RELIEF

95. The allegations in Paragraph 95 incorporate by reference all previous paragraphs and, therefore, no response is required. To the extent a response is required, Idaho incorporates by reference its answers to all previous paragraphs.

96. The allegations in Paragraph 96 characterize the ESA, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

97. The allegations in Paragraph 97 characterize an ESA implementing regulation, which speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the regulation's plain language, meaning, or context.

98. The allegations in Paragraph 98 characterize the ESA and a case interpreting the ESA, which speak for themselves and are the best evidence of their own content. Idaho denies any allegations contrary to the ESA's plain language, meaning, or context.

99. The allegations in Paragraph 99 are a legal conclusion to which no response is required. To the extent a response is required, Idaho denies the allegations.

100. The allegations in Paragraph 100 characterize an ESA implementing regulation and are legal conclusions to which no response is required. The regulation speaks for itself and is the best evidence of its own content. Idaho denies any allegations contrary to the regulation's plain language, meaning, or context. To the extent a response is further required, Idaho denies the remainder of Paragraph 100. Idaho avers that its removal of the grizzly bear on November 10, 2023 was authorized by and in compliance with 50 CFR 17.40 (b)(i)(C).

101. Idaho denies the allegations in Paragraph 101.

102. The allegations in Paragraph 102 characterize an ESA implementing regulation and the IGBC Guidelines. The regulation and Guidelines speak for themselves and are the best evidence of their own content. Idaho denies any allegations contrary to the regulation and Guidelines' plain language, meaning, or context. Idaho incorporates its prior responses (e.g., response to Paragraph 90) regarding the inapplicability of the Guidelines to non-federal lands. Idaho avers that grizzly bear 1089 and both offspring were hazed multiple times and trapped and re-located from the Mammoth/Gardiner area in Montana to national forest lands near the Montana-Idaho border. Idaho's efforts to trap the bears in the Tetonia area were unsuccessful, as were Idaho's efforts on November 9 and 10, 2023 to trap and to free dart the young bear (i.e., attempt to shoot with a dart containing tranquilizing drugs without trapping it first).

103. The allegations in Paragraph 103 characterize an ESA implementing regulation and the IGBC Guidelines. The regulation and Guidelines speak for themselves and are the best evidence of their own content. Idaho denies any allegations contrary to the regulation and Guidelines' plain language, meaning, or context. Idaho incorporates its prior responses (e.g.,

response to Paragraph 90) regarding the inapplicability of the Guidelines to non-federal lands. The link provided in Paragraph 103 is not a link to the Guidelines.

104. The allegations in Paragraph 104 are a legal conclusion for which no response is required. To the extent a response is further required, Idaho denies the remainder of Paragraph 104, and avers that Idaho's taking of a grizzly bear on November 10, 2023 complied with 50 C.F.R. 17.40(b)(1)(i)(C).

105. The allegations in Paragraph 105 are a legal conclusion for which no response is required. To the extent a response is further required, Idaho denies the remainder of Paragraph 105.

106. Idaho denies the allegations in Paragraph 106.

107. The allegations in Paragraph 107 are a legal conclusion for which no response is required. To the extent a response is further required, Idaho denies the remainder of Paragraph 107.

108. The allegations in Paragraph 108 characterize Plaintiff's requested relief, for which no response is required. To the extent a response is further required, Idaho denies that Plaintiff is entitled to any relief whatsoever.

H. ANSWER TO PLAINTIFF'S PRAYER FOR RELIEF

The final paragraph (with four letter subparagraphs) of the Complaint constitutes Plaintiff's request for relief, to which no response is required. To the extent that a response is required, Idaho denies that Plaintiff is entitled to their requested relief or any relief whatsoever.

I. ANSWER – GENERAL DENIAL

Idaho denies every allegation in the Complaint that is not specifically admitted.

J. ANSWER – DEFENSES

Idaho reserves the right to assert additional affirmative defenses at a later date.

Idaho asserts that the following defenses bar some or all of Plaintiff’s claims:

1. Plaintiff fails to demonstrate standing to assert some or all of their claims.
2. This Court lacks jurisdiction over some or all of Plaintiff’s claims.

V. IDAHO’S PRAYER FOR RELIEF

Idaho respectfully requests declaratory and injunctive relief to:

- (1) Adjudge and declare that the ESA listing of grizzly bear in the conterminous (“lower 48”) United States, and associated 10j rule listing of a nonessential experimental population in the Selway-Bitterroot area, are unlawful because they are inconsistent with, and in excess of, USFWS’ authority and jurisdiction under the ESA because the listing is not a “species”;
- (2) Order the vacatur of the 50 C.F.R. 17.11 listing of grizzly bear in the lower-48 conterminous United States as a threatened species and the associated designation of a nonessential experimental population in the Selway-Bitterroot area (50 CFR 17.84(l));
- (3) Adjudge and declare that USFWS’ February 6, 2023 negative “90-day” determination on Idaho’s March 9, 2022 petition is arbitrary, capricious, an abuse of discretion, not in accordance with the law, and otherwise contrary to constitutional rights and powers; and remand the matter to USFWS for further consideration consistent with law and action by a date certain;
- (4) Declare that: (a) 50 CFR 17.40(b)(1)(i)(C) is authorization by the USFWS for the agency taking of grizzly bears, including lethal removal, if conditions of the regulation are met, without additional requirement for bear-specific approval by USFWS; and (b) that the

1986 Guidelines referenced in this regulation apply only to federal lands as specified by “Management Situation,” and do not apply to non-federal lands;

- (5) Award Idaho its reasonable fees, costs, expenses, and disbursements, including attorney’s fees associated with this litigation; and
- (6) Grant Idaho such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 29th day of September, 2023.

HON. RAÚL R. LABRADOR
Attorney General
SCOTT L. CAMPBELL
Chief of Energy & Natural Resources Division

/s/ Kathleen E. Trever
KATHLEEN E. TREVER
Deputy Attorney General