



June 30, 2017

Ryan Zinke, Secretary
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BY E-MAIL AND CERTIFIED MAIL

RE: Sixty-Day Notice of Intent to Sue to Remedy Violations of the Endangered Species Act in the U.S. Fish and Wildlife Service's Final Rule Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife

Dear Secretary Zinke and Acting Director Sheehan:

On behalf of the Northern Cheyenne Tribe, Center for Biological Diversity, Sierra Club, and National Parks Conservation Association, in accordance with the citizen suit provision of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1540(g), we hereby provide notice that the United States Fish and Wildlife Service ("Service") is in violation of the ESA, 16 U.S.C. § 1533, and its implementing regulations, 50 C.F.R. § 402 *et seq.*, with regard to the Service's June 30, 2017 final rule Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife (June 30, 2017) ("Final Rule"). In light of the imperiled status of the grizzly bear, including both present and future threats to the species' survival, and the Service's unlawful attempt to designate a grizzly bear distinct population segment ("DPS") for the sole purpose of delisting that DPS as well as other procedural errors, the Final Rule violates section 4 of the ESA. 16 U.S.C. § 1533.

In this second attempt to remove protections from the Greater Yellowstone grizzly bear, the Service incorrectly and misleadingly asserts that the Greater Yellowstone population of grizzly bears is not threatened by a recent shift to a meat-centered diet, which puts bears and cubs at risk of human conflict and predation by other bears. The Service also erroneously argues that application of the Final Rule's mortality thresholds will arrest any decline in the grizzly population due to this dietary shift, despite the fact that the best available science shows that application of the thresholds themselves has an unacceptably high likelihood of resulting in a substantial decline in the Greater Yellowstone grizzly population within ten years. The Service further irrationally dismisses threats to the Greater Yellowstone grizzly bear from climate

change, genetic isolation, habitat degradation, and inadequate regulatory mechanisms. In addition to these substantive shortcomings, the Service's attempt to designate a new Greater Yellowstone grizzly DPS for the sole purpose of delisting that DPS and its concomitant failure to address the status of the listed grizzly bear entity throughout its range are contrary to law. Further, the Service unlawfully failed to provide an opportunity for meaningful public comment on and peer review of its 2016 Conservation Strategy and other key documents.

The Service's action to remove federal ESA protections for the Greater Yellowstone grizzly threatens severe consequences for the region's iconic bear population, including enabling State-sponsored trophy hunting of grizzly bears even though existing human-caused grizzly mortality levels have reached record highs in recent years. Such hunting threatens to remove bears that serve a critical function in the ecology of the Greater Yellowstone Ecosystem; play an important cultural and spiritual role in the lives of many people, including many indigenous people; and figure prominently in the experience of visitors to Yellowstone and Grand Teton National Parks and the John D. Rockefeller, Jr. Memorial Parkway.

Accordingly, pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2), this letter provides you with notice that, unless within 60 days of receipt of this letter the Service withdraws its Final Rule, we intend to challenge in federal district court the Rule removing the Greater Yellowstone grizzly bear population from the list of threatened and endangered species.

I. The Service Has Not Rationally Addressed the Threat Posed by Grizzly Bears' Shift to a Meat-Based Diet and a Decline in Other Food Resources

Under section 4(a)(1)(E) of the ESA, 16 U.S.C. § 1533(a)(1)(E), the Service must list a species that is threatened or endangered due to "other natural or manmade factors affecting its continued existence." The Service's evaluation of the threat posed by these factors must be rational, Greater Yellowstone Coal. v. Servheen, 665 F.3d 1015, 1020 (9th Cir. 2011), and grounded in the best available science, 16 U.S.C. § 1533(b)(1)(A). In the Final Rule, the Service failed to rationally assess whether a recent shift to a meat-centered diet threatens the Greater Yellowstone grizzly bear population. The Service also arbitrarily evaluated threats due to climate change and the loss of other food resources.

After catastrophic declines in some of their traditional foods, Yellowstone-region grizzly bears have recently shifted to a diet based more extensively on meat, including wild ungulates and livestock. See Advance Copy of Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife at 137, 259–60 ("Advance Copy"); David J. Mattson, Wyoming Wildlife Advocates, Comments 24–26 (May 5, 2016), attached as Exhibit 1.¹ Bears pursuing meat are much more likely to come into conflict with hunters and ranchers, conflicts that often prove fatal to bears. Advance Copy at 359. Mothers and cubs that rely on meat are also more likely to encounter aggressive and hostile male bears, as well as other predators. Exhibit 1 at 13. Because of this shift to meat, bear deaths due to human conflicts have spiked in the last few years; 53 bear deaths attributable to humans

¹ The Advance Copy of the Final Rule is available at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-13160.pdf>. Exhibits are attached to the email transmitting the electronic copy of this letter and included on the CD enclosed with the paper copy.

occurred in 2015 alone, up from 19 human-caused deaths in 2014.² Cub recruitment has also decreased, likely because of predation by other bears, as grizzlies compete for meat food sources. Id. at 13.

As set forth in more detail in the attached comment letters, the Service failed to rationally assess this shift to a meat-centered diet, because:

- (1) the Service failed to reasonably assess its own data, which confirm that grizzly mortalities have risen, and—despite the Service’s assertions to the contrary, Advance Copy at 162—the grizzly population has begun to decline, in the face of growing conflict with humans, David J. Mattson, Additional Comments 2 (May 30, 2017), attached as Exhibit 2; Exhibit 1 at 24–26;
- (2) the Service’s finding that its mortality thresholds will prevent any human conflict-driven decline in the bear population is not supported by the best available science, Letter from Earthjustice to U.S. Fish & Wildlife Serv. 26–27 (May 10, 2016), attached as Exhibit 3; David J. Mattson, Comments 7–8 (Oct. 7, 2016), attached as Exhibit 4; Len Broberg, Proposed Hunting Influences GYE Grizzly Bear Population Structure 1–3, attached as Exhibit 5;
- (3) the Service’s conclusion that increased bear deaths in recent years are due to “density-dependent” effects is not supported by the best available science, Exhibit 3 at 7, 12–14;
- (4) the Service fails to rationally account for lag effects in its analysis of grizzly bear population trends, Exhibit 3 at 9–10; Letter from L. Jace Killsback, N. Cheyenne Tribe Admin. to Deputy Reg’l Dir. Matt Hogan 4, attached as Exhibit 6; and
- (5) the Service’s conclusion that any decline in the population due to the shift to meat can be addressed through unspecified adaptive management is contrary to law and not supported by the best available science, Exhibit 3 at 10.

In addition to its arbitrary discussion of bears’ shift to a meat-based diet, the Service irrationally assessed the effects of the recent loss of whitebark pine in the Greater Yellowstone Ecosystem. Id. at 4–8; Letter from Sierra Club to U.S. Fish & Wildlife Serv. 2–3 (May 10, 2016), attached as Exhibit 7. In particular, the Service relied on faulty information in assessing the importance of whitebark pine to grizzly bears, including remote sensing data that underestimates both the extent of whitebark pine cover and the abundance of pine seeds in bear habitat. Exhibit 7 at 3. Further, the Service has not rationally addressed the impacts of climate change on Greater Yellowstone grizzlies’ food resources, including army cutworm moths, and the bear population generally. Letter from Stephanie Adams, Nat’l Parks Conservation Ass’n to Dir. Daniel Ashe 4 (Oct. 7, 2016), attached as Exhibit 8; Exhibit 6 at 4.

² Interagency Grizzly Bear Study Team, Yellowstone Grizzly Bear Investigations 2015 29 (2015), available at, https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/s3fs-public/atoms/files/2015%20IGBST%20Annual%20Report_0.pdf; Interagency Grizzly Bear Study Team, Yellowstone Grizzly Bear Investigations 2014 26 (2014), available at <https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/s3fs-public/atoms/files/2014Report.pdf>.

II. The Service Has Not Rationally Addressed the Threat Posed by Inadequate Regulatory Mechanisms

Under section 4(a)(1)(D) of the ESA, 16 U.S.C. § 1533(a)(1)(D), the Service must list a species that is threatened or endangered due to the “inadequacy of existing regulatory mechanisms.” Despite the growing threat posed by bears’ shift to a meat-based diet, the Service asserts in the Final Rule that adequate regulatory mechanisms will prevent any population decline. See Advance Copy at 135 (asserting population-level impacts, whatever their cause, can be addressed by “carefully manag[ing] human-caused mortality”). The Service’s assessment of existing regulatory mechanisms is irrational in three respects.

First, as set forth in more detail in the attached comment letters, the Service has failed to provide a rational explanation for its conclusion that mortality thresholds established by the Final Rule will adequately protect the grizzly bear, because:

- (1) the best available science, including models developed by leading grizzly bear experts, demonstrates that application of the mortality thresholds has an unacceptably high likelihood of resulting in a significant decline of the Greater Yellowstone grizzly bear population following delisting, see Exhibit 4 at 7–8; Exhibit 5 at 1–3;
- (2) the Service has not demonstrated that its monitoring program will promptly detect declines in the bear population, see Exhibit 1 at 61;
- (3) the States and federal land management agencies have not committed to use the Chao2 population estimate method for any specified period, nor have they committed to recalibrate mortality thresholds if they adopt a new method, Exhibit 1 at 71; Letter from Earthjustice to U.S. Fish & Wildlife Serv. 9–10 (Oct. 7, 2016), attached as Exhibit 9; Exhibit 8 at 6;
- (4) the Service’s method for estimating bear deaths chronically underestimates bear mortality, Exhibit 1 at 67;
- (5) the Service’s population estimate method will not detect a decline in the male bear population, which is likely to occur under the mortality thresholds, Exhibit 4 at 7–9;
- (6) undetected declines in the male grizzly population will cause the Chao2 population estimate method to chronically overestimate the bear population, id. at 7–9;
- (7) the mortality thresholds fail to account for bear birth rates, as well as death rates, Exhibit 1 at 63–64;
- (8) the Service’s proposed measures for responding to a population decline are inadequate to ensure the long-term survival of grizzly bears, Exhibit 3 at 26–27;
- (9) the Service’s conclusion that unspecified adaptive management will address any imminent decline in the grizzly bear population is contrary to law and not supported by the best available science, Exhibit 3 at 10;
- (10) the Final Rule, State grizzly bear management plans, and the Tri-State Memorandum of Agreement do not calculate background bear mortality based on a four-year average, and will therefore overestimate the number of bears available for hunting each year,

Letter from Sierra Club to U.S. Fish & Wildlife Serv. 4–5 (Oct. 7, 2016), attached as Exhibit 10;

- (11) the Service’s monitoring plan does not rationally account for bears that may move out of the demographic monitoring area and die after they are counted toward the population estimate, id. at 6;
- (12) the mortality thresholds do not account for annual variations in environmental conditions, id. at 6;
- (13) the Service has not committed to adjust the mortality thresholds in response to substantial shifts in the demographic composition of the bear population, id. at 6; and
- (14) the Service’s method for assigning sex to probable bear mortalities is not supported by the best available science, Letter from Ctr. for Biological Diversity to U.S. Fish & Wildlife Serv. 38 (May 10, 2016), attached as Exhibit 11.

Second, the Service did not rationally explain why existing regulatory mechanisms will be adequate to protect grizzly bears, despite its earlier conclusion that the States must adopt certain enforceable regulations before delisting and hunting may occur. See 81 Fed. Reg. 13,174, 13,202–03. In its proposed rule, the Service asserted that

[i]f State agencies decide to establish hunting seasons, the following regulatory mechanisms must be in place by law and regulation for delisting to occur. The States will enact specific regulations that will serve as adequate regulatory mechanisms

Id. The regulatory mechanisms that the Service concluded were required included, among others, provisions to suspend hunting seasons if the bear population estimate falls below 600 or “if total mortality limits for any sex/age class . . . are met at any time during the year,” as well as a general ban on hunting female bears with young. Id. at 13,203. The States have not adopted regulations incorporating these requirements. See Exhibit 3 at 24; Exhibit 9 at 7–8; Letter from Ctr. for Biological Diversity & Humane Soc’y of the U.S. to Sec’y Ryan Zinke et al. 1–5 (June 20, 2017), attached as Exhibit 12. Indeed, Idaho has not even updated its grizzly bear management plan, which was finalized 15 years ago, and is now severely out of date. Exhibit 10 at 2. And rather than adopt the rules the Service concluded were required for delisting, the Idaho legislature recently passed a bill renegeing on limits imposed by the Conservation Strategy on killing bears that have depredated livestock. Exhibit 12 at 5. Although, as described above, these regulatory measures will not ensure the long-term persistence of Greater Yellowstone grizzly bears, they are important limits that are central to the Service’s conclusion that bears are not threatened by the absence of adequate regulatory mechanisms.

Third, the Service does not provide a rational explanation for its conclusion that grizzly bears will not be threatened by habitat degradation. While the Service asserts the Final Rule will address this threat by maintaining secure habitat in the Greater Yellowstone Ecosystem at 1998 levels, Advance Copy at 72–74, the 2016 Conservation Strategy fails to embody this commitment and provides a process for modifying this 1998 baseline in the future. Exhibit 8 at 6.

III. The Service Has Not Rationally Explained Why Grizzly Bears Are Not Threatened by the Lack of Genetic Connectivity with Other Populations

The Service has failed to provide a rational explanation why Greater Yellowstone grizzly bears are not threatened by a lack of genetic connectivity—one of the “other natural or manmade factors affecting [bears’] continued existence.” 16 U.S.C. § 1533(a)(1)(E). As the Service acknowledges, the Greater Yellowstone grizzly population is genetically isolated from other lower-48 bear populations. Advance Copy at 57–58. The Service’s assessment of Greater Yellowstone grizzly bears’ genetic isolation is not rational, because:

- (1) the Service relies on an unreasonably high estimate of the bears’ effective population size, Exhibit 3 at 15;
- (2) the Service’s conclusion that Greater Yellowstone grizzlies’ current effective population size is sufficient to support the bears’ short-term genetic health is contrary to the best available science, *id.* at 15–16; and
- (3) neither the Service nor the States have made any firm commitment to foster connectivity between the Greater Yellowstone grizzly population and other populations in the lower-48, thus imperiling the bears’ long-term genetic health, *id.* at 17.

IV. The Service’s Attempt to Delist the Greater Yellowstone “Distinct Population Segment” Violates the ESA

In addition to the substantive shortcomings described above, the Final Rule unlawfully attempts to reclassify grizzly bears in the Greater Yellowstone area as a DPS under the Endangered Species Act and simultaneously delist the DPS, while maintaining protections for the rest of the lower-48 grizzly population. *See* Advance Copy at 51–55. Under the ESA, the Service may list species, sub-species, or “any distinct population segments of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). The Service incorrectly argues that this provision gives it authority not only to list a DPS but to designate a DPS of a listed species and then immediately delist that DPS. Advance Copy at 53. Contrary to the Service’s assertion, “the structure, history, and purpose of the ESA demonstrate that the agency may not designate a DPS only for the purpose of delisting the covered vertebrate population[.]” *Humane Soc’y of the U.S. v. Jewell*, 76 F. Supp. 3d 69, 104 (D.D.C. 2014). Further, even assuming for the sake of argument that this were not so,

[t]o reclassify or delist [the grizzly bear], the FWS must review the status of [the grizzly bear], the listed entity, throughout its range, which the listing rule defined as the conterminous United States, and decide whether it is still threatened with extinction throughout “all or a significant portion of its range.” 50 C.F.R. § 424.11. Use of the DPS tool to circumscribe the status review required for a listing change in order to limit such review to only part of the listed species, as the FWS appears to suggest, is contrary to the statutory direction.

Id. at 124 (footnotes omitted); *see generally id.* at 117–27. As it stands, lower-48 grizzly bears as a whole are imperiled throughout all or a significant portion of their range, and do not qualify for delisting. Exhibit 11 at 9–12. For these reasons, and as more fully described in the attached comment letters, the Service’s DPS gambit is contrary to law. Exhibit 3 at 2–4; Exhibit 6 at 3.

Even accepting for the sake of argument the Service’s claim that it has authority to designate and delist the Greater Yellowstone grizzly bear DPS (which it does not), the Service’s decision to designate as a DPS and delist grizzlies in the Greater Yellowstone Ecosystem would remain improper for another reason: the Service is attempting to delist a DPS of a DPS. Although the grizzly bear is found in the lower-48 states, in Canada, and in Alaska, when the Service first listed the grizzly bear under the ESA in 1975, it listed only the lower-48 portion of the species. See 40 Fed. Reg. at 31,734. Thus, the Service listed a portion—a geographically distinct population—of a broader population. The ESA does not permit listing or delisting of subcomponents of distinct populations. See Alsea Valley All. v. Evans, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001). Put simply, it is impermissible under the ESA to list or delist, as the Service attempts to do here, a DPS of a DPS. Exhibit 3 at 4; Exhibit 6 at 3.

V. The Service Did Not Provide an Adequate Opportunity for Public Comment and Peer Review

As set out in more detail in the attached comment letters, the Service did not provide a meaningful opportunity for public comment on its 2016 Conservation Strategy. Exhibit 9 at 2–5. The Administrative Procedure Act (“APA”), 5 U.S.C. § 553(c), requires that the Service provide such an opportunity during its rulemaking process. See also Kern Cty. Farm Bureau v. Allen, 450 F.3d 1072, 1076 (9th Cir. 2006) (“An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.” (internal quotation marks omitted)). The ESA provides that, with certain exceptions not relevant here, the APA’s rulemaking requirements “shall apply to any regulation promulgated to carry out the purposes” of the ESA’s listing provisions. 16 U.S.C. § 1533(b)(4). The Conservation Strategy, which forms the linchpin of the Service’s conclusion that the grizzly bear is no longer threatened and adequate regulatory mechanisms will ensure its long-term persistence, was finalized on December 16, 2016—after the final public comment opportunity afforded by the Service to address the adequacy of regulatory mechanisms had passed. Advance Copy at 47. Although a draft of the Conservation Strategy was available during the comment period, the Service and State wildlife agencies negotiated significant changes to the document before it was finally signed. The public received no opportunity to comment on those changes or the final document. The Service’s failure to provide an opportunity for meaningful public comment on this key document as it pertains to the adequacy of regulatory mechanisms was arbitrary and unlawful. Exhibit 9 at 2–5.

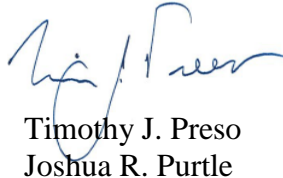
In addition to its failure to provide an opportunity for meaningful public comment, the Service also failed to provide for meaningful peer review. Like the public, the Service’s peer reviewers were asked to evaluate a draft of the Conservation Strategy—not the final 2016 Conservation Strategy on which the Service’s delisting analysis depends. Exhibit 10 at 3. Further, as one reviewer noted, the peer reviewers were not provided access to the Tri-State Memorandum of Agreement signed by Montana, Wyoming, and Idaho, which contains important information about the States’ plans for managing grizzly bears. Id. Without encompassing these key documents, the Service’s peer review was incomplete. Id.

VI. Conclusion

As set forth in this letter and the attached comment letters, the Service violated the ESA in determining that the Greater Yellowstone grizzly bear population is no longer threatened, and should be removed from the list of threatened and endangered species.

If the Service does not retract its Final Rule within 60 days of the receipt of this letter, the parties to this notice letter will institute a legal action to challenge the Service's Final Rule in federal district court.

Sincerely,

A handwritten signature in blue ink, appearing to read "Timothy J. Preso".

Timothy J. Preso
Joshua R. Purtle