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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

CROW INDIAN TRIBE et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA et  
al.,

Federal-Defendants.

And

STATE OF WYOMING, et al.,

CV 17-89-M-DLC

(Consolidated with CV 17-  
117-M-DLC, CV 17-118-M-  
DLC, CV 17-119-M-DLC,  
and CV 17-123-M-DLC)

RESPONSE IN  
OPPOSITION TO  
DEFENDANTS' MOTIONS  
FOR SUMMARY  
JUDGMENT AND REPLY  
IN SUPPORT OF  
PLAINTIFF'S MOTION  
FOR SUMMARY  
JUDGEMENT

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## INTRODUCTION

Federal-Defendants (“the Service”) and Intervenors accuse WildEarth Guardians (“Guardians”) of a number of unsavory things – “ginning up” facts, casting “aspersions,” relying on “bald conjecture,” engaging in “histrionics,” and even being motivated by a desire to see grizzlies in cities and major urban areas. *See, e.g.*, Doc. 203:13,107, 112,124; Doc. 209:7,20,30–31,34. Such vitriol is unhelpful and unprofessional. It is also inaccurate.

In reviewing this case Guardians respectfully requests this Court conduct a “thorough, probing, in-depth review” of the issues and record. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). This Court should “not rely on counsel’s statements as to what is in the record; the district court itself must examine the administrative record and itself must find and identify the facts that support the agency’s action.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). Such careful review will reveal the Service’s decision to designate and delist a Yellowstone grizzly segment runs afoul of the ESA, conflicts with the best available science, and should be set aside.

## ARGUMENT<sup>1</sup>

### **I. The lower-48 listing rule envisions a functional meta-population, does not provide for piecemeal delisting, and remains in effect.**

No dispute exists that the lower-48 listing rule remains in effect. *See* 83 Fed. Reg. at 18,739; Doc. 203:19,30. The Service must therefore comply with the rule until it is withdrawn or amended. *Fort Stewart Schs. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990).

Relevant here, the rule does not provide for the delisting of individual populations. Instead, the rule lists all grizzlies in the lower-48 as a *single entity*, commits to recovering grizzlies in all occupied ecosystems, and protects “any members of the species occurring elsewhere in the 48 conterminous States.” 40 Fed. Reg. at 31,734–36. This approach is outlined in the first recovery plan, FWS-Lit-14322. “The conservation and recovery of [at least] three populations, as opposed to only one or two populations is believed necessary to assure perpetuation of the species to a point that [it] no longer requires

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<sup>1</sup> Guardians adopts and incorporates by reference the other Plaintiffs’ arguments as identified in its opening brief (Doc. 186).

protections of the ESA.” FWS-Lit-14331.<sup>2</sup> And, instead of delisting individual populations, the rule envisions modifying the grizzly’s 4(d) rule to allow more management flexibility as populations grow. *See id.* This approach ensures the recovery of the entire listed-entity (grizzlies in the lower-48).

As the Service’s former Director explained, the lower-48 listing envisioned managing grizzlies as a “functional meta-population” that will “enhance the genetic and demographic health of all . . . population units . . . .” FWS-Del-Em-000151569. But once the Service starts delisting individual populations it leaves the remaining populations (especially the smaller ones) vulnerable to losing their ESA-protective status because they may no longer qualify as a “segment” under the Service’s 1996 segment policy. *Id.* This could result in “catastrophic negative impacts on the recovery of the grizzly bear as envisioned by

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<sup>2</sup>The 1993 recovery plan envisions delisting individual populations but this does not alter the listing rule. *See* FWS-Lit-14557. Recovery plans are non-binding and routinely revised, *see* FWS-Lit-016072, sometimes in response to state input. *See* FWS-Del-EM-00122644. The 1993 plan’s piecemeal delisting approach was also adopted prior to the segment policy which may create problems and undermine recovery efforts. *See* FWS-Del-EM-00151569-570. The Service has also called the science in the plan into question, *see* FWS-Lit-016080, 016081.

the 1975 listing” and nullify “33 years of recovery efforts . . . .” *Id.*; *see also* 83 Fed. Reg. at 18,739 (recognizing negative effects on other grizzlies).

**II. The Service cannot create a Yellowstone grizzly segment from an already designated lower-48 grizzly segment.**

The Service cannot create a segment from an already designated segment. *See* Doc. 186:25. This is not in dispute. *See* Doc. 203:29–30.

The Service maintains, rather, that grizzlies were never classified as a lower-48 *segment* so the prohibition on creating a segment of a segment does not apply. Doc. 23:29. This is incorrect.<sup>3</sup>

All listings that predated the 1978 amendments to the ESA or the Service’s 1996 segment policy – like the grizzly bear at issue here – were re-evaluated on a case-by-case basis, most often during the five-year status reviews required by section 4(c)(2) of the ESA. 61 Fed. Reg. at 4,725; *see also* 82 Fed. Reg. at 30,516 (explaining such reviews); the

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<sup>3</sup> The Service also asserts it did not create a “segment of a segment” because it assessed the population’s discreteness and significance in relation to the taxon as a whole. This argument confuses *how* segments are designated under the segment policy, *see* 61 Fed. Reg. at 4725, with *whether* segments of an already designated segment can be designated.

Service's Five-Year Review Guidance ("Guidance") at page 1-6 (same).<sup>4</sup>

These re-evaluations are to arrive "at a conclusion as to the appropriate classification of the currently listed species as described in the List (50 CFR 17.11 –17.12)." Guidance at 1-6.

In total, twenty-three listings were re-evaluated because they predated the 1978 amendments or segment policy. 82 Fed. Reg. at 30,516. As a result, some species were deemed segments and then downlisted. *See, e.g.*, 72 Fed. Reg. 13,027 (March 20, 2007) (American crocodile). Others were deemed segments and then uplisted. *See* 62 Fed. Reg. 24,345 (May 5, 1997) (Steller sea lion). And, some listings were divided into multiple segments. *See, e.g.*, 81 Fed. Reg. 62,260 (September 8, 2016) (humpback whale). Other species like the grizzly bear, however, retained their listing status but were recognized as "segments" in accordance with the segment policy. *See* Guidance at A-1. These changes are reflected in the Service's 2006 list:

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<sup>4</sup> The Service's Guidance is available online at [https://www.fws.gov/endangered/esa-library/pdf/5-yrReview\\_Guidance\\_20060701.pdf](https://www.fws.gov/endangered/esa-library/pdf/5-yrReview_Guidance_20060701.pdf) and subject to judicial notice, *see Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010).

## Appendix A. Domestic Species Listed as Distinct Population Segments

Domestic Species Listed As Distinct Population Segments (DPS) or as Populations That are Considered to be DPSs as of 03/03/06				
* Denotes species listed prior to the 2/7/96 FWS-NOAA Fisheries DPS Policy; ** Denotes species listed in compliance with 11/20/91 NOAA Evolutionary Significant Unit (ESU) Policy				
Inverted Common Name	Scientific Name	Where Listed	Status	Date Listed
<i>Mammals</i>				
Bat, Mariana fruit *	<i>Pteropus mariannus mariannus</i>	Guam	E	8/27/1984
Bear, grizzly *	<i>Ursus arctos horribilis</i>	Coterminous U.S. (lower 48 states)	E	3/11/1967
Caribou, woodland *	<i>Rangifer tarandus caribou</i>	ID, WA, Canada (that part of S.E. British Columbia bounded by the U.S. - Canada border, Columbia River, Kooteney R., Kooteney Lake and Kootenai R.	E	1/14/1983
Deer, Columbia white-tailed	<i>Odocoileus virginianus leucurus</i>	Clark, Cowlitz, Pacific, Skamania, and Wahkiakum Counties, WA., and Clatsop, Columbia, and Multnomah Counties, OR	E	7/24/2003 (3/11/1967 original listing date *)
Lynx, Canada	<i>Lynx canadensis</i>	CO, ID, ME, MI, MN, MT, NH, NY, OR, UT, VT, WA, WI, WY	T	4/20/2000
Rabbit, Columbia Basin pygmy	<i>Brachylagus idahoensis</i>	Columbia Basin, WA	E	11/30/2001
Rice rat *	<i>Oryzomys palustris natator</i>	Lower FL Keys (west of Seven Mile Bridge)	E	4/30/1991
Sea-lion, Steller	<i>Eumetopias jubatus</i>	Entire, except the population segment west of 144° longitude	T	5/5/97 (11/26/90 original (final) listing date*)
		Population segment west of 144° longitude	E	
Sea-otter, northern (southwest Alaska DPS)	<i>Enhydra lutris kenyoni</i>	AK - Aleutian Islands, Alaska Peninsula coast, and Kodiak Archipelago	T	8/9/2005
Sheep, bighorn	<i>Ovis canadensis</i>	CA - Peninsular ranges	E	3/18/1998
Sheep, Sierra Nevada bighorn	<i>Ovis canadensis californiana</i>	CA - Sierra Nevada	E	4/20/1999
Whale, gray *	<i>Eschrichtius robustus</i>	Western North Pacific Ocean	E	6/16/1994
Wolf, gray	<i>Canis lupus</i>	U.S.A. (MN)	T	3/11/1967

## Guidance at A-1 (excerpt).

In 2011, during the five-year review of the lower-48 grizzly listing, the Service completed a formal segment analysis confirming that the lower-48 listing is a segment: “This review confirms that the lower 48 State listing qualifies as a [segment] . . . .” FWS-Lit-016195; *see also* FWS-Lit-016170 (same); FWS-Lit-016078 (lower-48 population is discreet and significant and “warrants recognition” as a segment). This

was not merely a “recommendation”; it was an affirmative determination that grizzlies in the lower-48 are a segment. *See id.* Following this finding, the Service officially found that grizzlies in the lower-48 are a “segment” and published that finding in the Federal Register and Code of Federal Regulations:

Bear, brown .....	<i>Ursus arctos pruinosus</i> ...	Wherever found .....	E	1970. 41 FR 24062; 6/14/1976.
Bear, grizzly [Lower 48 States DPS].	<i>Ursus arctos horribilis</i> ....	U.S.A., conterminous (lower 48) States, except where listed as an experimental population.	T	32 FR 4001; 3/11/1967, 35 FR 16047; 10/13/1970, 40 FR 31734; 7/28/1975, 72 FR 14866; 3/29/2007, 50 CFR 17.40(b) <sup>4d</sup> .
Bear, grizzly .....	<i>Ursus arctos horribilis</i> ....	U.S.A. (portions of ID and MT, see § 17.84(l)).	XN	70 FR 69854; 11/17/2005, 50 CFR 17.84(l) <sup>10l</sup> .
Bear, Mexican grizzly .....	<i>Ursus arctos</i> .....	Mexico .....	E	35 FR 8491; 6/2/1970.
Bear, polar .....	<i>Ursus maritimus</i> .....	Wherever found .....	T	73 FR 28212; 5/15/2008, 50 CFR 17.40(q) <sup>4d</sup> , 50 CFR 17.95(a) <sup>CH</sup> .

50 C.F.R. §17.11 (October 1, 2016); *see also* 81 Fed. Reg. 51,549, 51,558 (Aug. 4, 2016) (same); 81 Fed. Reg. at 51,552-53 (explaining that it is adding distinct population segment or “DPS” to the common name column to clarify which listings are segments).

Because grizzlies are already classified as a “lower-48 segment,” it is settled (and not disputed) that the Service cannot divide populations contained within that segment into smaller parts and create a Yellowstone grizzly segment. The ESA “stops at a designated [segment] – nothing smaller.” *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d

1207, 1215–16 (D. Mont. 2010); *see also* *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001) (same).

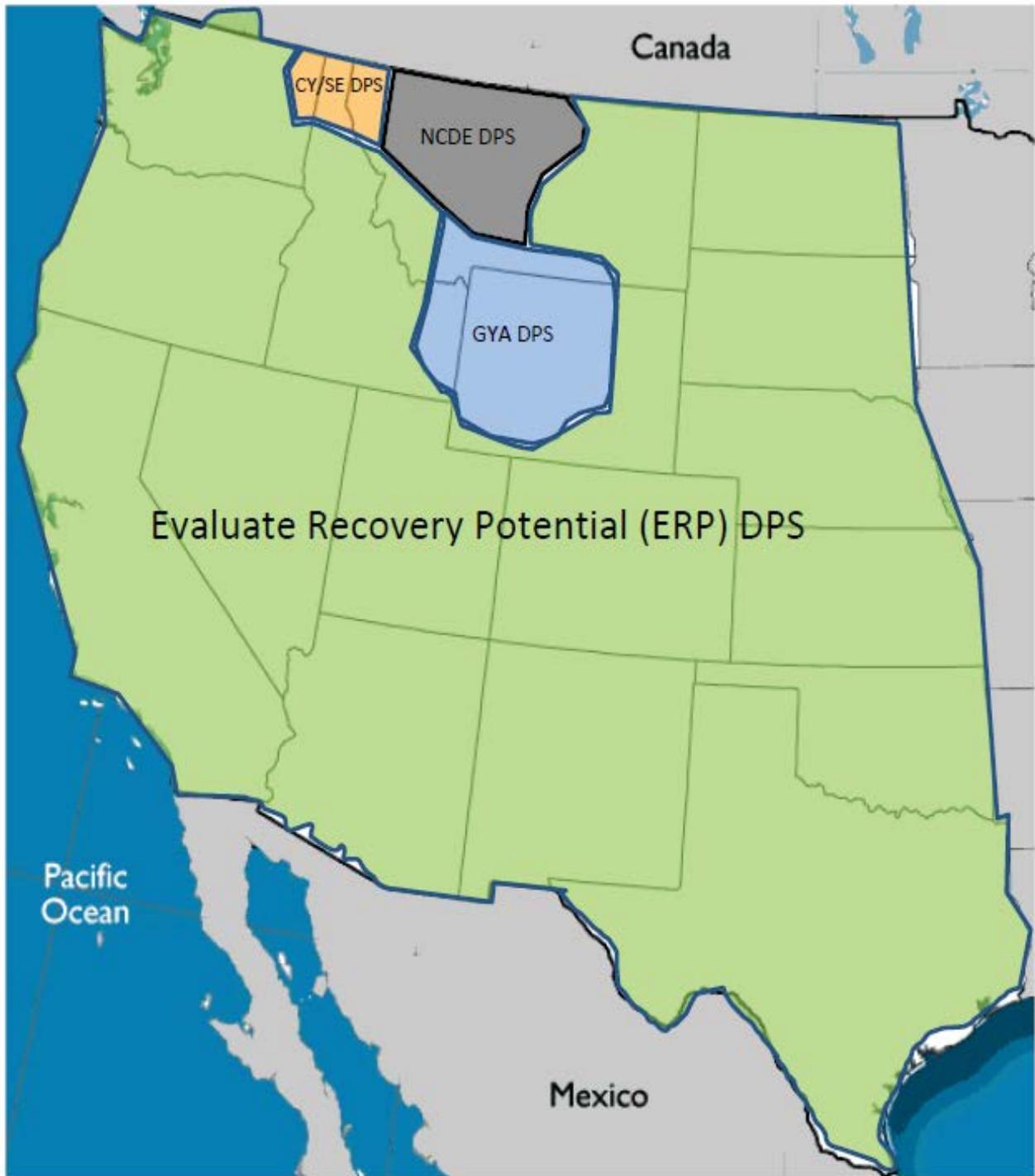
This is not to suggest the Service is without options to flexibly manage populations of grizzly bears in the lower-48 segment differently and ensure “resources can be brought to bear” where most needed.

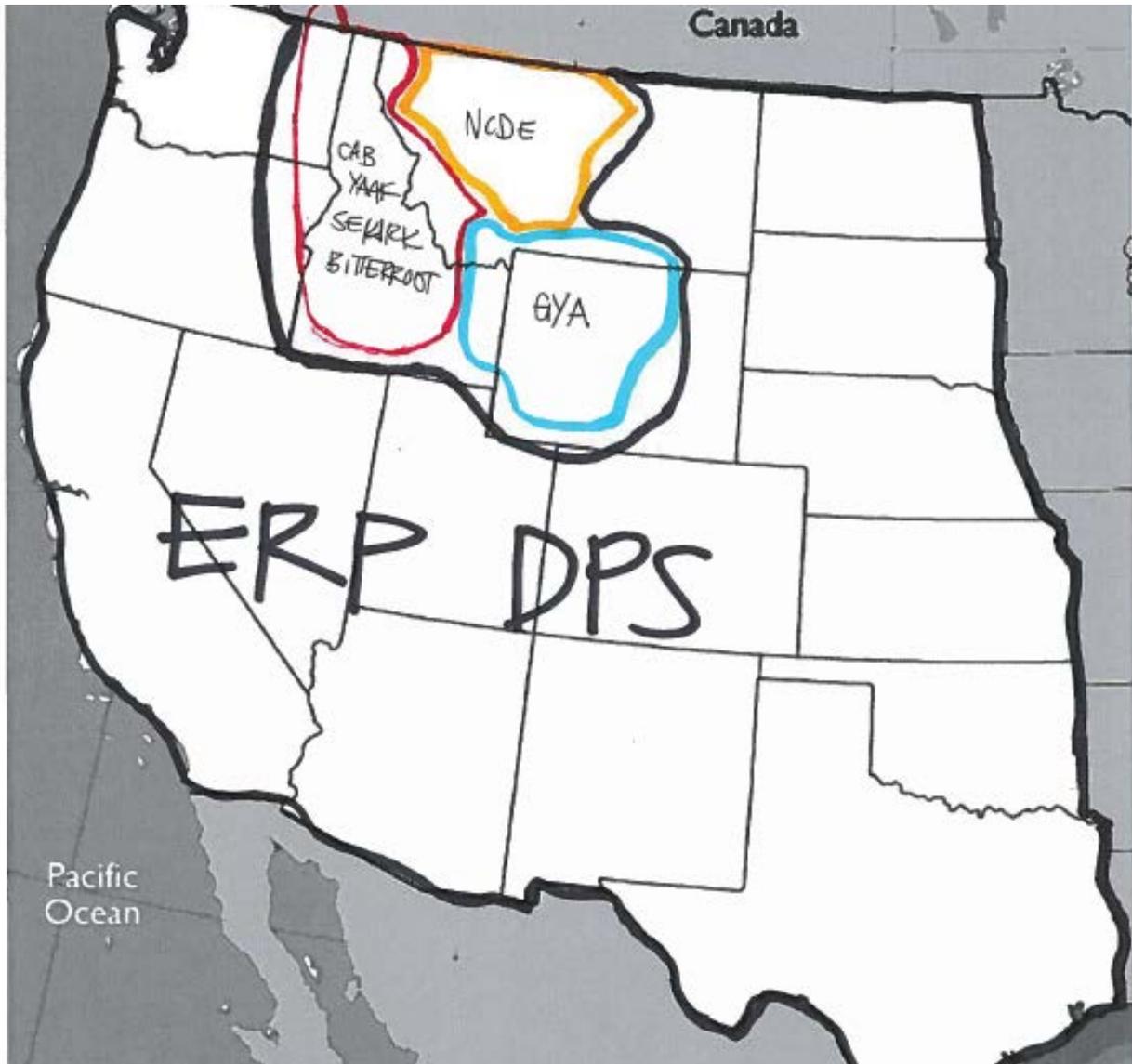
*Humane Soc’y of the U.S. v. Zinke*, 865 F.3d 585, 598 (D.C. Cir. 2017).

This can be done by revising the grizzly’s 4(d) rule, *see* 50 C.F.R. § 17.40(b), to allow more (or fewer) restrictions depending on the conservation status of each population, as envisioned by the lower-48 listing rule, 40 Fed. Reg. at 31,735.

Another option is to replace the lower-48 listing with multiple segment listings. *See, e.g.*, 81 Fed. Reg. 62,260 (humpback whale). The Service recognized and explored this possibility for grizzly bears. *See* FWS-Lit-016080 (“we believe there is sufficient evidence to support multiple [segments] within the current lower 48 listing . . . .”); FWS-Del-Doc-52621 and FWS-Del-Em-000149908 (discussing multiple segment options); FWS-Del-Em-000146604 (same); FWS-Del-Em-000146778-81 (same); FWS-Del-Doc-011380 (same). Maps depicting

some of the multiple segment options the Service considered are in the record:





FWS-Del-Doc-019632; FWS-Del-Doc-019631. The Service also explored keeping the lower-48 listing in place, *see* FWS-Del-EM-0000149907, or changing the listing to “wherever found” like Canada lynx, *see* FWS-Del-Doc-52620. None of these options “work to the detriment of grizzly bear recovery.”

**III. The Service cannot delist a Yellowstone grizzly segment that was never previously listed.**

A species must be listed before it can be delisted under the ESA. See Doc. 186:28–29. The Service maintains it *implicitly* listed a Yellowstone grizzly segment as part of the lower-48 listing. Doc. 203:31–32. For support, the Service relies on 50 C.F.R. § 17.11(a)’s statement that a listing of a “particular taxon includes all lower taxonomic levels” and *Humane Soc’y*, 865 F.3d at 597 (which, in turn, relies on a 2008 Solicitor’s Opinion).<sup>5</sup>

The problem is there is nothing “implicit” about segments. Segments, unlike taxonomic units, i.e., a species, subspecies or populations, are solely a creature of the ESA. 61 Fed. Reg. at 4722. Undoubtedly, a larger listing would implicitly include all possible subspecies and populations of that taxon. But a segment is not necessarily a population because to qualify a population must be discrete and significant “to the taxon as a whole.” *Id.* Not all

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<sup>5</sup> The 2008 Solicitor’s Opinion is available online at <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37018.pdf> and subject to judicial notice. See *Daniels-Hall*, 629 F.3d at 998–99.

populations will therefore qualify as a segment. Nor will all species or subspecies listings include segments.

Moreover, the ESA, regulations, and segment policy contain no mention of “implied” listings. *Humane Soc’y v. Jewell*, 76 F. Supp. 3d 69, 113 (D.D.C. 2014). Instead, each listing must be subject to notice and comment rulemaking and be precisely identified in the Federal Register. *Id.* This requirement promotes clarity as to the precise “species” subject to federal regulation and protection. *Id.*; *see also Humane Soc’y v. Kempthorne*, 579 F. Supp. 2d 7, 17 n.10 (D.D.C. 2008) (no species may be listed “unless that species itself is subjected to the five-factor analysis”). An “implied” segment listing would undermine this entire process. It would also undermine the ESA’s delisting process by allowing the Service to “cherry-pick” healthy populations of a larger species for delisting. *Humane Soc’y*, 76 F. Supp. 3d at 123. Such an approach renders “meaningless the original listing decisions for a species at risk ‘throughout all or a significant portion of its range.’” *Id.* at 122. The listed species’ specified “range” could be subject to change or alteration “at any time that the agency designates a [segment].” *Id.* As this Court previously recognized, “[u]nder such interpretation, the

Service could remove virtually any species from the threatened and endangered list simply by designating it a [segment].” *Greater Yellowstone Coalition v. Servheen*, 672 F. Supp. 2d 1105, 1125 n.9 (D. Mont. 2009). This impermissible approach is precisely what occurred here.

#### **IV. The Service violated section 7 of the ESA.**

The Service does not dispute that it failed to initiate and complete section 7 consultation on its decision to designate and delist a Yellowstone grizzly segment. The Service also admits this decision “may affect” threatened grizzlies outside the segment boundary. 83 Fed. Reg. at 18,739. The Service insists, however, that consultation is not required because its decision: (1) is not “agency action;” and (2) is non-discretionary. Doc. 203:126–129. This is incorrect.

An “agency action” necessary to trigger section 7 consultation is “determined as matter of law by the Court, not by the agency.” *Intertribal Sinkyone Wilderness Council v. Nat’l Marine Fisheries Serv.*, 970 F.Supp.2d 988, 1004 (N.D. Cal. 2013). Here, the Service’s decision to designate and delist a Yellowstone grizzly segment qualifies as “agency action” under the ESA, 16 U.S.C. § 1536(a)(2). Agency “action”

means “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies . . . Examples include, but are not limited to . . . the promulgation of regulations.” 50 C.F.R. § 402.02. Congress intended this term “to have a broad definition in the ESA.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012). “Agency actions” triggering section 7 include the renewal of contracts, the creation of interim management strategies, construction of a dam, the registration of pesticides, the issuance of permits, the approval of mining activities, *see id.* at 1021, the revision, amendment, and on-going implementation of forest plans, *see Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1087 (9th Cir. 2015), and the promulgation of rules. *See, e.g., California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1021 (9th Cir. 2009) (roadless rule); *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495–98 (9th Cir. 2011) (grazing regulations). The Service routinely engages in section 7 consultation for 4(d) rules because they “may affect” listed species. *See, e.g.*, 81 Fed Reg. 1900, 1903 (Jan. 14, 2016). The situation here is no different and the Service admits its rule designating and delisting a Yellowstone grizzly segment “may affect”

threatened grizzlies in the lower-48. *See* 83 Fed. Reg. at 18,739; Doc. 186:32.<sup>6</sup>

The Service insists its rule merely “changes the legal status of the [Yellowstone grizzly segment] and transfers jurisdiction from the [Service] to the States.” Doc. 203:126–127. But the challenged rule does much more: it includes a decision to promulgate a rule that: (1) designates grizzlies in the Yellowstone region a segment (and relatedly, decides where to draw the segment boundary and how to manage grizzlies within that boundary); (2) removes the segment from the lower-48 listing; and (3) dictates how the segment will be managed and monitored post-delisting. *See* 82 Fed. Reg. at 30,502.

The Service’s additional claim that it retains no “discretion” when it comes to designating and delisting the Yellowstone grizzly segment is equally unavailing. As noted above, the “agency action” at issue

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<sup>6</sup>The Service’s reliance on *Cal. Sportfishing Prot. All. v. FERC*, 472 F.3d 593 (9th Cir. 2006) and *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008 (9th Cir. 2012), is misplaced. The question in *Cal. Sportfishing* was whether the listing of a species triggered a new consultation in the last few years of a thirty-year operating license for a dam, not whether a decision to designate and delist a species requires consultation. 472 F.3d at 594. Similarly, the question in *Grand Canyon Trust* was if each annual operating plan for the “ongoing operation” of a dam triggered a new consultation. 691 F.3d at 1021.

includes a number of “discretionary” decisions, including designating the segment, removing the segment from the lower-48 listing, and dictating how the segment is managed. These are all “discretionary” actions. *See Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024, 1033 (9th Cir. 2010) (the Service has discretion in deciding the composition of a segment); 83 Fed. Reg. at 18,738 (delisting segments provides the Service with “discretion” to order priorities); 61 Fed. Reg. at 4,724 (recognizing the Service’s “exercise of [its] authority” to designate segments); FWS-Lit-016999–017004 (discussing discretionary management).

Even if one assumes, *arguendo*, that “delisting” is the only “action,” the Service has “discretion” over delisting decisions and may set low priorities for delisting, wait for more research and scientific studies, or even “sit on candidate lists.” *Coos County Board of Comm’rs v. Kempthorne*, 531 F.3d 792, 807–08 (9th Cir. 2008). Delisting may be a “mandatory” goal, but the Service retains discretion to choose “what specific actions to take” to get there. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008).

**V. The best available science reveals an isolated population of 700 grizzlies is not “recovered.”**

To delist the Yellowstone grizzly segment, the best available science must support the Service’s finding that *the segment* is “recovered” under the ESA, i.e., that the approximately 700 isolated grizzly bears in the segment are unlikely to become endangered within the foreseeable future. *See* Doc. 186:34; 82 Fed. Reg. at 30,520. The “recovery” finding must be premised on the long-term viability of the segment, not merely the segment’s ability to survive in the short-term over several decades or generations. *Id.* And, the finding must be based solely on the status of the population within the *segment itself*. *See* 82 Fed. Reg. at 30,520–45 (assessing threats to the segment); *id.* at 30,552 (focus on segment); *see also id.* at 30,546 (same).

Thus, while the Service’s ability to translocate additional bears into the Yellowstone grizzly segment and the potential for future connectivity in the region will be beneficial (and likely necessary), these hypothetical future events cannot support the Service’s recovery finding

now, because they involve bears and actions outside the segment. *See id.* at 30,552.<sup>7</sup>

Here, the best available science, including *every* published peer reviewed paper on population viability and minimum population size reveals an isolated population of 700 grizzly bears is not biologically “recovered” in the long-term as required by the ESA. These papers, including Lande (1995), Carroll (2001), Reed (2003), Traill (2007), Traill (2009), and Frankham (2014) may disagree on the estimate needed for long-term viability, but there is consensus that an isolated population in the thousands (not hundreds) is required. Facts:¶¶64–80; FWS-Lit-024712; FWS-Lit-020530.

Miller and Waits (2003) and Kamath (2015) – two additional papers relied on by the Service – are not to the contrary. Miller and Waits (2003) found the viability of the Yellowstone grizzly segment is likely secure in the short-term but the “genetic consequences of inbreeding and isolation are likely to transpire over longer periods of

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<sup>7</sup>The Service’s statement that nothing precludes future translocations into the segment is a red herring. The issue is not whether the Service can translocate bears; it is whether an isolated population of 700 grizzlies which requires future translocation can truly be deemed “recovered” under the ESA. *See* FWS-Lit-010611; Doc. 186:37-39.

time (decades and centuries).” FWS-Lit-009423. The paper also recognizes a more “immediate threat” from human-caused mortality and habitat loss and recommends steps be taken to encourage more dispersal and reintroduction efforts to address long-term genetic concerns. *Id.* Kamath (2015) likewise found the Yellowstone grizzly segment does not currently meet the “long-term viable population criterion” but “may eventually” get there. FWS-Lit-005979. Given its small size, low diversity, and isolation, this population could still benefit from increased gene flow, “particularly given the unpredictability of future climate and habitat changes.” *Id.*

In response, the Service points to “effective” population size (the number of bears able to reproduce) and insists it is “well above the recommended minimum.” Doc. 203:111. But this statement is misleading and contradicted by evidence in the record.

Effective population size is typically 25-27 percent of the total population size, FWS-Lit-016151 (citing papers), which would equal approximately 175 for the current Yellowstone grizzly segment. This is

well below even the Service's and Franklin (1980)'s 500 figure needed for long-term viability. *See* FWS-Lit-003610.<sup>8</sup>

Citing Miller and Waits (2003), the Service maintains an effective population of 100 is sufficient. Doc. 203:110. This is the same study the Service relied on in *Greater Yellowstone Coalition*, 672 F. Supp. 2d at 1121. The problem is that Miller and Waits (2003) never states effective population size should be 100 to ensure long-term viability (recovery). Rather, the authors explain the minimum effective population size needed to avoid the “short term effects” of inbreeding “is not known” and state that the current effective population is likely to be near or greater than 100 (assuming a total population of 400). FWS-Lit-009423; *see also* Pub-Cmt-004192 (comment from biologists addressing misreading of Miller and Waits (2003)).

The Service also relies on Kamath (2015). This paper says the ratio between total and effective population size may be “considerably higher” than published estimates – more like 42 to 66 percent of the total population. FWS-Lit-005979. But even if you accept and apply

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<sup>8</sup> Franklin (1980) estimates that an effective population of “50” is needed for short-term viability but “500” for long-term viability. FWS-Lit-003610. This correlation is often referred to as the “50/500” rule.

Kamath (2015)'s high percentage ratios and the high end of those percentages (66 percent) – as the Service does – the effective population still comes up short at 469, below the 500 figure needed for long-term viability. FWS-Lit-003610. As the Service concedes, an effective population of 469 is only “approaching” and “has not reached the long-term viable population criterion” of 500 bears required by Franklin (1980) for long-term viability. 82 Fed. Reg. at 30,610.

By the Service's own admission, therefore, it does not have a sufficient effective population for long-term viability (recovery). *See Defenders of Wildlife v. Jewell*, 176 F.Supp.3d 975, 1006 (D. Mont. 2016) (directing the Service to reconsider threats to wolverine due to “inappropriately-low short and long term effective population sizes”). The Service is “confident” it will someday reach an effective population size of 500 but no supporting science or data is provided. *See* 82 Fed. Reg. at 30,610. And, evidence in the record reveals the Service's delisting decision, Conservation Strategy, and state-sanctioned trophy hunting (plus background mortality) is a recipe for population decline, not growth.

Evidence also reveals Franklin (1980)'s 500 figure used by the Service is no longer the best available science. Based on data accumulated since 1980, Frankham (2014) recommends doubling the effective population number to 1000 to prevent inbreeding depression, limit loss of genetic fitness, and retain evolutionary potential. FWS-Lit-003588; *see also* FWS-Lit-003590 (discussing changes). Frankham (2014) also recommends doubling the International Union for Conservation of Nature's ("IUCN's") criteria for "endangered" status from a population of fewer than 2,500 to a population of fewer than 5,000. FWS-Lit-03590 (table 1); FWS-Lit-003594; *see also* Doc. 186:35-36 (discussing IUCN's recommendations); FWS-Rel-Docs-005200 (peer reviewer recommending Frankham (2014)).

The Service's attempt to cast this as a scientific debate about "recovery" numbers is thus misplaced. *Every* published, peer reviewed paper on population viability reveals the Service's "recovery" finding is premature. The ESA does not allow the Service to "disregard[] available scientific evidence that is in some way better than the evidence [it] relies on." *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006).

Indeed, the Service now concedes that while it “considered” the published scientific papers on population viability and minimum population size it “rationally declined” to adopt or apply them. Doc. 203:64. In other words, the Service neglected to base its “recovery” finding on a population viability analysis because they are too “inexact,” “simplifications,” “generalizations” and “guidelines” that are incapable of providing meaningful numbers on long-term viability. Doc. 203:63-64. But this litigation position is contradicted by the Service’s statements on the importance of population viability analyses. *See* 82 Fed. Reg. at 30,561.

The Service explained, for instance, it considered population viability analyses “in considerable depth,” *id.* at 30,579, and recognized such analyses as “another tool population ecologists often use to assess the status of a population by estimating its likelihood of persistence in the future.” *Id.* at 30,507; *see also* FWS-Lit-006379 (Service’s use of a 100-year population viability analysis for the Louisiana black bear).

In fact, Boyce (2001) – the paper relied on by the Service to attack population viability analyses – expressly recommends the Service update the analysis with a habitat-based framework and prepare one

for the Yellowstone grizzly segment. FWS-Lit-001332. Boyce (2001) also notes that despite some imperfections and uncertainties, population viability analyses remain “the *best method available* for integrating conservation science and management.” FWS-Lit-001310 (emphasis added). Any attempt by the Service’s counsel to now discredit the use of such analyses is thus without merit and irrational. As noted in Boyce (2001), changes may be required, but population viability analyses still remain the very basis for adaptive management which offers “the best, safest, and most rigorous approach toward successful conservation.” *Id.*<sup>9</sup>

This is precisely what the ESA requires – use of the best available, not the best possible, science. *Building Indus. Ass’n v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001). Scientific findings are often necessarily made from “incomplete or imperfect information.” *Brower v. Evans*, 257

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<sup>9</sup>The Service’s suggestion that there is too much data and information on the Yellowstone grizzly segment for a population viability analysis, Doc. 203:64, is misplaced. Boyce (2001) said the population viability analysis “focused” on Yellowstone grizzlies “because this population has been the most studied.” FWS-Lit-001308; *see also* FWS-Lit-018162 (encouraging use of analyses when there is data). The Intervenor also rely on Boyce (2001) to suggest the probability of extinction is low. But Boyce (2001) cautioned against such use, stating that this prediction is not “defensible” because the authors did not have “sufficient understanding of the genetics and ecology” of the grizzly to make a viability assessment. FWS-Lit-001332.

F.3d 1058, 1070–71 (9th Cir. 2001). Uncertainties and imperfections are thus expected and part of the process. Where “there is no superior data, occasional imperfections do not violate the ESA.” *Defenders of Wildlife*, 176 F. Supp. 3d at 999 (citation omitted). Population viability analyses meet this test. *See, e.g., Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 878 F.3d 725, 737 (9th Cir. 2017) (setting aside a biological opinion because its conclusions conflicted with the population viability analysis); *Native Ecosystems Council v. Marten*, 883 F.3d 783, 795–96 (9th Cir. 2018) (upholding use of population viability analysis).

Unable to rely on the best available science, the Service highlights the growth of the Yellowstone grizzly segment over the years.

Population data, however, is misleading due to the different “apples and oranges” methods used to count bears, *see* Facts:¶63, and the Service’s exclusion of recent data on population declines. *See* Facts:¶¶60–62.

Data on population growth – by itself – also does not tell us much about whether the current number is sufficient for recovery. The Service also faults Guardians for its “myopic” focus on population size. Doc. 203:62. Yet, population size is what the Service uses for its recovery criteria and finding, *see* 82 Fed. Reg. at 30,514 and post-delisting management

strategy, *id.* at 30,531 (table 3). It “is irrefutable that population size matters for extinction risk.” FWS-Lit-030548.

The Service’s reliance on voluntary and ever-changing recovery plan criteria is also misplaced. *See supra* note 2. The Service also mentions some peer review comments to create a false impression of scientific consensus. *See* Doc. 203:75–76. In reality, a number of the peer reviewers raised concerns with the delisting proposal and recovery finding. *See* FWS-Rel-Docs-005200 (“There is no scientific basis for the lower limit of 500 bears.”); FWS-Rel-Docs-005203 (highlighting uncertainty about synergistic effects and vulnerability to local extinction). These concerns were echoed by leading experts in the fields of conservation biology. *See* FWS-Pub-Cmt-003915 (International Association for Bear Research and Management); FWS-Pub-Cmt-004191 (American Society of Mammalogists and Society for Conservation Biology); FWS-Pub CMT-006108 (sixty-four scientific experts). These views represent more than general “comments” from “the public.”

**VI. The Service failed to analyze the cumulative threats facing the Yellowstone grizzly segment.**

The Service confidently states that “the entire 130-page rule” examined cumulative threats and population trend data “explicitly accounts[s]” for such threats. Doc. 203:108. But no citations are provided. Nor does the Service reference any analyses in the rule or record or explain how population trend data can account for *future* threats. See Doc. 186:44. Such a sweeping and vague argument deserves little attention from this Court. *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994). Courts should only consider issues that are argued “specifically and distinctly.” *Id.* “Judges are not like pigs, hunting for truffles buried in briefs.” *Id.* Where, as here, counsel “has heaved the entire contents of a pot against the wall in hopes that something would stick,” it is not the Court’s job to “sort through the noodles.” *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003).

Here, the Service failed to analyze the total combined threats – including future threats – facing the Yellowstone grizzly segment. The issue was brought to the Service’s attention in comments and during peer review, see Doc. 186:44, but the Agency ignored the issue. See Doc.

186:40-44. The Service does include a “cumulative effects” section in the preamble to the rule but no analysis is provided. *See* 82 Fed. Reg. at 30,544. Instead, the Service discusses only some of the threats in isolation, not *the total* combined impact. The Service fails to even mention how the projected increase in grizzly mortality from trophy hunting in conjunction with “background” levels of mortality, loss of important food sources, and climate change may collectively threaten the Yellowstone grizzly segment. *Id.*

The Service’s assertion that population trend data accounts for cumulative threats is also misplaced. *See* Doc. 186:42-44. The data relied on by the Service excludes the most recent data showing population declines since 2014. *See* Doc. 186:42. The population dropped from approximately 757 to 717 in 2015, and dropped again in 2016 to 690. FWS-Emails-000003.

Moreover, population trend data cannot be a metric for analyzing cumulative threats because it fails to account for *future* threats. *See* Doc. 186:43-44. Population trend “is determined by births, deaths, and how many animals move into or out of the population (i.e., disperse) . . .,” 82 Fed. Reg. at 30,506, and does not account for future threats from

trophy hunting, new regulatory mechanisms (the Conservation Strategy) and climate change at issue here. A proxy can only be used if it is a sound substitute for the underlying criterion. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9th Cir.2004). The Service must demonstrate the proxy “‘reasonably ensures’ that the proxy results mirror reality.” *Id.* (citations omitted); *cf. Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009) (rejecting reliance on population trend data as proxy for species persistence). Here, the Service cannot demonstrate (even if it tried – which it did not) that population trend data is a sound substitute for analyzing cumulative threats.

## CONCLUSION

For the foregoing reasons, Guardians respectfully requests this Court declare the Service’s rule unlawful and set aside the rule under to the APA.

Respectfully submitted this 8th day of August, 2018.

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/s/ John R. Mellgren  
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/s/ Kelly E. Nokes  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of August, 2018, I filed a copy of this document electronically through the CM/ECF system, which caused all ECF registered counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Matthew K. Bishop  
Matthew K. Bishop

### **CERTIFICATE OF COMPLIANCE**

I, the undersigned counsel of record, hereby certify that this brief is proportionally spaced, has a typeface of 14 points or more, and in accordance with this Court's August 2, 2018 order (Doc. 222) contains 5,000 words or less. I relied on Microsoft Word to obtain the word count.

/s/ Matthew K. Bishop  
Matthew K. Bishop