

Douglas L. Honnold
Earthjustice
209 South Willson Avenue
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 586-9695
dhonnold@earthjustice.org

Laurence (“Laird”) J. Lucas (ISB # 4733)
P.O. Box 1342
Boise, ID 83701
(208) 424-1466
Fax: (208) 342-8286
llucas@lairdlucas.org

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT,)
SIERRA CLUB, NATURAL RESOURCES)
DEFENSE COUNCIL, ALLIANCE FOR)
THE WILD ROCKIES, CENTER FOR)
BIOLOGICAL DIVERSITY, GREAT BEAR)
FOUNDATION, and JACKSON HOLE)
CONSERVATION ALLIANCE,)

No. 07-cv-243

Plaintiffs,)

vs.)

CHRISTOPHER SERVHEEN, U.S. Fish and)
Wildlife Service Grizzly Bear Recovery)
Coordinator; H. DALE HALL, U.S. Fish and)
Wildlife Service Director; DIRK)
KEMPTHORNE, Secretary of the Interior;)
and UNITED STATES FISH AND)
WILDLIFE SERVICE,)

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Defendants.)

INTRODUCTION

1. Plaintiffs in this case challenge the U.S. Fish and Wildlife Service’s decisions to designate a Distinct Population Segment (“DPS”) for the Yellowstone grizzly bear population and to remove the Yellowstone grizzly bear population from the list of threatened species under

the Endangered Species Act (“ESA”). The delisting of the grizzly bear violates the ESA because it is based on a plan that insufficiently protects the bears’ habitat, fails to address looming threats to the bears’ key food sources, and contemplates permanent custodial management—including the trucking in of more than two grizzly bears per decade—to redress insufficient numbers of bears and the absence of connectivity between grizzly bear populations.

JURISDICTION, VENUE, AND ADMINISTRATIVE REMEDIES

2. Plaintiffs bring this action pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq., and the Endangered Species Act, 16 U.S.C. § 1531 et seq. This Court has jurisdiction over plaintiffs’ claims pursuant to 28 U.S.C. § 1331 (federal question) and the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g), and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02.

3. Venue is proper under 28 U.S.C. § 1391(e) because one or more plaintiffs and defendants reside in this district, and a substantial part of the events or omissions giving rise to plaintiffs’ claims occurred in this District.

4. Plaintiffs have attempted to resolve their claims administratively by commenting on the proposed Yellowstone DPS designation and delisting decision that appeared in the Federal Register on November 17, 2005. See 70 Fed. Reg. 69,854-69,884. Further, plaintiffs provided defendants 60 days notice of their intent to sue pursuant to 16 U.S.C. § 1540(g). Therefore, plaintiffs have exhausted all available administrative remedies and satisfied all statutory preconditions to suit.

PARTIES

5. Plaintiff Western Watersheds Project (“Western Watersheds”) is an Idaho non-profit conservation group, headquartered at the Greenfire Preserve located on the East Fork

Salmon River, near Clayton in Custer County, Idaho. The Greenfire Preserve is a former cattle ranch, which Western Watersheds manages to promote the restoration of native habitats and protection of wildlife species there; to educate the public about native habitat restoration, wildlife protection, and other environmental issues; and to carry out science-based advocacy in the region. Western Watersheds has over 1,400 members plus additional volunteers and supporters, located in Idaho and around the United States; as well as professional staff in Idaho, Utah, and Wyoming. Western Watersheds, as an organization and on behalf of its members, is concerned with and active in seeking to protect and improve the wildlife, riparian areas, water quality, fisheries, and other natural resources and ecological values of watersheds throughout the West.

6. Plaintiff Sierra Club is a nationwide conservation organization with more than 750,000 members, some 4,000 of whom belong to the Idaho Chapter. The Sierra Club is America's oldest, largest and most influential grassroots environmental organization. The mission of the Sierra Club is: "To explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments."

7. Plaintiff Natural Resources Defense Council ("NRDC") is a non-profit conservation organization that uses law, science, and the support of more than 400,000 members, including more than 2,000 members in Idaho, to protect the planet's wildlife and wild places, and to ensure a safe and healthy environment. NRDC and its members have a longstanding interest in conserving threatened and endangered species, including grizzly bears.

8. Plaintiff Alliance for the Wild Rockies ("AWR") is a tax-exempt, non-profit public-interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plants, fish, and animal life, and its

naturally functioning ecosystems. AWR has over 2,000 individual members, many of whom reside in the Yellowstone ecosystem, and more than 500 member businesses and organizations.

9. Plaintiff Center for Biological Diversity is a nonprofit organization dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. The Center was founded in 1989, and is based in Tucson, Arizona with offices in California, Oregon, New Mexico and Washington, D.C. The Center has over 35,000 members, including approximately 200 members in Idaho, and many more who explore and enjoy the Greater Yellowstone Ecosystem.

10. Plaintiff Great Bear Foundation is a non-profit conservation organization founded in 1982 and based in Missoula, Montana. Great Bear Foundation seeks to preserve all eight of the world's bear species and their habitats worldwide. Great Bear Foundation's efforts focus specifically on curtailing habitat destruction that is rapidly depleting the ecosystems that bears need to survive.

11. Plaintiff Jackson Hole Conservation Alliance is a non-profit organization based in Jackson, Wyoming with more than 1,800 members. The Jackson Hole Conservation Alliance is dedicated to responsible land stewardship, and to ensuring that human activities are in harmony with the area's irreplaceable wildlife, scenery, and other natural resources.

12. All plaintiffs have long-standing interests in the preservation and recovery of grizzly bears in Idaho and the surrounding Yellowstone ecosystem, both because they and their members place a high value on the bears as a species, and because the presence of grizzly bears is essential to the healthy functioning of the Greater Yellowstone ecosystem in Idaho and the surrounding region. Plaintiffs have been active in seeking to protect and recover the grizzly

bears through a wide of array of actions including public education, scientific analysis, and advocacy intended to promote achievement of healthy ecosystem functioning in the region.

13. The members of each of the plaintiff conservation groups use the Yellowstone Ecosystem for recreational pursuits, including hiking, camping, backpacking, horseback riding, hunting, wildlife viewing, and aesthetic enjoyment. The challenged decisions to designate the Yellowstone grizzly bear DPS and to remove it from the list of threatened species will reduce the likelihood that these individuals may experience grizzly bears and grizzly presence in the wild in Idaho and throughout the Yellowstone Ecosystem. The legal violations alleged in this complaint cause direct injury to the aesthetic, conservation, recreational, scientific, educational, and wildlife preservation interests of staff and members of the plaintiff organizations.

14. Plaintiffs' aesthetic, conservation, recreational, scientific, educational, and wildlife preservation interests have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely and irreparably injured by defendants' failure to comply with federal law. These are actual, concrete injuries, traceable to defendants' conduct, that would be redressed by the requested relief. Plaintiffs have no adequate remedy at law.

15. Defendant Christopher Servheen is the U.S. Fish and Wildlife Service Grizzly Bear Recovery Coordinator. Defendant Servheen drafted the proposals at issue in this case, and served as the primary contact for public comment and/or questions on the proposals. Defendant Servheen is sued in his official capacity.

16. Defendant H. Dale Hall is the Director of the U.S. Fish and Wildlife Service. Defendant Hall signed the Fish and Wildlife Service decision designating the Yellowstone grizzly bear DPS and removing the Yellowstone DPS from the list of threatened species. Defendant Hall is sued in his official capacity.

17. Defendant Dirk Kempthorne is the United States Secretary of the Interior. In that capacity, Secretary Kempthorne has supervisory responsibility over the U.S. Fish and Wildlife Service. Defendant Kempthorne is sued in his official capacity.

18. Defendant United States Fish and Wildlife Service (“FWS”) is a federal agency within the Department of Interior. The FWS is responsible for administering the ESA with respect to terrestrial wildlife such as the grizzly bear, and with listing and delisting decisions for the grizzly bear.

THE THREATENED GRIZZLY BEAR

19. Grizzly bears define wilderness in the northern Rocky Mountain region. Grizzlies survive only in the lands most inhospitable to humans. The grizzly was once the victim of an aggressive campaign by settlers to drive the bear from the western landscape. Those efforts were largely successful: persecution, poisoning, conflicts with ranchers, sport hunting, and habitat destruction associated with the march of human development nearly eliminated the grizzly bear from the lower-48 states by the time of the bear’s listing as a threatened species in 1975. 40 Fed. Reg. 31,734 (July 28, 1975). The only places where the grizzly bear survived this extermination campaign were those places so remote, so wild, and so inhospitable to humans that the bear could find refuge: places like the wildlands of Yellowstone National Park.

20. The numbers tell the story: the grizzly bear has been relegated to a mere one percent of its historic range in the lower 48 states and seen its population shrink from more than 50,000 to roughly 1,000 bears. What once was a large contiguous population of bears has been reduced to isolated fragments of mountainous terrain; and what once was country filled with abundant sources of native foods such as large bison herds on the plains is now abundant in humans, roads, and civilization.

21. In the face of this persecution, and severe habitat degradation and fragmentation, FWS listed the grizzly bear as a threatened species in 1975. At that time, grizzly numbers were estimated at roughly 1,000 animals living in 6 separate ecosystems in the Rocky Mountains and North Cascades. Since their listing, the grizzly bear population in the San Juan Mountains of Colorado has gone extinct. The last bear was killed there in 1979. And today, the tiny populations in the Selkirk mountains and Cabinet-Yaak region in northwestern Montana, northern Idaho, and northeast Washington teeter on the brink of extinction, with roughly 25-35 bears in the Selkirks and 15-40 bears in the Cabinet-Yaak. Recent research suggests a 95-100% probability of extinction of both populations over 100 years unless conditions quickly improve. In addition, in the Cabinet-Yaak ecosystem where human-caused mortality has exceeded sustainable rates, FWS estimates that the population is currently declining. Today, despite significant recovery efforts, the grizzly remains at 1% of its former numbers, surviving on 1-2% of its former habitat.

22. In listing the grizzly bear as threatened throughout the lower 48 states, FWS focused on the “present or threatened destruction, modification, or curtailment of its habitat or range,” 16 U.S.C. § 1533(a)(1)(A), because the once wide-ranging grizzly bear “is now confined to isolated regions in Montana, Idaho, and Wyoming.” 40 Fed. Reg. 31,734 (July 28, 1975). FWS also recognized that “in two of the three areas where grizzly bears still occur, the bears are isolated from other populations so that they cannot be reinforced, either genetically or by movement of individual bears.” Id. Thus, FWS specifically acknowledged the decrease in habitat quality and quantity, the low population numbers, and the isolated nature of the Yellowstone grizzly bear population as principal reasons for listing the bear.

23. Although a major reason for listing the grizzly bear was concern over habitat loss of a species that is especially sensitive to the effects of development, FWS has consistently failed to address habitat degradation in subsequent actions. For example, because FWS failed to establish habitat targets in its 1993 revised grizzly recovery plan, even though habitat degradation was a primary basis for listing, a federal district court found the 1993 recovery plan to be deficient. See Fund for Animals v. Babbitt, 903 F. Supp. 96 (D.D.C. 1995). Now, more than a decade after the district court invalidated FWS' 1993 revisions to the recovery plan, FWS proposes to delist the Yellowstone population of grizzly bears without ensuring adequate habitat protections throughout the Yellowstone bears' occupied range.

24. In the greater Yellowstone ecosystem – which includes portions of Idaho, Montana and Wyoming surrounding Yellowstone National Park – grizzly bears exist today on an isolated habitat “island” that is relatively small, containing an estimated 400 to 600 bears. The best available science indicates that a population of 2,000 to 3,000 grizzly bears is necessary over the long term to prevent extinction due to environmental changes and genetic impoverishment.

25. In its 1993 Grizzly Bear Recovery Plan, FWS acknowledged that grizzly bear presence in all six grizzly bear recovery zones identified in that document, including the central Idaho ecosystem where no grizzly bears were then thought to exist, is necessary to the species' survival. The FWS also observed that bear migration between ecosystems is necessary to maintain adequate genetic diversity. Connecting grizzly bears in Yellowstone to other grizzly populations is vital for the genetic health of Yellowstone bears, which have lost a considerable amount of their genetic diversity in 100 years of isolation.

26. Grizzly bear presence in Idaho is essential to true recovery of grizzlies throughout the lower 48 states, including the Yellowstone area. The Targhee National Forest in Idaho, situated to the immediate west of Yellowstone National Park, provides vital habitat for the Yellowstone grizzly bear population. Establishing protected corridors extending from the Targhee toward high-quality grizzly bear habitat in central Idaho wilderness areas would promote necessary population growth and genetic exchange.

THE ENDANGERED SPECIES ACT

27. The ESA was enacted to “provide a program for the conservation of ... endangered species and threatened species” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). To receive the full protections of the ESA, a species must first be listed by the Secretary as “endangered” or “threatened” pursuant to section 4 of the ESA. Id. § 1533.

28. The ESA defines “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.” Id. § 1532(6). A “threatened species” is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20). The term “species” is defined to include “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” Id. § 1532(16).

29. The ESA requires the Secretary to “determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;

- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.”

Id. § 1533(a)(1). The Secretary must make these determinations “solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species.” Id. § 1533(b)(1)(A).

30. Once a species is listed as “endangered” or “threatened” under the ESA, it is protected under the Act’s substantive and procedural provisions. Among other things, the ESA prohibits any federal agency from taking any action found “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat].” Id. § 1536(a)(2).

THE CHALLENGED DECISION

31. On November 17, 2005, FWS proposed to designate the Greater Yellowstone population of grizzly bears as a DPS and to remove this DPS from the federal list of endangered and threatened wildlife. 70 Fed. Reg. 69,854. Following a public comment period and hearings during which the public overwhelmingly denounced the FWS proposal, on March 29, 2007, FWS finalized the decision to designate the Yellowstone grizzly bear DPS and remove the legal and habitat protections of the ESA from the Yellowstone grizzly bear population. 72 Fed. Reg. 14,866. The delisting of the Yellowstone grizzly bear population became effective on April 30, 2007; and Plaintiffs promptly sent Defendants a 60-day notice letter thereafter to notify Defendants of their intent to bring this lawsuit. Defendants have not altered their challenged decision in response to the notice letter; and the statutory notice period has now expired.

FIRST CAUSE OF ACTION

(Failure to Consider Loss of Historic Range in Designating and Delisting the Yellowstone Grizzly Bear DPS)

32. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 31, supra.

33. When determining whether to list a species under the ESA, including a Distinct Population Segment, the ESA requires the Secretary to determine whether a species is imperiled due to “destruction, modification, or curtailment of its habitat or range.” 16 U.S.C. § 1533(a)(1)(A). The purpose behind this provision is to identify species that are likely to become extinct because of dramatic declines in their distribution across their historic range, as well as to fulfill the Act’s mandate to conserve the ecosystems upon which threatened and endangered species depend.

34. In designating the Yellowstone grizzly bear DPS and deciding to delist that DPS, FWS violated this requirement of the ESA by failing to consider the loss of historic grizzly bear habitat and range, either within the lower 48 states or within the Yellowstone DPS. Instead, FWS relied on a much narrower analysis of bears’ current distribution within the Yellowstone area supplemented by consideration of those lands in the area that FWS deemed appropriate for grizzly bears to occupy (defined by FWS as “suitable habitat”). This approach is contrary to the ESA, which recognizes that the loss of historically occupied habitat or range – by itself – may be sufficient to warrant listing under the Act.

35. The challenged decision is thus arbitrary, capricious, and not in accordance with the law, and must be set aside pursuant to the ESA and APA. See 5 U.S.C. § 706(2)(A); 16 U.S.C. §§ 1533, 1540(g).

SECOND CAUSE OF ACTION

(Yellowstone Grizzlies Are Threatened Due to Decline of Key Food Sources)

36. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 35, supra.

37. In its decision to delist the Yellowstone grizzly bear DPS, FWS acknowledged that key grizzly bear foods, such as the seeds of whitebark pine trees, affect the carrying capacity of a grizzly bear ecosystem. 72 Fed. Reg. at 14,891. Just like their polar bear relatives in the Arctic, Yellowstone grizzlies are rapidly losing habitat as a result of global warming. Throughout the western United States, whitebark pine stands that were once climatically ill-suited for mountain pine beetle attacks are now succumbing to massive beetle attacks as a result of warming winter weather.

38. The impacts of this decline in whitebark pine on grizzly bears in the Yellowstone ecosystem are well-studied. Without the rich, fatty whitebark pine seeds to help female grizzlies add needed weight during the fall, both the number of grizzly bear litters and the number of cubs per litter declines dramatically. Without whitebark seeds high in the backcountry, away from humans, grizzlies range far and wide, seeking alternate food sources, resulting in increased human-bear conflicts and grizzly mortalities. The result is that, in poor whitebark pine seed cone production years, grizzly fecundity decreases and grizzly mortality increases exponentially. Whitebark pine stands thus constitute grizzly bear habitat essential to the successful reproduction and conservation of Yellowstone grizzly bears.

39. In addition to whitebark pine, Yellowstone grizzly bears rely on three other essential food sources: Yellowstone cutthroat trout, army cutworm moths, and ungulates – primarily bison and elk. Like whitebark pine, the Yellowstone cutthroat trout, army cutworm moths, and Yellowstone's bison and elk are all in danger of major population declines.

Yellowstone cutthroat trout are in crisis due to the introduction of lake trout into Yellowstone Lake. Army cutworm moths are threatened by the increased use of agricultural pesticides, and global warming, which will cause alpine wildflowers upon which the moths depend to wither earlier in the season and potentially disappear from the Yellowstone ecosystem altogether. Finally, Yellowstone bison and elk populations face a decline due to brucellosis control efforts that involve capturing and slaughtering infected animals, combined with a threat of chronic wasting disease in elk that is invariably fatal.

40. Despite the inevitable loss of whitebark pine due to global warming, combined with the concomitant decline of every other major food source for Yellowstone grizzly bears, FWS's challenged decision simply assumed that grizzly bears will adapt to a drastically changed environment. This determination violates the ESA's requirement that FWS utilize, not ignore, the best available scientific information when it makes listing decisions, 16 U.S.C. § 1533(b)(1)(A); and also shows that grizzly bears are threatened by current and projected habitat loss and degradation due to substantial reduction in whitebark pine seed productivity and the decline of other key food sources, requiring FWS to continue protecting the bear under the requirement of 16 U.S.C. § 1533(a)(1)(A).

41. The challenged decision is thus arbitrary, capricious, and not in accordance with the law, and must be set aside pursuant to the ESA and APA. 5 U.S.C. § 706(2)(A); 16 U.S.C. §§ 1533, 1540(g).

THIRD CAUSE OF ACTION

(Yellowstone Grizzly Bears Are Threatened Due To Small Population Size)

42. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 41, supra.

43. The Yellowstone grizzly bear population has been isolated from other grizzly bear

populations for over 100 years. Scientists believe that even prior to complete isolation, Yellowstone-area bears did not frequently interbreed with bears in northwestern Montana. Because of their low population size and reproductive isolation, Yellowstone grizzly bears have substantially less genetic diversity than grizzlies in northwestern Montana. Loss of genetic diversity increases extinction risk because genetic diversity ensures that species have the full arsenal of adaptive behaviors and immunities in their genetic makeup.

44. In deciding to delist the Yellowstone grizzly bear population, FWS recognized that the Yellowstone grizzly bear population was at increased extinction risk due to the isolated nature of the population and the small size of the population, resulting in loss of genetic diversity. However, FWS concluded that these extinction risks would be remedied by transporting grizzly bears from the Northern Continental Divide Ecosystem to Yellowstone on a regular basis starting in 2020, to avert further decline in genetic diversity in Yellowstone-area bears. FWS's plan to augment the Yellowstone DPS with transported bears cannot serve as the basis to delist the population. First, the admitted need for indefinite artificial replacement of Yellowstone bears with bears from other regions is flatly inconsistent with the ESA's statutory mandate to achieve recovery of self-sustaining populations in the wild. Second, even if the use of population augmentation as the basis for delisting a species was permissible, in this case there are no assurances that augmentation will ever take place. The Yellowstone grizzly bear population, and grizzlies in the lower 48 states, remain threatened due to small population size and associated genetics problems, and thus fail to meet the statutory requirements for recovery of a listed species laid out in 16 U.S.C. § 1533.

45. The challenged decision is thus arbitrary, capricious, and not in accordance with the law, and must be set aside pursuant to the ESA and APA. 5 U.S.C. § 706(2)(A); 16 U.S.C.

§§ 1533, 1540(g).

FOURTH CAUSE OF ACTION

(Yellowstone Grizzlies Are Threatened Due to Failure to Protect Currently Occupied Habitat)

46. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 45, supra.

47. In its delisting decision, FWS relied on habitat protections within an area called the Primary Conservation Area (“PCA”) as the basis for its conclusion that the Yellowstone DPS is not threatened by present or future threats of habitat destruction. This area is the same as the FWS grizzly bear recovery zone, which FWS designated in the 1993 FWS Grizzly Bear Recovery Plan. FWS originally designated the recovery zone in its first Grizzly Bear Recovery Plan in 1982, based largely on speculation concerning where grizzly bears were then located and how much habitat was needed to support a “recovered” population of merely 229 grizzly bears. In short, FWS designated the recovery zone at a time when the Yellowstone grizzly population was at its nadir, both in terms of population size and geographic distribution. Despite the fact that the habitat needs, population, and distribution of the Yellowstone DPS has changed dramatically since 1982, FWS was under fierce political pressure not to modify the grizzly bear recovery zone due to perceived impacts on extractive industries such as oil and gas development, grazing, logging, and mineral development, along with associated roading on Forest Service lands in Idaho and other states.

48. In its final Yellowstone grizzly bear delisting decision, FWS adopted this antiquated and biologically inaccurate PCA as the location where needed restrictions on development of public Forest Service lands would be imposed for the protection of grizzly bears. More than 40 % of the Yellowstone grizzly bears’ currently occupied habitat occurs outside the PCA, and thus receives no protection under the delisting decision. To make matters worse,

despite the lack of habitat protections for nearly half of Yellowstone grizzly bears' occupied habitat and evidence of increasing grizzly bear mortalities outside the PCA, FWS decided to count bear numbers and geographic distribution outside the PCA as a basis for delisting. For this reason, Yellowstone grizzly bears are threatened with extinction by current and projected habitat loss and degradation outside the PCA, 16 U.S.C. § 1533(a)(1)(A).

49. The agency decision is thus arbitrary, capricious, and not in accordance with the law, and must be set aside pursuant to the ESA and APA. 5 U.S.C. § 706(2)(A); 16 U.S.C. §§ 1533, 1540(g).

FIFTH CAUSE OF ACTION

(Yellowstone Grizzlies Are Threatened Due to Inadequate Regulatory Mechanisms)

50. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 49, supra.

51. In assessing the extinction risks that species face, FWS must list a species if it qualifies for listing under any one of the five listing criteria, quoted above. One of the statutory listing criteria is "the inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D). Thus, even if a species is not imperiled due to small population size or loss of habitat, it must nonetheless be listed if it is in danger of extinction because regulatory mechanisms are not in place to protect the species from recognized threats.

52. In delisting the Yellowstone grizzly bear DPS, FWS determined that Yellowstone grizzlies were adequately protected by existing regulatory mechanisms. FWS erred in relying on laws and regulations that were merely procedural and provided no substantive protections to grizzly bears. These laws and regulations include a Conservation Strategy that is vague and unenforceable and Forest Service forest plans to manage grizzly bear habitat within the PCA that are not regulatory mechanisms and are non-binding. Additionally, FWS failed to analyze the

impacts to Yellowstone grizzlies of state and county laws and regulations that have legal effect following delisting. For these reasons, Yellowstone grizzly bears are threatened by inadequate regulatory mechanisms, 16 U.S.C. § 1533(a)(1)(D).

53. The challenged decision is thus arbitrary, capricious, and not in accordance with the law, and must be set aside pursuant to the ESA and APA. 5 U.S.C. § 706(2)(A); 16 U.S.C. §§ 1533, 1540(g).

SIXTH CAUSE OF ACTION

(Yellowstone Grizzlies Are Threatened Due to Lack of Funding For Needed Management and Monitoring)

54. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 53, supra.

55. In delisting the Yellowstone grizzly bear DPS, FWS developed a Conservation Strategy that itemizes numerous grizzly bear management and monitoring activities. FWS has repeatedly stated that implementation of these management and monitoring activities are essential to maintaining a recovered Yellowstone grizzly bear population. The cost of these activities exceeds \$3 million on an annual basis. The states of Idaho, Montana, and Wyoming have stated that they will not fully implement the Conservation Strategy unless the federal government funds these activities. At the time the delisting decision was rendered, the funding for these necessary activities had not been secured. For this reason, FWS erred in relying on unfunded and speculative management and monitoring activities in rendering its delisting decision. The Yellowstone grizzly bear population is threatened due to the lack of funding for needed management and monitoring activities. 16 U.S.C. § 1533(a)(1)(D).

56. The challenged decision is thus arbitrary, capricious, and not in accordance with the law, and must be set aside pursuant to the ESA and APA. 5 U.S.C. § 706(2)(A); 16 U.S.C. §§ 1533, 1540(g).

SEVENTH CAUSE OF ACTION

(Erroneous DPS Designation)

57. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 56, supra.

58. Congress passed the Endangered Species Act in 1973. In 1975, FWS listed the grizzly bear as a threatened species in the lower 48 states under the ESA. At that time, the ESA allowed listing of “any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature.”

59. In 1978, Congress amended the ESA, limiting the listing of populations to vertebrate species by changing the definition of species to “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). Following the 1978 ESA amendments, FWS retained the listing of grizzly bears in the lower 48 states unchanged. The grizzly bear, *Ursus arctos horribilis*, is a subspecies of brown bear. The listing of the grizzly bear in the lower 48 states was not a listing of the subspecies worldwide; FWS did not list the grizzly bear in Alaska and Canada. Thus, the lower 48 grizzly bear listing was a de facto listing of bears in the lower-48 states as a “distinct population segment” under 16 U.S.C. § 1532(16).

60. The ESA authorizes the listing of threatened or endangered species. Congress defined “species” to include species, subspecies, and populations of vertebrate fish and wildlife. When FWS designated the Yellowstone grizzly bear DPS, it violated section 4 of the ESA, 16 U.S.C. § 1533, by failing to determine that the Yellowstone grizzly bear species/DPS was threatened or endangered, and thus suitable for ESA listing. Instead, FWS sought to delist the DPS. Before a “species” can be delisted, FWS must first list the “species” under the ESA. FWS

failed to follow section 4 of the ESA by designating the Yellowstone grizzly bear DPS without entering a finding that the DPS was threatened or endangered and without designating critical habitat, as required by 16 U.S.C. § 1533(3) and 50 C.F.R. § 424.12. FWS failed to explain why it was necessary to change the existing lower 48 grizzly bear DPS, or examine any of the ESA listing criteria with respect to the lower 48 grizzly bear population.

61. The agency decision is thus arbitrary, capricious, and not in accordance with the law, and must be set aside pursuant to the ESA and APA. 5 U.S.C. § 706(2)(A); 16 U.S.C. §§ 1533, 1540(g).

EIGHTH CAUSE OF ACTION

(Yellowstone Grizzlies Are Threatened By Lag Effects)

62. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 61, supra.

63. In evaluating the impact of habitat destruction or degradation on wildlife species, an important consideration is when the adverse impacts of habitat disturbance will be expressed in a decline in the population size, distribution, or behavioral conduct of the studied species. The impact of habitat modification is often delayed, especially with a wide-ranging species such as the grizzly bear, because it may take years for an individual animal to encounter the habitat destruction or degradation. Scientists refer to this phenomenon as “lag effects.”

64. In a seminal peer-reviewed scientific article, Professor Dan Doak examined how habitat destruction would be expressed in the demography of the Yellowstone grizzly population. Using Yellowstone grizzly bear data, Doak analyzed the relationship between relatively minor habitat degradation (0.5 % per year) and projected impacts on demographic trends. Doak determined that “habitat degradation can have highly nonlinear effects on population growth rates, with small amounts of degradation leading to large decreases in overall population

growth.” Second, Doak concluded that the population growth rates provide “extremely poor measures of population safety or health under conditions of ongoing habitat degradation.” Finally, Doak’s analysis demonstrated that if degradation of habitat is slow, “long lag times can exist between critical levels of habitat degradation and any detectable change in population sizes, even when monitoring data are excellent.” Doak estimated that the lag time between habitat degradation and a detectable effect on Yellowstone grizzly bear population trend was 8 to 13 years.

65. Several scientists selected by FWS to conduct a scientific peer review of the FWS Yellowstone grizzly bear delisting proposal, as well as numerous public comments, urged FWS to consider the import of the Doak article and lag effects on Yellowstone grizzly bears. Despite these efforts, FWS failed to discuss the Doak article or the import of lag effects on its assessment of habitat destruction and demographic data in its delisting decision. By ignoring such an important aspect of the delisting proposal, FWS failed to employ the best available science, in violation of 16 U.S.C. § 1533(b)(1)(A), and failed to consider a relevant factor in assessing whether the Yellowstone grizzly bear population is threatened or endangered due to “the present or threatened destruction, modification, or curtailment of its habitat or range,” 16 U.S.C. § 1533(a)(1)(A).

66. The challenged decision is thus arbitrary, capricious, and not in accordance with the law, and must be set aside pursuant to the ESA and APA. 5 U.S.C. § 706(2)(A); 16 U.S.C. §§ 1533, 1540(g).

REQUEST FOR RELIEF

THEREFORE, plaintiffs respectfully request that this Court:

1. Declare that FWS' decision to designate the Yellowstone grizzly bear DPS violates the ESA and/or APA;
2. Declare that the FWS decision to remove the Yellowstone grizzly bear DPS from the list of threatened species violates the ESA and/or APA;
3. Set aside the final rule designating the Yellowstone grizzly bear DPS and removing the Yellowstone DPS from the list of threatened species;
4. Enjoin the U.S. Fish and Wildlife Service from designating the Yellowstone grizzly bear DPS and removing the Yellowstone DPS from the list of threatened species;
5. Award plaintiffs their reasonable fees, costs, and expenses, including attorneys fees, associated with this litigation; and
6. Grant plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 4th day of June, 2007.

/s/ Laird J. Lucas

Douglas L. Honnold
Earthjustice
209 South Willson Avenue
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 586-9695
dhonnold@earthjustice.org

Laurence ("Laird") J. Lucas (ISB # 4733)
P.O. Box 1342
Boise, ID 83701
(208) 424-1466
Fax: (208) 342-8286
llucas@lairdlucas.org

Attorneys for Plaintiffs