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

WESTERN WATERSHEDS
PROJECT, a non-profit organization;
ALLIANCE FOR THE WILD
ROCKIES, a non-profit organization;
NATIVE ECOSYSTEMS COUNCIL,
a non-profit organization; CENTER
FOR BIOLOGICAL DIVERSITY, a
non-profit organization; WYOMING
WILDLIFE ADVOCATES, a non-
profit organization; SIERRA CLUB,
a non-profit organization; FRIENDS
OF THE BITTERROOT, a non-profit
organization; WILDEARTH
GUARDIANS, a non-profit
organization, and GALLATIN
WILDLIFE ASSOCIATION, a non-
profit organization,

No.

COMPLAINT

Plaintiffs,

vs.

RANDY MOORE, in his official capacity as Chief of the U.S. Forest Service; the UNITED STATES FOREST SERVICE, a federal agency; MARTHA WILLIAMS, in her official capacity as Director of the U.S. Fish and Wildlife Service; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency; DEB HAALAND, in her official capacity as Secretary of the Interior; and the UNITED STATES DEPARTMENT OF THE INTERIOR, a federal department,

Federal-Defendants.

INTRODUCTION

1. Plaintiffs bring this civil action against Federal-Defendants, the United States Forest Service (“Forest Service”) and U.S. Fish and Wildlife Service (“FWS”), under Section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, for violations of the ESA and National Environmental Policy Act (“NEPA”).

2. This case challenges the Forest Service’s East Paradise Range Allotment Management Plan decision (“East Paradise decision” or “decision”) and FWS’s biological opinion on how that decision may affect threatened grizzly bears.

3. The East Paradise decision authorizes continued and expanded livestock grazing on National Forest lands in occupied grizzly bear habitat in the Absaroka Mountains, just north of Yellowstone National Park. Livestock grazing in this area results in increased conflicts with grizzly bears and increased grizzly bear mortalities that thwart recovery of the species in the lower 48 States.

JURISDICTION AND VENUE

4. This Court has jurisdiction under 28 U.S.C. § 1331, 16 U.S.C. § 1540(c), and 5 U.S.C. § 704.

5. This Court has the authority to review the Forest Service’s and FWS’s action(s) and/or inaction(s) complained of herein and grant the relief requested under 16 U.S.C. § 1540(g) and 5 U.S.C. § 706.

6. Plaintiffs exhausted all available administrative remedies. Plaintiffs submitted comments on the draft environmental assessment (“EA”) prepared for the East Paradise decision. Plaintiffs submitted

timely objections to the draft decision and draft finding of no significant impact. In accordance with the applicable regulations and guidance, Plaintiffs sent their objections to the Forest Service's Northern Regional Office in Missoula, Montana. The Forest Service denied Plaintiffs' objections on August 12, 2021.

7. All requirements for judicial review required by the ESA are satisfied. Plaintiffs sent the Forest Service and FWS a valid 60-day notice of intent to sue letter in accordance with the ESA via email and U.S. Mail (delivery confirmation). On July 19, 2022, the Forest Service and FWS responded to Plaintiffs' 60-day notice letter. In its response, the Forest Service and FWS reasserted their position that they complied with Section 7 of the ESA before authorizing the East Paradise decision but nonetheless determined that it would reinitiate consultation due to "minor errors" and changes in regulations and species' status. The Forest Service and FWS did not provide a timeline for completion of new consultation (or agree to share any consultation documents produced). The Forest Service did not withdraw its East Paradise decision authorizing grazing pending new consultation and FWS did not withdraw the previous consultation documents (biological

opinion) pending completion of new consultation. The East Paradise decision and consultation documents remain in force. Plaintiffs filed this case only after the 60-day notice period had run.

8. The relief sought is authorized by 28 U.S.C. § 2201, 28 U.S.C. § 2202, 16 U.S.C. § 1540, and 5 U.S.C. § 706.

9. Venue is proper in this Court under 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e).

10. Plaintiffs have organizational standing. Plaintiffs satisfy the minimum requirements for Article III standing. Plaintiffs – including their members, supporters, and staff – have suffered and continue to suffer injuries to their interests in grizzly bears and grizzly bear conservation as a result of the East Paradise decision. This Court can redress these injuries by granting the relief requested. There is a present and actual controversy between the Parties.

PARTIES

11. Plaintiff WESTERN WATERSHEDS PROJECT (“WWP”) is a non-profit organization with over 12,000 members and supporters dedicated to protecting and conserving the public lands, watersheds, and native wildlife across the American West, including grizzly bears. WWP’s Montana office is located in Missoula, Montana. WWP brings this action on behalf of itself, its members, and its supporters.

12. Plaintiff ALLIANCE FOR THE WILD ROCKIES (the “Alliance”) is a non-profit conservation organization with approximately 2,000 members and supporters. The mission of the Alliance is to protect and restore the ecological and biological integrity of the Northern Rockies. The Alliance is based in Missoula and Helena Montana. The Alliance brings this action on behalf of itself, its members, and its supporters.

13. Plaintiff NATIVE ECOSYSTEMS COUNCIL is a non-profit advocacy organization based in Three Forks, Montana dedicated to protecting and restoring native ecosystems in the Northern Rockies. In furtherance of this mission, Native Ecosystems Council’s members and supporters remain active in wildlife management, including grizzly bear conservation. Native Ecosystems Council brings this action on behalf of itself, its members, and its supporters.

14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a non-profit organization that is dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center is incorporated in California and headquartered in Tucson, Arizona, with additional offices throughout

the country, including in Missoula, Montana. The Center has more than 89,000 active members, some of which recreate and have an interest in conserving the lands and wildlife in the Absaroka-Beartooth mountain range. The Center and its members have a long-standing interest in conserving native species and have consistently advocated for the conservation and protection of native species, including grizzly bears. The Center brings this action on behalf of itself, its members, and its supporters.

15. Plaintiff WYOMING WILDLIFE ADVOCATES (“WWA”) is a non-profit organization focused on informing, educating, and empowering communities to preserve our wild legacy and protect our shared wildlife resources. WWA envisions a Wyoming that leads the nation in exceptional and innovative wildlife management; all stakeholders are valued equally, and management decisions are driven by the best available science. WWA values grizzly bears as part of a healthy, biodiverse Greater Yellowstone Ecosystem and work to protect them from trophy hunting and unnecessary mortality from preventable conflicts. Headquartered in Jackson, Wyoming, WWA has thousands of supporters in Wyoming, the Greater Yellowstone Ecosystem, and

nationwide. WWA brings this action on behalf of itself, its members, and its supporters.

16. Plaintiff SIERRA CLUB is a national non-profit conservation organization with more than 649,000 members. Headquartered in Oakland, California, the Sierra Club maintains offices throughout the country, including Montana. The Sierra Club's mission 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; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Sierra Club and its members have advocated for grizzly bear recovery in the lower-48 States and protection of grizzly bear habitat in the Greater Yellowstone Ecosystem for more than 20 years. The Sierra Club brings this action on behalf of itself, its members, and its supporters.

17. Plaintiff FRIENDS OF THE BITTERROOT is a non-profit organization with over 600 members dedicated to protecting the quality of life and native wildlife species (including grizzly bears) in Montana.

Friends of the Bitterroot brings this action on behalf of itself, its members, and its supporters.

18. Plaintiff WILDEARTH GUARDIANS (“Guardians”) is a non-profit conservation organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and the health of the American West. Guardians is specifically committed to ensuring the survival and recovery of grizzly bears in the lower-48 States. Guardians has approximately 235,000 active members and supporters across the American West, including many who reside in Montana, Idaho, Wyoming, and Washington. Guardians maintains an office in Missoula, Montana, where most of its work to conserve grizzly bears occurs. Guardians brings this action on behalf of itself, its members, and its supporters.

19. Plaintiff GALLATIN WILDIFE ASSOCIATION (“GWA”) is a local, all volunteer wildlife conservation organization dedicated to the preservation and restoration of wildlife, fisheries, habitat and migration corridors in Southwest Montana and the Greater Yellowstone Ecosystem using science-based decision making. GWA was founded in 1976 and recognizes the intense pressures on our wildlife, including

grizzly bears, from habitat loss and climate change. GWA advocates for science-based management of public lands for diverse public values, including but not limited to hunting and angling.

20. Plaintiffs have members and supporters who have standing to pursue this civil action in their own right and their interests in grizzly bear and grizzly bear conservation (at stake in this case) are germane to their respective organization's purposes. Plaintiffs' members, supporters, and staff are dedicated to ensuring the long-term survival and recovery of grizzly bears in the lower-48 states and ensuring the Forest Service and FWS comply with the law. Plaintiffs' members, supporters, and staff understand the importance of taking a hard look at the environmental effects of agency actions and ensuring full compliance with Section 7 of the ESA's consultation provisions.

21. Plaintiffs' members, supporters, and staff live in or near and/or routinely recreate in or near the East Paradise decision area and surrounding landscape and other areas in the region occupied by grizzly bears. Plaintiffs' members, supporters, and staff enjoy observing – or attempting to observe – and studying grizzly bears, including signs of grizzly bear presence and/or photographing grizzly bears in areas where

the species is known to den, travel, and occur, including in the Absaroka mountains. The opportunity to view grizzly bears and grizzly bear sign in the wild and in the area affected by the East Paradise decision is of significant interest and value to Plaintiffs' members, supporters, and staff and increases their use and enjoyment of the action area.

22. Plaintiffs' members, supporters, and staff derive aesthetic, recreational, scientific, inspirational, educational, spiritual, and other benefits from grizzly bears, including by seeing (or trying to see) grizzly bears in the wild. Plaintiffs' members, supporters, and staff also have an interest in working to conserve grizzly bears. Ensuring that the Forest Service and FWS comply with the law as alleged in this case when authorizing the East Paradise grazing decision and making other important decisions affecting our public lands in areas occupied by grizzly bears is a key component of Plaintiffs' interests.

23. The Forest Service's and FWS's East Paradise decision, which will continue and expand livestock grazing in this area which, in turn, will negatively affect grizzly bears and the species' use of the area, and thus has harmed, is likely to harm, and will continue to harm Plaintiffs'

interests in grizzly bears and grizzly bear conservation. Plaintiffs' interests have been, are being, and unless the requested relief is granted, will continue to be harmed by the East Paradise decision. If this Court issues the relief requested, the harm to Plaintiffs' interests will be alleviated and/or lessened.

24. Federal Defendant RANDY MOORE is sued in his official capacity as Chief of the United States Forest Service. As Chief, Mr. Moore is the federal official with responsibility for all Forest Service officials' actions and/or inactions challenged in this case.

25. Federal Defendant UNITED STATES FOREST SERVICE, is an agency within the United States Department of the Agriculture that is responsible for applying and implementing the federal laws and regulations challenged in this case.

26. Federal Defendant MARTHA WILLIAMS is sued in her official capacity as Director of the United States Fish and Wildlife Service. As Director, Ms. Williams is the federal official with responsibility for all FWS officials' actions and/or inactions challenged in this case.

27. Federal Defendant, UNITED STATES FISH AND WILDLIFE SERVICE is an agency within the United States Department of the

Interior that is responsible for applying and implementing the federal laws and regulations challenged in this case.

28. Federal Defendant, DEB HAALAND, is sued in her official capacity as Secretary of the Interior. As Secretary, Ms. Haaland is the federal official with responsibility for all FWS officials' actions and/or inactions challenged in this case.

29. Federal Defendant, the UNITED STATES DEPARTMENT OF THE INTERIOR, is the federal department responsible for applying and implementing federal laws and regulations challenged in this case.

BACKGROUND

Grizzly bears

30. Grizzly bears (*Ursus arctos horribilis*) are a subspecies of brown bear (*Ursus arctos*) that occur in North America.

31. Adult grizzly bears are normally solitary except when breeding or when females have dependent young. Home ranges for male grizzly bears are generally larger than those for females and vary among ecosystems (due to population densities and habitat productivity). Male grizzly bear dispersal distances of 42-109 miles have been documented in Montana. Female grizzly bears have also been known to disperse long distances (up to 56 miles), typically on the periphery of expanding populations. Female grizzly bear dispersal is important for grizzly bear

range expansion. Female grizzly bear dispersal is also important for establishing demographic connectivity between subpopulations which is needed for the long-term recovery of the species in the lower 48 States.

32. Grizzly bears have one of the slowest reproduction rates amongst mammals, mainly due to the late age of first reproduction, small litter size, and long birthing interval. Grizzly bears typically mate from May through July with a peak in mid-June. Females give birth in their dens in late January or early February and generally nurse for 3-4 months inside the den. Cubs will remain with the female for about 2.5 years. The typical litter size is 2-4 cubs.

33. Grizzly bears den in winter. Denning is a life history strategy grizzly bears use to cope with seasons of low food abundance. In preparation for denning, bears increase their food intake dramatically during the two to four months before denning (a process is called hyperphagia). Grizzly bears must consume foods rich in protein and carbohydrates in order to build up fat reserves to survive the denning and post-denning period. Grizzly bears typically enter dens between October and December and male grizzly bears exit dens from early March to late April. Female grizzly bears typically emerge from their dens later than males, usually from mid-March to mid-May.

34. Grizzly bears use a variety of habitats. A grizzly bear's individual habitat needs and daily movements are largely driven by the search for food.

35. Grizzly bears are opportunistic omnivores that eat a wide variety of foods, including plants, berries, roots, insects, small mammals, and ungulates. In the Greater Yellowstone Ecosystem, grizzly bears rely heavily on four primary food sources: cutthroat trout, ungulates (elk, deer, and bison), army cutworm moths, and whitebark pine seeds. Grizzly bears rely more heavily on meat when other high-quality food sources (like whitebark pine seeds) are less abundant.

36. Meat from large herbivores (including livestock) is a high-quality grizzly bear food. Male grizzly bears tend to eat more meat, though levels are similar with females when other high-quality foods are not available.

37. Food resources for grizzly bears are especially important during the period leading up to denning (August-October) when bears must consume energetically rich foods to build up fat reserves to survive the denning and post-denning period.

38. Grizzly bears opportunistically prey on domestic livestock, agricultural crops, and other human foods. Some level of predation by grizzly bears will predictably occur if livestock are available and vulnerable. Livestock can also attract grizzly bears to an area and lead to an increase in bear densities. Livestock predation rates are higher in areas with higher grizzly bear densities, and in the late summer and fall when grizzly bears are preparing for denning.

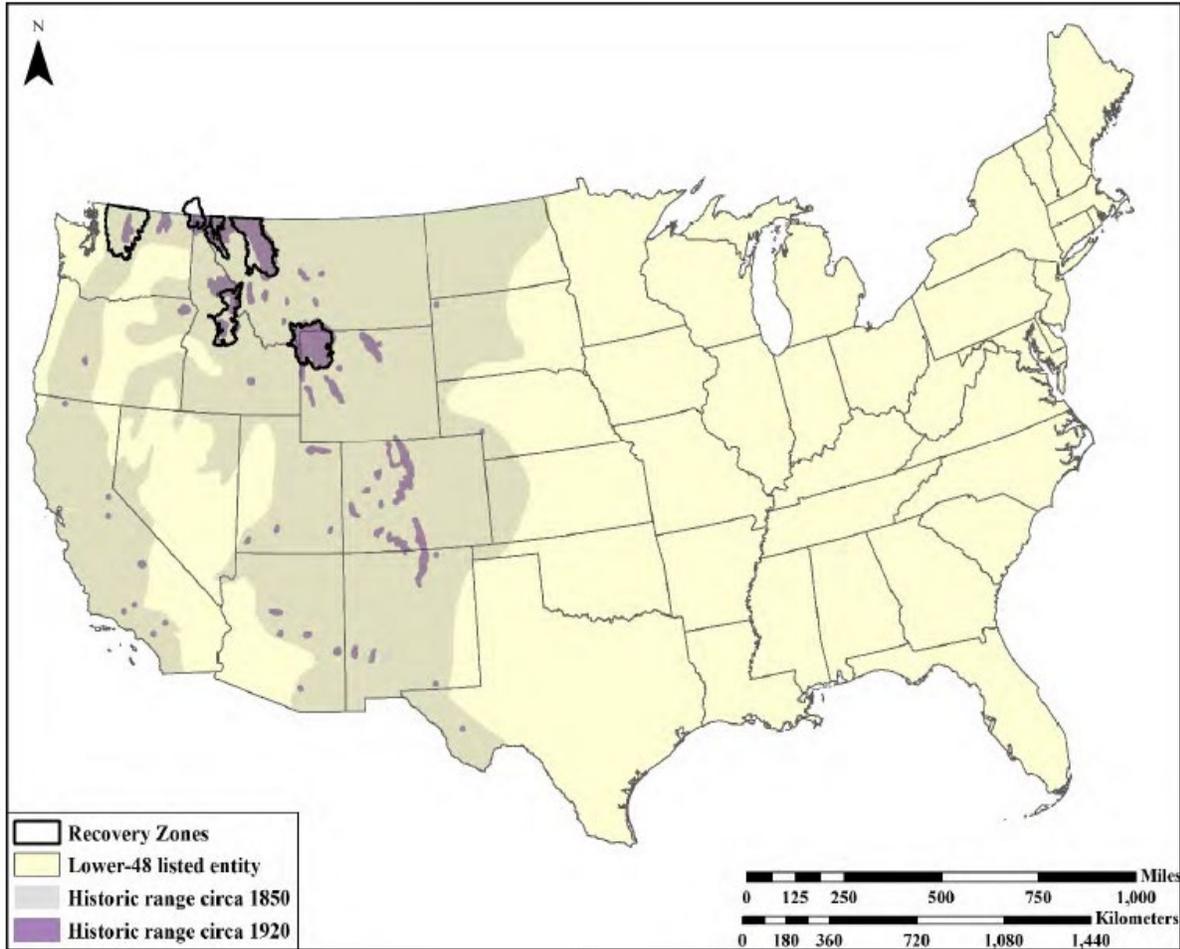
Threats to grizzly bears

39. Prior to the arrival of Europeans, grizzly bears occurred throughout much of the western half of the contiguous United States, central Mexico, western Canada, and most of Alaska.

40. Historically, an estimated 50,000 grizzly bears were distributed in one large contiguous area throughout all or portions of 18 western states. With the arrival of Europeans to North America, grizzly bears were seen as a threat to livestock and human safety and an impediment to western expansion and settlement. In the 1800s, government-funded bounty programs focused on the eradication of grizzly bears, which were shot, poisoned, trapped, and killed wherever they were found.

41. By the 1930s, grizzly bears were reduced to roughly two percent of their historic range in the lower-48 states with a corresponding decrease in total population.

42. By 1975, the total grizzly bear population in the lower 48 States was estimated to be roughly 700-800 individuals and grizzly bears only remained in a few, isolated areas.



43. In 1975, FWS listed all grizzly bears in the lower-48 states a “threatened” species under the ESA.

44. In 1982, FWS prepared a recovery plan for grizzly bears in the lower 48 States. In 1993, FWS updated and amended the 1982 recovery plan. In 2011, FWS determined that the 1993 recovery plan was no longer premised on the best available science and needed to be updated and changed. The 1993 recovery plan has been amended several times since 1993, most recently in 2018.

45. In the recovery plan, FWS designated six recovery zones for grizzly bears in the lower-48 states. These include the North Cascades,

Selkirk, Cabinet-Yaak, Northern Continental Divide, Bitterroot, and Greater Yellowstone Ecosystem.

46. Each of these six recovery zones was identified as a core recovery area where conservation efforts for grizzly bears would be focused. FWS recognized that grizzly bears would eventually need to occupy areas outside the six recovery zones and that linkage between the recovery zones would be required for long-term recovery of grizzly bears in the lower-48 states.

47. FWS estimates that the current population of grizzly bears in the lower-48 States is roughly 1,923 individuals. This includes approximately 727 bears in the Greater Yellowstone Ecosystem, 1,092 bears in the Northern Continental Divide, 60 bears in the Cabinet-Yaak, 44 bears in the Selkirks, and no bears in the North Cascades or Bitterroot.

48. Grizzly bear movement and connectivity between the various recovery zones in the lower48 states which is needed for long-term recovery has yet to be restored. Grizzly bears in the Greater Yellowstone Ecosystem remain isolated.

49. In January, 2021, FWS published a species status assessment (“Grizzly SSA”) for grizzly bears in the lower-48 states. The Grizzly SSA provides the best available current science on grizzly bear and grizzly bear conservation in the lower-48 States.

50. In the Grizzly SSA, FWS determined that grizzly bears in the lower-48 states have certain individual, ecosystem, and species-levels needs. Individually, grizzly bears need sufficient habitat, including large and relatively undisturbed blocks of land for all life stages (breeding, feeding, shelter and dispersal). Grizzly bears need access to denning sites, cover, and access to high-caloric foods. At the ecosystem level, grizzly bears need sufficient abundance, positive population trends, adult female survival, genetic diversity and sufficient connectivity between various recovery zones. At the species level, grizzly bears in the lower 48 States need multiple resilient ecosystems (recovery zones) that are distributed across a wide geographic area and with sufficient connectivity to ensure genetic and ecological diversity.

51. FWS reported in the Grizzly SSA that the main threats or stressors to grizzly bears and grizzly bear recovery in the lower 48 States include: human-caused mortality (due to management removals, accidental killings, illegal killings, and mistaken identity kills); motorized access; livestock grazing allotments; developed recreational sites and recreational activities; timber, energy, and mineral development; private land development; climate change; loss of connectivity and poor genetic health; and the loss of important food sources.

52. In the Grizzly SSA, FWS recognized the lack of connectivity and genetic interchange between the grizzly bear recovery zones as a

threat to bears and an impediment to long-term viability and recovery. The isolated nature of grizzly bears in the Greater Yellowstone Ecosystem was also identified as a potential threat to grizzly bears in the 1975 threatened ESA listing.

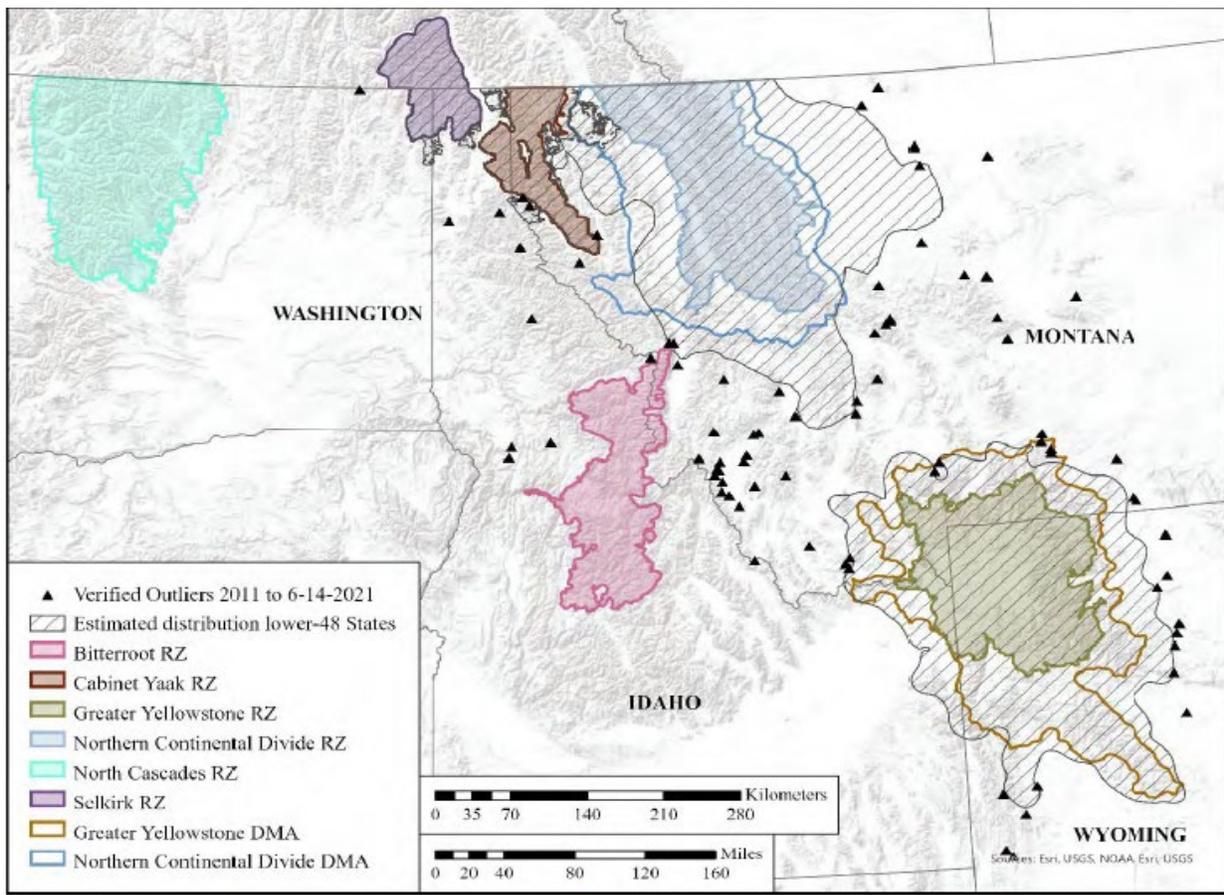
53. In the Grizzly SSA, FWS determined that natural connectivity between the recovery zones is needed for long-term grizzly bear conservation to allow for genetic exchange and demographic augmentation of isolated populations. Genetic diversity of smaller and isolated populations is influenced by connectivity.

54. The best available science reveals that smaller and isolated populations are vulnerable to extinction due to low genetic diversity (resulting in genetic drift and inbreeding depression) and demographic fluctuations resulting from various environmental processes (e.g., poor food years, disease, human-caused mortality).

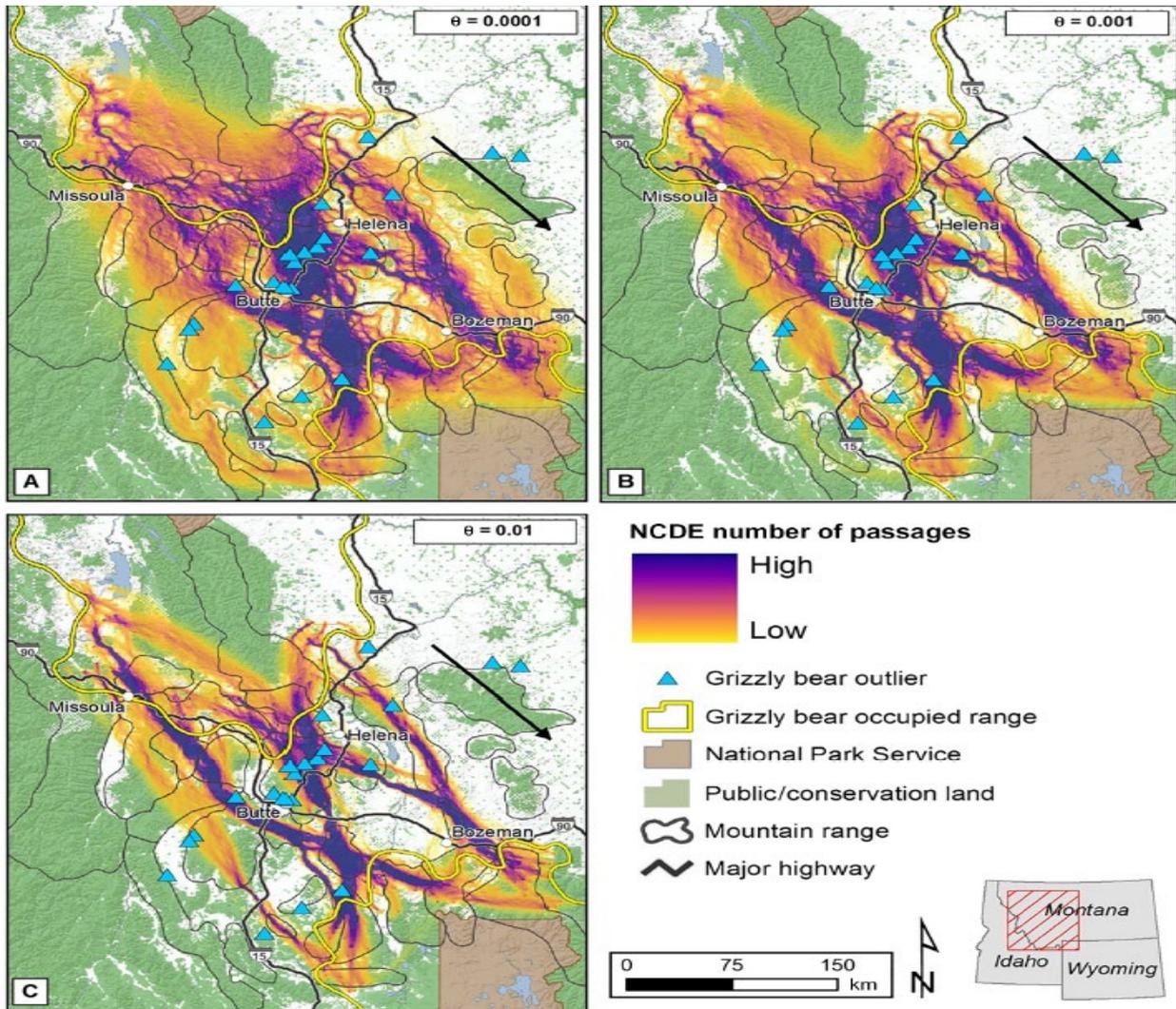
55. FWS stated in the Grizzly SSA that connectivity or dispersal and successful immigration of males or females enhances genetic diversity and reduces genetic fragmentation. The best available science reveals at least one to two effective migrants per generation is needed to maintain and enhance genetic diversity in isolated populations.

56. FWS noted that while the Greater Yellowstone recovery zone remains isolated, all of the zones are currently within “dispersal distance of existing populations” and “connectivity” needed for long-term viability and recovery “is possible.”

57. FWS said the expanding grizzly bear population in the Northern Continental Divide is very close to reaching the Bitterroot and is “expected to be within female dispersal distance in the future.” FWS noted that the distance between grizzly bears dispersing from the Greater Yellowstone and Northern Continental Divide ecosystems is now very close (roughly 30 miles) with “multiple verified sightings in between.” FWS said it is likely that natural connectivity needed for recovery “will occur in the near future.” In the Grizzly SSA, FWS provided this map illustrating grizzly bear movement outside and between the various recovery zones:



58. FWS explained that a recent paper (Peck 2017) modeled potential dispersal paths for grizzly bears between the Greater Yellowstone and Northern Continental Divide recovery zones, which is where conservation efforts designed to facilitate and foster connectivity should be focused:



59. In order to facilitate grizzly bear movement and restore connectivity, Peck (2017) recommended various conservation efforts in these dispersal paths be implemented, including efforts to reduce

human conflict situations (like those caused by livestock grazing) that result in grizzly bear removals and/or mortalities.

60. FWS recognizes livestock grazing as a potential conflict situation that results in grizzly bear mortalities. Livestock grazing in areas important for grizzly bear dispersal and movement inhibits connectivity.

61. FWS's Grizzly SSA identified livestock grazing on National Forest lands as an ongoing threat and stressor to grizzly bears and grizzly bear recovery. In the Grizzly SSA, FWS said the negative effects to grizzly bears from livestock grazing include: (1) direct mortality from control actions resulting from livestock depredations; (2) direct mortality from control actions in response to grizzly bear habituation and/or learned use of bear attractants, such as livestock carcasses and feed; (3) increased chances of grizzly bear and livestock and human conflicts; (4) displacement from an area due to livestock activities; and (5) direct competition for preferred forage species.

62. The best available science reveals the consumption of meat from livestock by grizzly bears is normal and to be expected given the high quality of this food resource. When grizzly bears and livestock share the same space and landscape, some level of predation of livestock

often occurs. Livestock can be an attractant and local driver of increased grizzly bear densities.

63. FWS said the “main impact” to grizzly bears is human-caused mortality resulting from management removals in response to livestock depredations. Human-caused mortality of grizzly bears, including management removals and conflicts resulting from livestock grazing in areas occupied by grizzly bears (both inside and outside the recovery zones), is a threat to the species and results in significant grizzly bear mortality.

64. There has been a large increase in the amount of grizzly bear mortalities attributed to livestock grazing in and around the Greater Yellowstone Ecosystem over the last two decades.

65. From 1980 to 2001, FWS reported that 9 grizzly bears were killed in the Greater Yellowstone Ecosystem due to management removals from conflicts with livestock grazing. From 2002-2020, FWS reported that 128 grizzly bears were killed due to management removals from conflicts with livestock grazing.

66. Since 2000, the range of the grizzly bear population in the Greater Yellowstone Ecosystem has expanded. Since 2000, the grizzly

bear's range in the Greater Yellowstone Ecosystem has nearly tripled in size compared to the bear's range in the 1980s. Grizzly bears now permanently occupy areas outside the recovery zone and areas outside the demographic monitoring area ("DMA"). The DMA is where the grizzly bear population – including mortality – is monitored. Roughly thirty percent of the current grizzly bear distribution in the Greater Yellowstone Ecosystem is beyond the recovery zone and demographic monitoring area. Since 2000, the grizzly bear population in the Greater Yellowstone Ecosystem has remained largely stable.

67. In the Grizzly SSA, FWS recognized loss of important food sources for grizzly bears as an additional threat or stressor.

68. Over the last two decades, there have been significant changes to the amount of available food sources for grizzly bears in the Greater Yellowstone Ecosystem. Seeds from whitebark pine cones were once important food for grizzly bears in the Greater Yellowstone Ecosystem and more so for female bears than male bears. Roughly 70 percent of mature cone-producing whitebark pine trees were lost in the Greater Yellowstone Ecosystem between 2000 and 2010 due to a climate-driven outbreak of mountain pine beetles. Losses of whitebark pine trees were

most pronounced in the Absaroka Mountains. Losses of whitebark pine seeds accelerated after 2007. Seed availability has remained low since 2007.

69. Cutthroat trout was once an important food source for grizzly bears in the Greater Yellowstone Ecosystem. This food source has declined since the late 1990s and early 2000s, mainly due to the introduction of invasive species like lake trout, brook trout, and brown trout.

70. The best available science reveals that in the wake of losses of cutthroat trout and whitebark pine seeds, grizzly bears' overall consumption of meat increased. Consumption of meat by grizzly bears in the Greater Yellowstone Ecosystem has steadily increased since the early 2000s. The best available science reveals that in the wake of losses of whitebark pine seeds in the early to mid-2000s, there has been an increase in levels of grizzly bear activity at army cutworm moth sites in the Absaroka Mountains.

71. The best available science reveals that in years of poor whitebark pine seed production, grizzly bears shift their diets and consumed more meat. Grizzly bear consumption of ungulate carcasses

and encounters with hunters increased during periods of whitebark pine decline. Grizzly bear conflicts and management removals on livestock grazing allotments increased during periods of whitebark pine decline.

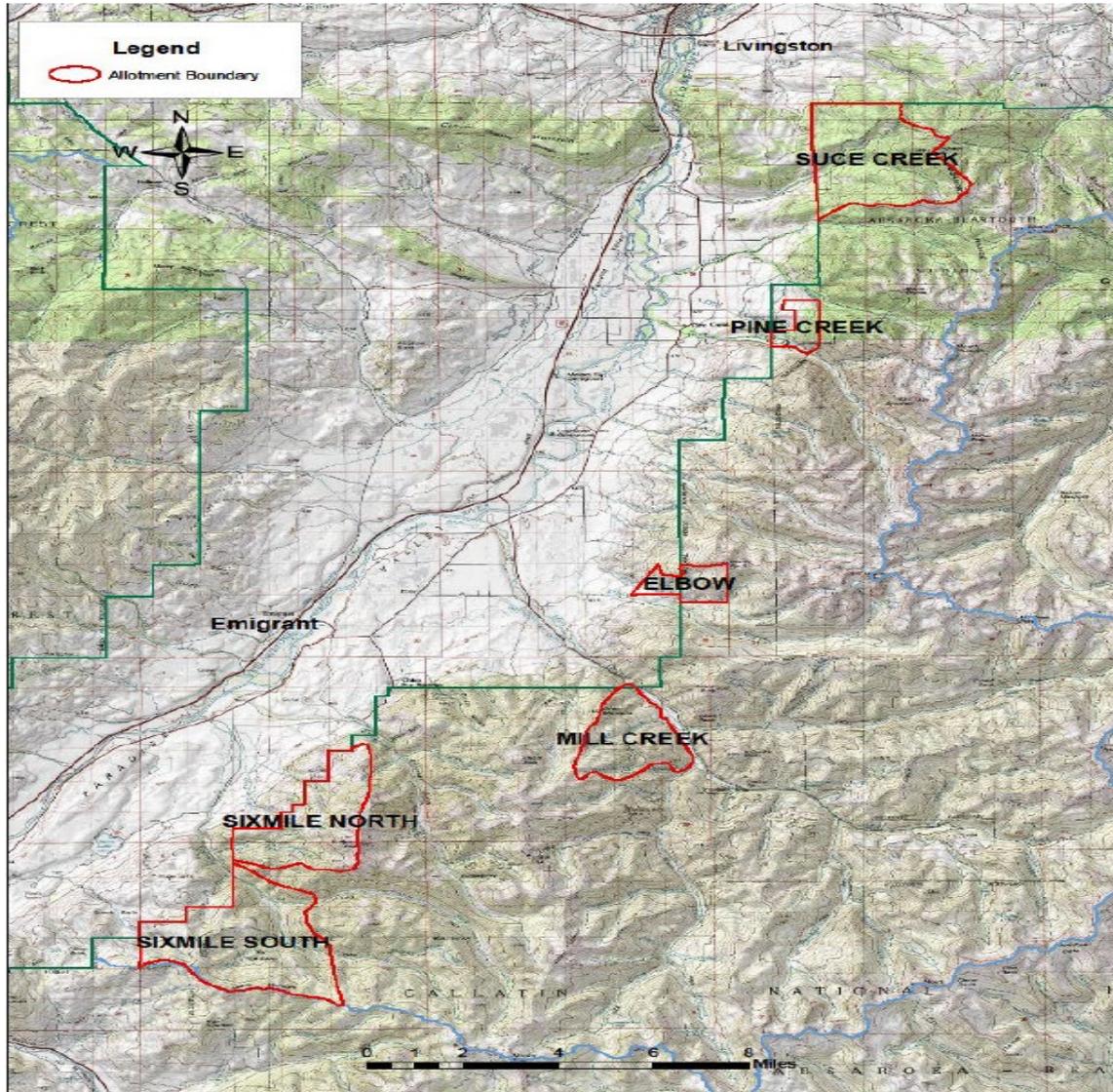
72. Grizzly bears' reliance on a meat-based diet results in increased conflicts with big game hunters during the hunting season. Grizzly bears' increased reliance on meat-based diet has resulted in an increase in management removals associated with livestock grazing, mainly just outside of the Greater Yellowstone recovery zone.

73. Dependence of grizzly bears on meat from livestock leads to higher mortality rates, reduced densities and local extirpation of grizzly bears on the landscape. The best available science reveals livestock grazing in and near areas occupied by grizzly bears can fuel an "ecological trap" by attracting bears of both sexes into situations that end up being lethal to the involved grizzly bears.

The East Paradise decision

74. In December, 2021, the Forest Service signed the East Paradise decision. The East Paradise decision remains in effect. The East Paradise decision has not been withdrawn.

75. The East Paradise decision involves six allotments (from north to south): Suce Creek, Pine Creek, Elbow, Mill Creek, Sixmile North, and Sixmile South:



76. The East Paradise allotments encompass a portion of the Absaroka-Beartooth Wilderness and parts of the North Absaroka Roadless Area north of Yellowstone National Park in the Custer-

Gallatin National Forest. Portions of the East Paradise allotments are within the primary conservation area or “recovery zone” for grizzly bears in the Greater Yellowstone Ecosystem. The total project area is roughly 20,900 acres.

77. The East Paradise decision leaves some of the allotments vacant. The East Paradise decision expands the grazing season on some allotments. The East Paradise decision increases the acreage available for grazing on some allotments. The East Paradise decision increases the number of livestock allowed to graze on some allotments.

78. The Suce Creek allotment will remain in “vacant status” but not closed (which means it can be restocked at a future date). The Suce Creek allotment has remained vacant since 2002. Existing structures associated with historic livestock grazing, including two water systems and two miles of fencing still remain on the landscape in the Suce Creek allotment directly adjacent to the popular Livingston Peak trail. A portion of the Suce Creek allotment is within the Absaroka-Beartooth Wilderness Area. The Suce Creek allotment is on steep and heavily timbered lands.

79. Grazing will be allowed on 588 acres of National Forest lands in the Pine Creek allotment. The season available for grazing will be expanded in the Pine Creek allotment. Previously, the grazing season on the Pine Creek allotment ran for one month, from September 15th to October 15th. Grazing on the Pine Creek allotment will now be expanded to extend from June 1st through October 15th of each year. The Pine Creek allotment is divided into two pastures and will utilize a rotation system with the north pasture grazed annually and the other pasture (near a campground) grazed once every five years after the campground closes for the season. The allotment is authorized for 10 animals (and 13 Animal Unit Months or “AUMs”). This allotment is located in the Pine Creek drainage, which flows into the Yellowstone River. Much of the allotment is steep with heavy timber. Livestock grazing is occurring on the Pine Creek allotment as per the East Paradise decision.

80. The Forest Service will allow grazing on 697 acres (430 acres of National Forest lands) in the Elbow allotment. In this allotment, the Forest Service chose to expand the season of use from August 1st to September 15th, to June 1st through October 15th of each year. The

Elbow allotment is authorized for 20 animals and 40 AUMs. An existing water system that supplies water to a tank on private property is located on the allotment. The Elbow allotment is defined by steep slopes and heavy timber with steep gradient streams. Livestock grazing is occurring on the Elbow allotment as per the East Paradise decision.

81. The Forest Service chose not to allow grazing in the Mill Creek allotment. The allotment will remain in “vacant status” but not closed. This allotment has remained vacant since 2009.

82. The Forest Service chose to allow grazing on roughly 5,700 acres (an additional 1,300 acres from previous authorizations) in the Sixmile North allotment. The season of use on this allotment will be expanded from July 1st to October 15th, to June 1st through October 15th of each year. The Sixmile North allotment will expand to both the east and the south – including an additional 970 acres in the grizzly bear recovery zone – and include a new, fourth pasture. The allotment is authorized for 96 animals and 446 AUMs.

83. The Sixmile North allotment includes four water systems and 5.5 miles of fencing, but additional improvements will be allowed, per the East Paradise decision. These additional improvements include:

more fencing for the new pasture, installing two cattle guards, and extending existing water systems. This allotment is steep and at high elevation, and includes a number of open grassy meadows. The allotment also includes stands of whitebark pine, including in areas along the ridgeline and next to water developments (where the soil is trampled). Livestock grazing is occurring on the Sixmile North allotment as per the East Paradise decision.

84. The Forest Service chose not to allow grazing in the Sixmile South allotment. This allotment will remain in “vacant status” but not closed. This allotment has not been actively grazed since 2000. In 2013 the Emigrant fire burned roughly 40 percent of the Sixmile South allotment.

85. The East Paradise decision requires implementation of various design criteria and conservation measures. These include measures regarding noxious weed control, placement of salt supplements, design requirements for new infrastructure, requirements on excavation of lands and motorized access and water developments, food storage orders, monitoring, and requirements for carcass removal.

86. The East Paradise allotments all include land located on National Forest System lands occupied by grizzly bears. Male grizzly bears have been documented in the project area. Female grizzly bears with cubs have been documented in the action area.

87. The East Paradise allotments are located inside the demographic monitoring area (“DMA”) for the Greater Yellowstone Ecosystem. Portions of the East Paradise allotments – including the Sixmile North allotment, where livestock grazing is expanded under the decision – are located within the recovery zone for grizzly bears. The action area for the East Paradise allotments is an area important for grizzly bear movement and dispersal outside the recovery zone. The action area for the East Paradise allotments is important to restoring connectivity between recovery zones in the region.

88. The Sixmile North and Sixmile South allotments in the East Paradise action area total over 7,500 acres in size. Both allotments are located within the Hellroaring-Bear grizzly bear management unit (“BMU”) and Hellroaring #1 grizzly bear subunit. The Suce Creek, Pine Creek, Elbow, and Mill Creek allotments are located just outside the recovery zone, but within the Mill Creek bear analysis unit (“BAU”).

The Mill Creek BAU is located within a movement corridor for grizzly bears.

89. The Forest Service prepared an environmental assessment (“EA”) for the East Paradise decision. The EA includes a section on potential effects (direct, indirect, and cumulative) to grizzly bears. In the EA, the Forest Service recognizes that the grizzly bear population trend in the Greater Yellowstone Ecosystem “has slowed” since the early 2000s.

90. In the EA, the Forest Service recognizes that grizzly bears rely on four primary food sources in the Greater Yellowstone Ecosystem: ungulates, army cutworm moths, whitebark pine seeds, and cutthroat trout. The Forest Service notes in the EA that two of these four food sources (whitebark pine and ungulates) are found in the East Paradise action area.

91. In the EA, the Forest Service explained that its overall objective for managing grizzly bear habitat inside the recovery zone is to manage the habitat in the area at the same level that existed in 1998. This management approach is called the “1998 baseline.”

92. The Forest Service's goal to manage habitat under the "1998 baseline" approach includes three factors that the Forest Service strives to maintain in the recovery zone at 1998 conditions: (1) secure habitat, which is defined as areas greater than 10 acres in size that are more than 500 meters away from an open or gated motorized route (or helicopter flight line); (2) number and capacity of developed sites; and (3) number and acreage of active commercial livestock grazing allotments.

93. The 1998 baseline was included in the 2007 Conservation Strategy for Grizzly Bears in the Greater Yellowstone Ecosystem. The 1998 baseline was later amended into the Gallatin Forest Plan in 2015.

94. The 1998 baseline's livestock standard states that, subject to some exceptions, there shall be no increase in the number or acreage of active livestock grazing allotments in the recovery zone above that which existed in 1998, no re-activation of vacant or closed sheep allotments, and no conversion of cattle/horse allotments to sheep allotments. In the EA, the Forest Service explains that there were 25 active allotments in the recovery zone (including 14 vacant allotments) in 1998 totaling 182,727 acres across the entire recovery zone, and that,

as of 2016, the number of allotments and acreage available has been reduced below these 1998 levels. The EA does not evaluate or discuss how many allotments and how much acreage is currently being used for livestock grazing in the recovery zone in 2020 or 2021.

95. In the EA, the Forest Service recognized that livestock grazing for the East Paradise allotments is an activity with one of the “highest potential[s]” for negative conflict with grizzly bears, and that the potential for livestock predations and associated removals exists, given the expanded grazing allowed by the East Paradise decision.

96. In the EA, the Forest Service recognized that its East Paradise decision to continue and expand livestock grazing has the potential to result in greater conflicts with grizzly bears and increase grizzly bear mortality but the agency justified this decision on the grounds that in its view grazing would remain below the 1998 baseline levels.

97. In the EA, the Forest Service said grazing levels would continue to meet or be less than the 1998 baseline levels.

98. In the EA, the Forest Service reported that no historic grizzly bear conflicts and management removals have occurred inside the six grazing allotments. Management removals have occurred on private

lands adjacent to or near the six East Paradise grazing allotments. More than twenty grizzly bear management removals in response to livestock grazing have occurred near or adjacent to the East Paradise grazing allotments, including a large number of removals in the nearby Tom Miner Basin.

99. The Forest Service prepared a biological assessment for the East Paradise decision to analyze the potential effects of the proposed action on grizzly bears as required by Section 7 of the ESA.

100. The Forest Service's biological assessment found that the East Paradise decision "may affect, is likely to adversely affect" grizzly bears. The Forest Service reached this conclusion after considering the environmental baseline, effects of the action, and cumulative effects.

101. When evaluating the environmental baseline, the biological assessment noted that most grizzly bear and livestock conflicts occur outside the recovery zone. Roughly 59 percent of the grizzly bear's range in the Greater Yellowstone Ecosystem is now outside the recovery zone. The Forest Service noted how the existing baseline condition was in compliance with the 1998 baseline. The Forest Service explained in the biological assessment that its overall objective for grizzly bear habitat

inside the recovery zone is to comply with the 1998 baseline. The Forest Service explained in the biological assessment that the 1998 baseline's livestock standard was used for its analysis of impacts to grizzly bears.

102. When evaluating the effects of the East Paradise decision, the biological assessment recognized the potential for conflict and an increased risk of management removals of grizzly bears due to an increased season of livestock grazing, increase in the acreage grazed, and an increase in the population number and distribution of grizzly bears in the area (including the action area). The Forest Service noted that the vast majority of grizzly bear depredations of livestock occur during the hyperphagia period and that there was no history of grizzly bear predation of livestock on these allotments. The Forest Service relied on compliance with the 1998 baseline when evaluating the effects of the action and explained how it would reduce conflicts.

103. When evaluating the cumulative effects of the decision, the Forest Service's biological assessment recognized that the East Paradise decision, combined with other actions occurring in the action area, including private land development, will result in a cumulative impact on grizzly bears. The Forest Service said the East Paradise

decision will result in temporary disturbance to bears during new developments (fencing) and during allotment management activities (motor vehicle use, human presence). The Forest Service said the East Paradise decision would result in an increased grazing season and the number of acres being grazed which, when combined with other activities on private land in the action area, would result in a cumulative impact that would be “neither beneficial, discountable, or insignificant.” The Forest Service noted in the biological assessment that the cumulative effects associated with the East Paradise decision “may be significant.”

104. The Forest Service’s biological assessment determined that authorizing continued and expanded grazing for the East Paradise allotments may affect individual bears, but that overall, there has been a net reduction in grazing allotments and acreage in the recovery zone since 1998 so the project remains in compliance with the 1998 baseline.

105. FWS issued a biological opinion on the East Paradise decision. FWS’s biological opinion for the East Paradise decision has not been withdrawn. FWS’s biological opinion remains in force. FWS’s biological opinion determined that the East Paradise decision would not

jeopardize the continued existence of grizzly bears in the Greater Yellowstone Ecosystem. FWS's no jeopardy finding was focused solely on grizzly bears in the Greater Yellowstone Ecosystem.

106. FWS's biological opinion includes a description of the proposed action for the East Paradise decision. FWS noted compliance with the 1998 baseline in the proposed action. FWS also noted compliance with the Gallatin Forest Plan's livestock standard (the 1998 baseline) as well as specific conservation measures described in the biological assessment and EA for the proposed action.

107. When evaluating the environmental baseline, the biological opinion discusses a number of factors that may be affecting grizzly bears in the Greater Yellowstone Ecosystem and action area. When evaluating the environmental baseline, FWS noted that the Forest Service was in compliance with the 1998 baseline.

108. When evaluating the effects of the action, the biological opinion describes how the action may adversely affect grizzly bears generally, and more specifically in the action area, by altering behavior, reducing habitat quality, and increasing the risk of mortality associated with livestock conflicts. FWS determined that the East Paradise

decision would not result in an “appreciable negative impact” on grizzly bears in the Greater Yellowstone Ecosystem. FWS determined that most of the project is outside the recovery zone in areas that are not “biologically essential” to grizzly bears and the action will not change the “recovery status” or trajectory of grizzly bears in the Greater Yellowstone Ecosystem.

109. In the biological opinion, FWS explained that the East Paradise grazing decision will likely result in increased grizzly bear mortalities in the area, but noted that compliance with the 1998 baseline will minimize harm. FWS explained that the number and acreage of livestock grazing in the recovery zone meets and exceeds the 1998 baseline.

110. When evaluating the cumulative effects, the biological opinion found there were no “substantial negative cumulative effects.” This finding conflicts with the Forest Service’s cumulative effects finding in the biological assessment.

111. In the biological opinion, FWS anticipates that one grizzly bear or one family unit (i.e., a female grizzly bear and her cubs) could be incidentally taken during the life of the 10-year grazing permits for the

East Paradise allotments. FWS does not specify or limit the size of the family unit.

112. In the biological opinion, FWS determined that no reasonable and prudent measures or terms and conditions in the biological opinion's incidental take statement were necessary to minimize the incidental take of grizzly bears due to the Forest Service's compliance with the 1998 baseline. FWS said it believes compliance with various conservation measures and with the 1998 baseline within "the East Paradise allotments adequately reduces the potential for and minimizes the effect of incidental take of grizzly bears."

FIRST CAUSE OF ACTION

(Violation of the ESA – failure to address and evaluate effects to grizzly bears in the lower-48 states or grizzly bear recovery)

113. Plaintiffs incorporate all preceding paragraphs.

114. Section 7 of the ESA requires the Forest Service to consult with FWS on how its proposed East Paradise decision may affect listed species, including grizzly bears, which are listed as a threatened species in the lower-48 states. 16 U.S.C. § 1536(a)(2).

115. Under Section 7 of the ESA, the Forest Service must ensure that its East Paradise decision is not likely to jeopardize the continued

existence of grizzly bears. 16 U.S.C. § 1536(a)(2). Section 7 of the ESA imposes a substantive duty on the Forest Service to ensure the East Paradise decision does not jeopardize the continued existence of listed species, including grizzly bears. *Id.*

116. Under Section 7 of the ESA, if the Forest Service's East Paradise decision may adversely affect a listed species, then FWS must prepare a biological opinion to determine whether the action is likely to jeopardize the continued existence of the listed species. 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14. If FWS issues a "no jeopardy" finding in its biological opinion, it must specify reasonable and prudent measures, and terms and conditions, to minimize the impact of any incidental take resulting from the action. 50 C.F.R. § 402.14. FWS must also specify the amount or extent, and effects, of any incidental take that is anticipated by the proposed action. *Id.*

117. The Forest Service prepared a biological assessment for its proposed East Paradise decision. The biological assessment determined that the East Paradise decision "may affect and is likely to adversely affect" grizzly bears in the Greater Yellowstone Ecosystem.

118. The Forest Service’s “may affect” finding in the biological assessment was focused solely on grizzly bears in the Greater Yellowstone Ecosystem (a single subpopulation and single recovery zone). The Forest Service’s “may affect” finding in the biological assessment never addressed and evaluated how the East Paradise decision may affect grizzly bears in the lower-48 states. The Forest Service’s biological assessment never addressed and evaluated how the East Paradise decision may affect grizzly bear movement and connectivity between recovery zones and dispersal outside the Greater Yellowstone Ecosystem, which is needed for long-term recovery of the species. In failing to address and analyze how the East Paradise decision may affect grizzly bear movement and connectivity between recovery zones and dispersal outside the Greater Yellowstone Ecosystem, the Forest Service violated its substantive duty to ensure that the East Paradise decision does not jeopardize the continued existence of grizzly bears in violation of Section 7 of the ESA.

119. In response to the Forest Service’s “may affect” finding in the biological assessment, FWS prepared a biological opinion for the East Paradise decision. FWS’s biological opinion determined the East

Paradise decision would not jeopardize the continued existence of grizzly bears in the Greater Yellowstone Ecosystem.

120. FWS's "no jeopardy" finding in the biological opinion was focused solely on grizzly bears in the Greater Yellowstone Ecosystem (a single subpopulation and a single recovery zone). FWS's biological opinion never addressed or evaluated effects to the listed entity – grizzly bears in the lower-48 states. FWS's biological opinion never addressed and evaluated how the East Paradise decision may affect grizzly bear movement and connectivity between recovery zones and dispersal outside the Greater Yellowstone Ecosystem, which is needed for long-term recovery. FWS's biological opinion never addressed and evaluated how the East Paradise decision would affect grizzly bear recovery in the lower-48 states or connectivity and movement between recovery zones.

121. The Forest Service's and FWS's failure to consider and evaluate how the East Paradise decision may affect grizzly bears in the lower-48 states and/or grizzly bear connectivity or movement outside the Greater Yellowstone Ecosystem and grizzly bear recovery in the

lower-48 states is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with ESA. 5 U.S.C. § 706(2)(A).

**SECOND CAUSE OF ACTION
(Violation of the ESA – failure to analyze effects of escalating
grizzly bear conflicts with livestock)**

122. Plaintiffs incorporate all preceding paragraphs.

123. When preparing a biological assessment and consulting under Section 7 of the ESA, the Forest Service must address and analyze the environmental baseline, effects of the action, and cumulative effects of the East Paradise decision. 50 C.F.R. § 402.12.

124. When preparing a biological opinion and issuing a “no jeopardy” finding for the East Paradise decision, FWS must address and analyze the environmental baseline, effects of the action, and cumulative effects. 50 C.F.R. § 402.14(h).

125. When consulting on the East Paradise decision and preparing a biological assessment and issuing a “no jeopardy” biological opinion, the Forest Service and FWS failed to properly address and evaluate the environmental baseline, effects of the action, and cumulative effects on grizzly bears as required by Section 7 of the ESA.

126. The best available science reveals grizzly bears rely more heavily on a meat-based diet when whitebark pine seed production declines. In years with poor whitebark pine seed production, grizzly bears shift their diets and consume more meat. The best available science reveals that when grizzly bears' diet shifts to more meat, there is an increased risk of grizzly bear mortality, mainly due to encounters with hunters in the fall and with livestock.

127. Grizzly bear mortalities due to increased human encounters and conflicts with livestock have greatly increased in the Greater Yellowstone Ecosystem since the decline in whitebark pine seeds and loss of cutthroat trout as a food source in the early 2000s. Since the decline in whitebark pine seeds, grizzly bear deaths from conflicts with livestock grazing and hunters have spiked. This increase in grizzly bear mortality has had individual, ecosystem, and population level effects. This increase in grizzly bear mortality has affected movement of grizzly bears outside the recovery zone and within important linkage areas. This increase in grizzly bear mortality has affected grizzly bear recovery.

128. When consulting on the East Paradise decision and preparing a biological assessment and issuing a “no jeopardy” biological opinion, the Forest Service and FWS failed to address, analyze, or evaluate (either in the environmental baseline, effects of action, or cumulative effects) how the loss of important food sources for grizzly bears in the Greater Yellowstone Ecosystem, including cutthroat trout and whitebark pine seeds, results in more reliance on meat, and by itself and in conjunction with other stressors, results in an increased threat to grizzly bears and increased grizzly bear mortalities.

129. When consulting on the East Paradise decision, the Forest Service and FWS failed to account for the spike in grizzly bear mortalities from livestock grazing and hunter conflicts since the loss of whitebark pine seeds when analyzing the environmental baseline, effects of the action, or cumulative effects.

130. In failing to address and analyze the escalating grizzly bear mortalities due to grizzly bears’ increased reliance on a meat-based diet when consulting on the East Paradise decision, the Forest Service violated its substantive duty to ensure that the East Paradise decision

does not jeopardize the continued existence of grizzly bears in violation of Section 7 of the ESA.

131. FWS's "no jeopardy" finding in the biological opinion is arbitrary and legally flawed because it failed to address and analyze the escalating grizzly bear mortalities due to grizzly bears' increased reliance on a meat-based diet when consulting on the East Paradise decision.

132. The Forest Service's and FWS's failure to address and analyze the escalating grizzly bear mortalities due to grizzly bears' increased reliance on a meat-based diet when consulting on the East Paradise decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with ESA. 5 U.S.C. § 706(2)(A).

**THIRD CAUSE OF ACTION
(Violation of the ESA – 1998 baseline)**

133. Plaintiffs incorporate all preceding paragraphs.

134. The Forest Service explained that its overall objective for managing livestock grazing allotments in grizzly bear habitat is to manage the area at the same level as existed in 1998. This management approach is called the "1998 baseline."

135. The 1998 baseline was included in the 2007 Conservation Strategy for Grizzly Bears in the Greater Yellowstone Ecosystem and later amended into the Gallatin Forest Plan in 2015.

136. The 1998 baseline's livestock standard states that, subject to some exceptions, there shall be no increase in the number or acreage of active livestock grazing allotments in the recovery zone above which existed in 1998, no re-activation of vacant or closed sheep allotments, or conversion of cattle/horse allotments to sheep allotments.

137. When consulting on the East Paradise decision and analyzing the effects of the proposed action on grizzly bears as required by Section 7 of the ESA, the Forest Service and FWS relied on compliance with the 1998 baseline standard for the East Paradise decision. FWS's "no jeopardy" finding in the biological opinion relied on compliance with the 1998 baseline standard for the East Paradise decision. FWS relied on the 1998 baseline when defining the proposed action and evaluating the environmental baseline, effects of the action, and cumulative effects in the biological opinion. FWS determined that no reasonable and prudent measures or terms and conditions were required in the biological opinion because the Forest Service would comply with the 1998

baseline. FWS relied on the 1998 baseline when evaluating the effects of incidental take in the biological opinion.

138. The 1998 baseline is not premised on the current best available science. The 1998 baseline has never been subject to consultation under Section 7 of the ESA.

139. The 1998 baseline is outdated. Significant changes to grizzly bear habitat, distribution, and food sources, including the loss of cutthroat trout and whitebark pine seeds, have occurred in the Greater Yellowstone Ecosystem since 1998. The 1998 baseline does not address changes to grizzly bear food sources. Threats to grizzly bears in the Greater Yellowstone Ecosystem have changed since 1998.

140. The 1998 baseline is limited in geographic scope. The 1998 baseline is restricted to habitat conditions inside the recovery zone and is not applicable to actions that occur outside the recovery zone. The 1998 baseline does not analyze or evaluate effects from actions outside the recovery zone. There is no 1998 baseline applicable to actions that occur outside the recovery zone.

141. The 1998 baseline is narrow in focus and does not address all threats to grizzly bears. The 1998 baseline does not address grizzly bear

mortality or other threats. The 1998 baseline does not address changes to grizzly bear habitat, including the loss of cover. The 1998 baseline does not address private land development. The 1998 baseline does not address loss of important food sources. The 1998 baseline does not address cumulative effects.

142. The 1998 baseline was designed as habitat-based delisting criteria for the 1993 grizzly bear recovery plan. The 1998 baseline is not a proxy or surrogate for analyzing the effects of an action on grizzly bears or grizzly bear recovery. The 1998 baseline was never analyzed and applied to the BMUs or subunits in the action area. The 1998 baseline numbers for total allotments and acreage were never considered and analyzed during consultation.

143. By relying on the 1998 baseline, the Forest Service violated its substantive duty to ensure that the East Paradise decision does not jeopardize the continued existence of grizzly bears in violation of Section 7 of the ESA. FWS's "no jeopardy" finding in the biological opinion is arbitrary and legally flawed because it relies on the 1998 baseline.

144. The Forest Service's and FWS's reliance on the 1998 baseline when consulting on the East Paradise decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with ESA. 5 U.S.C. § 706(2)(A).

**FOURTH CAUSE OF ACTION
(Violation of ESA – whitebark pine)**

145. Plaintiffs incorporate all preceding paragraphs.

146. Section 7 of the ESA requires the Forest Service to consult with FWS on how its proposed East Paradise decision may affect listed species. 16 U.S.C. § 1536(a)(2). Section 7 also requires the Forest Service to confer with the FWS on any species proposed for listing. 16 U.S.C. § 1536(a)(4).

147. In December, 2020, FWS proposed listing whitebark pine (*Pinus albicaulis*) as a threatened species under the ESA.

148. The best available science reveals whitebark pine are threatened by four main stressors: altered fire regimes, white pine blister rust, mountain pine beetle, and climate change. The best available science also reveals that livestock grazing can be an additional stressor, mainly due to the trampling of regenerating whitebark pine trees. Soil disturbance and compaction caused by

livestock may destroy microsites for cached seeds, interrupt drainage, limit tree rooting, and damage seedlings. The browsing and trampling of whitebark pine seedlings may disrupt growth and stand density. Grazing in whitebark pine habitats characterized by grassy fine fuels can also substantially reduce natural fire occurrence.

149. The East Paradise decision may adversely affect whitebark pine which are located in the allotments and near water developments.

150. Whitebark pine trees are located within the East Paradise allotments. In a number of allotments, including the Sixmile North allotment, livestock congregate near water developments which are adjacent to stands of whitebark pine. Damage to whitebark pine stands has occurred in the East Paradise allotments due to livestock grazing.

151. In the biological assessment, the Forest Service admitted whitebark pine is found throughout the project area at treeline and in subalpine elevations but determined that the East Paradise decision would have “no effect” at all on whitebark pine. FWS concurred with the Forest Service’s “no effect” determination for whitebark pine.

152. The Forest Service’s “no effect” determination on whitebark pine and FWS’s concurrence with that determination when consulting

on the East Paradise decision pursuant to Section 7 of the ESA is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with ESA. 5 U.S.C. § 706(2)(A).

**FIFTH CAUSE OF ACTION
(Violation of NEPA – alternatives)**

153. Plaintiffs incorporate all preceding paragraphs.

154. NEPA requires the Forest Service to evaluate a reasonable range of alternatives in the EA prepared for the East Paradise decision. 42 U.S.C. § 4332 (C); 40 C.F.R. § 1502.14.

155. Under NEPA, the alternatives analysis is “the heart” of the environmental analysis because it presents impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for a choice among options. The alternatives analysis guarantees that agency decision-makers have before them and take into proper account all possible approaches to a particular action (including total abandonment of the action) which would alter the environmental impact and the cost-benefit balance.

156. NEPA requires the Forest Service to consider and evaluate a “no action” alternative. 40 C.F.R. § 1502.14 (d). The “no action” alternative is the continuation of the status quo or current management

that existing prior to the proposed action. Inclusion of a “no action” alternative in an NEPA document provides a benchmark to compare and contrast against the proposed action and other alternatives.

157. The EA for the East Paradise decision considers and evaluates three alternatives.

158. Alternative 1 in the EA is called the “no action and no grazing” alternative. Alternative 1 would discontinue all commercial grazing and domestic livestock on the six East Paradise allotments. Under Alternative 1, grazing permits would not be reissued. Alternative 1 requires action (ending grazing permits). Alternative 1 is not the current or existing management scheme for the allotments. Alternative 1 is not a “no action” alternative as defined by NEPA or NEPA’s implementing regulations.

159. Alternative 2 in the EA is called the “continuation of current livestock management” alternative. Under Alternative 2, three grazing allotments that are currently vacant (Suce, Mill, and Sixmile South) would be made available for grazing. Table 3 in the EA describes how these three allotments would be administered under Alternative 2. Alternative 2 is not the current or existing management of the East

Paradise allotments. Alternative 2 makes all six East Paradise allotments available for grazing.

160. Alternative 3 in the EA is the proposed action. Alternative 3 is not the current or existing management of the East Paradise allotments.

161. The Forest Service's EA for the East Paradise decision fails to consider and evaluate a reasonable range of alternatives. The Forest Service failed to consider and evaluate an alternative that includes the current and existing management of the East Paradise allotments.

162. The Forest Service's EA for the East Paradise decision fails to consider and evaluate a properly defined "no action" alternative.

163. The Forest Service's failure to consider and evaluate a reasonable range of alternatives and/or a proper "no action" alternative is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the NEPA. 5 U.S.C. § 706(2)(A).

**SIXTH CAUSE OF ACTION
(Violation of NEPA – effects)**

164. Plaintiffs incorporate all preceding paragraphs.

165. NEPA requires the Forest Service to adequately disclose, consider, and analyze the direct, indirect, and cumulative effects of its proposed actions. 42 U.S.C. § 4332 (C); 40 C.F.R. § 1502.16.

166. Direct effects are caused by the action and occur at the same time and place. Indirect effects are caused by the action and occur later in time or farther removed in distance, but are reasonably foreseeable. Cumulative effects are the impacts on the environment that result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

167. The EA for the East Paradise decision fails to adequately analyze the direct, indirect, and/or cumulative effects of authorizing continued and expanded livestock grazing (and its related activities) on grizzly bears, grizzly bear habitat (including connectivity linkages), and grizzly bear recovery.

168. The EA for the East Paradise decision, which relies on the outdated 1998 baseline to evaluate effects to grizzly bears and fails to account for escalating grizzly bear mortalities due to the loss of important food sources, fails to adequately analyze the direct, indirect,

and/or cumulative effects of authorizing continued and expanded livestock grazing (and its related activities) on grizzly bears, grizzly bear habitat, and grizzly bear recovery.

169. The Forest Service's failure to analyze the direct, indirect, and cumulative effects to grizzly bears and grizzly bear recovery is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the NEPA. 5 U.S.C. § 706 (2)(A).

**SEVENTH CAUSE OF ACTION
(Violation of NEPA – EIS required)**

170. Plaintiffs incorporate all preceding paragraphs.

171. NEPA requires the Forest Service to prepare an Environmental Impact Statement (“EIS”) for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

172. In deciding whether or not to prepare an EIS, the Forest Service must consider both the context and intensity of the proposed action. 40 C.F.R. § 1508.27.

173. Context refers to the scope of the proposed action, including the interests affected. 40 C.F.R. § 1508.27(a). Assessing context requires that an action be analyzed in several contexts such as society as a whole

(human, national), the affected region, the affected interests, and the locality, with both short- and long-term effects being relevant.

174. Intensity refers to the severity of the impact, and requires consideration of a number of factors, including: beneficial and adverse impacts; the degree to which the proposal affects public health and safety; unique characteristics of the geographic area, such as proximity to ecologically critical areas and cultural resources; the degree to which effects are likely to be controversial, highly uncertain, or involve unique or unknown risks; the precedential nature of the action; whether the action is related to other actions with cumulatively significant impacts; and the degree of adverse effects on species listed as endangered or threatened under the ESA. 40 C.F.R. § 1508.27(b).

175. The East Paradise decision authorizes continued and expanded livestock grazing in an ecologically critical area for grizzly bear movement, dispersal, and recovery. The effects of the East Paradise decision on grizzly bear and grizzly bear recovery, especially in light of changes to grizzly bear habitat, distribution and available food sources in the Greater Yellowstone Ecosystem since 2000 and escalating grizzly bear mortalities in the area, are highly controversial, highly

uncertain and involve unique and unknown risks. The East Paradise decision and its reliance on the 1998 baseline to justify continued and expanded grazing in the area establishes a dangerous precedent for future livestock grazing and other National Forest projects in the region. The East Paradise decision will have cumulatively significant impacts on grizzly bears and grizzly bear recovery. The East Paradise decision will have adverse effects on grizzly bears and grizzly bear recovery. The East Paradise decision will adversely affect whitebark pine.

176. In deciding not to prepare an EIS, the Forest Service failed to adequately consider and evaluate these significance factors.

177. The Forest Service's decision not to prepare an EIS for the East Paradise decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare the Forest Service violated and continues to violate the ESA and NEPA as alleged above;

B. Declare FWS violated and continues to violate the ESA as alleged above;

C. Vacate the Forest Service's authorization of the East Paradise decision, related EA, and any decisions or permits authorizing new or expanded grazing;

D. Vacate FWS's biological opinion for the East Paradise allotments;

E. Remand this matter back to the Forest Service and FWS with instructions to comply with NEPA and the ESA, as outlined herein and by this Court, including completion of new NEPA analysis of effects and alternatives, preparation of an EIS, and completion of new Section 7 consultation, including the issuance of a new biological opinion for grizzly bears and completion of conferencing and/or consultation in accordance with Section 7 of the ESA on whitebark pine.

F. Enjoin the authorization of livestock grazing and related developments (including removal of such developments) on the East Paradise allotments pending compliance with NEPA and the ESA (including issuance of a new biological opinion) as alleged above;

G. Award Plaintiffs their reasonable attorneys' fees, costs and expenses of litigation pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g) and/or the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412;

H. Issue any other relief, including preliminary or permanent injunctive relief that Plaintiffs may subsequently request.

I. Issue any other relief this Court deems necessary, just, or proper.

Respectfully submitted this 12th day of September, 2022.

/s/ Matthew K. Bishop
Matthew K. Bishop

/s/ Kelly E. Nokes
Kelly E. Nokes

Counsel for Plaintiffs