



Via Email and Certified Mail/Return Receipt Requested

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Re: Grizzly Bear Recovery: Notice of Intent to Sue for Violations of the Endangered Species Act

Dear Acting Secretary Bernhardt and Principal Deputy Director Everson:

On behalf of the Center for Biological Diversity (“Center”), we hereby provide notice that the U.S. Fish and Wildlife Service (“Service”) is violating the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-559. Specifically, the Service has failed to update its grizzly bear recovery plan in violation of section 4(f) of the ESA, failed to pursue further grizzly bear recovery in violation of section 7(a)(1) of the ESA, failed to prepare a timely five-year status review for the grizzly bear in violation of section 4(c), and unreasonably denied the Center’s 2014 petition for an updated grizzly bear recovery plan.

BACKGROUND

I. The ESA Requires That the Service Develop Recovery Plans, Take Affirmative Conservation Actions, and Prepare Five-Year Status Reviews

The ESA was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). Once listed as “endangered” or “threatened,” a species is entitled to the ESA’s substantive protections, and federal agencies assume duties to conserve it.

Section 4(f) of the ESA directs the Service to develop and implement recovery plans for the “conservation and survival” of listed species unless the agency makes a finding that “such a plan will not promote the conservation of the species.” 16 U.S.C. § 1533(f)(1). The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3).

Section 7(a)(1) provides an “affirmative duty” for federal agencies to conserve listed species. It provides that all federal agencies shall “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed” 16 U.S.C. § 1536(a)(1).

The ESA also requires the Service to regularly assess the status of listed species. Specifically, section 4(c) requires that the Service “conduct, at least once every five years, a review of all [listed] species” 16 U.S.C. § 1533(c)(2). Based on that review, the agency can determine whether the species should maintain its protections, be uplisted or be delisted. *Id.*; *see also* 50 C.F.R. § 424.21.

II. The Grizzly Bear’s History of Persecution and Protection

Grizzly bears once ranged throughout most of western North America, from the high Arctic to the Sierra Madre Occidental of Mexico, and from the coast of California across most of the Great Plains.¹ Prior to European settlement, scientists believed that approximately 50,000 grizzly bears occupied the western United States between Canada and Mexico.²

With European settlement of the American West and federally-funded bounty programs aimed at eradicating grizzly bears, people shot, trapped, and poisoned them, reducing their population and shrinking where they live to just two percent of their historic range.³ As a result of its precipitous decline, the Service listed the grizzly bear as a threatened species in the lower 48 states under the Endangered Species Act in 1975.⁴

Since their listing under the Act, grizzly bears have made progress toward recovery in some areas. In 2016, scientists estimated that less than 1,800 grizzly bears remain in the lower 48 states, occupying five isolated populations.⁵ Most bears are confined to the Greater Yellowstone and Northern Continental Divide ecosystems, both of which remain completely isolated from the other remaining, sparse populations.⁶ Large areas of suitable, historical grizzly bear habitat have no bears at all.

III. The Grizzly Bear’s Outdated 1993 Recovery Plan and the Center’s Petition

In 1993, the Service developed the Grizzly Bear Recovery Plan to “delineate reasonable actions that are believed to be required to recovery and/or protect” the grizzly bear.⁷ The Service identified four recovery zones (Yellowstone, Northern Continental Divide, Cabinet/Yaak, and Selkirks) and three evaluation areas for potential recovery (Bitterroot, North Cascades, and San Juan Mountains).⁸ The Service further noted that it would evaluate “other potential recovery

¹ Servheen, Christopher, U.S. Fish and Wildlife Service, Grizzly Bear Recovery Plan 9 (Sept. 10, 1993) (hereinafter “1993 Recovery Plan”).

² 81 Fed. Reg. 13,174, 13,181 (March 11, 2016).

³ 81 Fed. Reg. at 13,181

⁴ 40 Fed. Reg. 31, 734 (July 28, 1975).

⁵ *See* 81 Fed. Reg. at 13,181-82.

⁶ 81 Fed. Reg. at 13,181.

⁷ 1993 Recovery Plan at i.

⁸ 1993 Recovery Plan at 39-121.

areas throughout the historical range of the grizzly bear,” with an analysis “focus[ed] on habitat values, size of the areas, human use and activities in general, relation to other areas where grizzly bears exist, and historical information.”⁹ The Service anticipated the analysis would take five years.¹⁰ It has not yet completed that analysis.¹¹

In August 2011, the Service published its most recent five-year review for grizzly bears. The Service noted that, with the exception of supplements relative to specifically identified recovery areas, “the recovery plan and the associated recovery criteria have not been updated since the plan was released in 1993 . . .” and “no longer reflects the best available and most up-to-date information on the biology of the species and its habitat.”¹² For example, the Service noted that it was “in the process of updating the demographic recovery criteria in the 1993 Recovery Plan because new science and techniques are now available.”¹³ In “Recommendations for Future Actions,” the Service listed, as its first recommendation, the need to “[r]evise the recovery plan . . . so that it reflects the best scientific and commercial information available.”¹⁴ Furthermore, the Service specifically noted that “other areas throughout the historic range of the grizzly bear in the lower 48 States should be evaluated to determine their habitat suitability for grizzly bear recovery,” including “historic habitat in Colorado, New Mexico, Arizona, Utah, California, Nevada, Oregon, and southern Washington (mountain ranges in the western U.S.).”¹⁵

On June 18, 2014, pursuant to the APA, 5 U.S.C. § 553(e), the Center filed its “Petition for a Recovery Plan for the Grizzly Bear (*Ursus arctos horribilis*) Across Its Native Range in the Conterminous United States” (hereinafter “Petition”). The Petition asked that the Service update the 1993 Recovery Plan “to include all significant remaining areas of suitable habitat across the grizzly bear’s native range in the western U.S., in addition to those populations that are already covered in the 1993 plan, including at least the Gila/Mogollon complex in Arizona and New Mexico, the Grand Canyon in Arizona, the Sierra Nevada in California, the Uinta Mountains in Utah, and areas of southern Utah.”¹⁶ The Center also requested that the Service update demographic parameters for all grizzly bear populations, create and implement a meta-population target for grizzly bears in the western United States, establish uniform suitable habitat and secure habitat standards, restore connectivity and habitat linkages within the historic range of

⁹ 1993 Recovery Plan at 121.

¹⁰ 1993 Recovery Plan at 121.

¹¹ The Service supplemented the recovery plan in 1996, 1997, 2007, and 2013. The 1996 Supplement provided a recovery chapter for the Bitterroot Ecosystem, and the 1997 Supplement provided a recovery chapter for the North Cascades Ecosystem. Servheen, Christopher, U.S. Fish and Wildlife Service, Grizzly Bear Recovery Plan, Supplement: Bitterroot Ecosystem Recovery Plan Chapter (Sept. 11, 1996); Servheen, Christopher, U.S. Fish and Wildlife Service, Grizzly Bear Recovery Plan, Supplement: North Cascades Ecosystem Recovery Plan Chapter (June 23, 1997). With these supplements in place, the current recovery plan calls for recovery of grizzly bears in six identified recovery areas: 1) the Greater Yellowstone Ecosystem, 2) the Northern Continental Divide Ecosystem, 3) the Cabinet-Yaak Ecosystem, 4) the Selkirk Ecosystem, 5) the North Cascade Ecosystem, and 6) the Selway-Bitterroot Ecosystem. The 2007 and 2013 Supplements deal with grizzly bears in the Greater Yellowstone Ecosystem and are not relevant to this Notice.

¹² Fish and Wildlife Service, Grizzly Bear 5-Year Review: Summary and Evaluation (Aug. 2011), at 14-15 (“Five-Year Review”).

¹³ Five-Year Review at 15.

¹⁴ Five-Year Review at 105.

¹⁵ Five-Year Review at 107.

¹⁶ Petition at 2 (attached as Exhibit 1).

the grizzly bear, develop recovery strategies for historic range, develop integrated climate change and non-native species mitigation and adaptation strategies for grizzly bears, and establish strategies for reducing human-caused mortality.¹⁷

On September 22, 2014, the Service denied the Petition, stating that “[r]ecover plans are not rules under the APA,” but rather are “discretionary guidance documents that are non-binding and non-enforceable,” and thus “Section 553(e) does not provide the right to petition for the issuance of a recovery plan.”¹⁸ The Service further stated that the agency satisfied its statutory responsibilities for recovery planning and implementation for the grizzly bear, and that “any additional recovery planning is subject to Service prioritization and is discretionary.”¹⁹

Rather than prepare the updated recovery plan requested in the Petition, the Service instead moved toward prematurely removing the bear’s ESA protections. The Service proposed in 2016²⁰ and finalized in 2017²¹ a rule to delist the Greater Yellowstone Ecosystem population of grizzly bears. In 2018, a court reinstated the population’s ESA protections after ruling that the Service’s delisting decision was unlawful.²²

LEGAL VIOLATIONS

In 2011, the Service explicitly acknowledged that its 1993 Recovery Plan no longer reflects the best available science, and that the Service must consider suitable historical bear habitat outside the identified recovery areas. The agency’s failure to update the plan violates Section 4(f) of the ESA. 16 U.S.C. § 1533(f). That provision provides, in pertinent part, that the Service “shall develop and implement plans [] for the conservation and survival of endangered species and threatened species” *Id.* § 1533(f)(1). Where, as here, the Service itself has acknowledged that the existing plan is outdated and fails to address geographical areas of historical importance to the grizzly bear, section 4(f)(1) imposes an obligation on the Service to “develop and implement” a plan that will in fact provide for the “conservation and survival” of the species.

The Service, in refusing to update the plan and pursue grizzly bear recovery in additional areas, has also violated its affirmative duty to conserve under section 7(a)(1) of the ESA. 16 U.S.C. § 1536(a)(1); *see also id.* § 1536(c)(1) (“It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.”). Furthermore, nearly eight years have passed since the Service prepared a status review for the grizzly bear, even though the ESA requires these reviews “at least once every five years.” 16 U.S.C. § 1533(c)(2)(a); *see also* 50 C.F.R. § 424.21.

¹⁷ Petition at 2.

¹⁸ Decision at 1 (attached as Exhibit 2).

¹⁹ Decision at 2.

²⁰ 81 Fed. Reg 13,173, 13,227 (March 11, 2016)

²¹ 82 Fed. Reg. 30,502 (June 30, 2017).

²² *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1003 (D. Mont. 2018); *see also Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011) (upholding district court reversal of the Service’s 2007 effort to prematurely delist grizzly bears in the Greater Yellowstone Ecosystem).

In addition to these ESA violations, the Service's denial of the Petition violates the APA. A recovery plan falls within the APA's broad definition of a "rule," 5 U.S.C. § 551(4), so the Service cannot reasonably deny the Center's petition on that basis. In addition, the agency supplied no reasoned analysis to supports its course reversal from 2011, when the Service committed to providing an updated plan. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 57 (1983).

CONCLUSION

If the Service does not act to correct the violations described in this letter, the Center will pursue litigation in U.S. District Court in sixty days. The Center will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have wish to discuss this matter or believe this notice is in error, please contact Collette at 651-955-3821.

Sincerely,



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