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February 20, 2019

Re: Sixty-Day Notice of Intent to Sue: Violations of the Endangered Species Act Associated with Grizzly Bear Hunts in 2019 Conducted Pursuant to SF0093, Enrolled Act No. 11 (2019 General Session, Enacted February 15th, 2019)

Dear Wyoming Game and Fish Commission, Commissioners, and Departmental Directors:

We write to provide notice under Endangered Species Act (ESA) Section 11(g)(2)(A)(i), 16 U.S.C. § 1540(g)(2)(A)(i), that the Sierra Club, Center for Biological Diversity, Wyoming Wildlife Advocates, Western Watersheds Project, and Humane Society of the United States

intend to file a citizen suit pursuant to ESA section 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A), against the Wyoming Game and Fish Commission and the Wyoming Game and Fish Department for any hunt of grizzly bears (*Ursus arctos horribilis*) held in Wyoming in 2019 pursuant to the enacted version of Wyoming SF0093, Enrolled Act No. 11 (attached), which the Governor of Wyoming signed into law on February 15th, 2019. For the reasons detailed below, holding such a hunt clearly would violate the prohibitions of the Endangered Species Act, and would constitute a violation of ESA section 9.

The Sierra Club is the nation's oldest grassroots organization. It is a non-profit organization with more than 790,000 members nationwide, including over 1100 members in its Wyoming Chapter, and is dedicated to the protection and preservation of the environment. One of the Sierra Club's main national initiatives, the Our Wild America campaign, tackles pressing environmental problems including threats to wildlife. Sierra Club has long advocated for protections for the grizzly bear under the Endangered Species Act, including litigation to ensure the species continues to receive the protections required by law.

The Center for Biological Diversity is a non-profit conservation organization dedicated to the protection of native species and their habitats through science, policy and environmental law. The Center has more than 1.4 million members and supporters dedicated to the protection and restoration of endangered species and wild places. The Center has worked for many years to protect imperiled plants and wildlife, including grizzly bears.

Wyoming Wildlife Advocates is a non-profit organization focused on informing, educating, and empowering communities to preserve our wild legacy and protect our shared wildlife resources. We envision 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. Headquartered in Jackson, Wyoming, WWA has thousands of supporters in Wyoming, the Greater Yellowstone Ecosystem, and nationwide.

Western Watersheds Project ("WWP") is a nonprofit organization dedicated to protecting and restoring western watersheds and wildlife through education, public policy initiatives, and legal advocacy. With over 9,500 members and supporters throughout the United States, WWP actively works to protect and improve upland and riparian areas, water quality, fisheries, wildlife, and other natural resources and ecological values. WWP has been a leading advocate

for maintaining and enhancing habitat and legal protections for grizzly bears in the Greater Yellowstone Ecosystem.

The Humane Society of the United States (“HSUS”) is the nation’s largest animal protection organization, with millions of members and constituents. HSUS’ mission is to promote the humane treatment of animals and to foster respect, understanding, and compassion for all creatures. HSUS supports efforts to protect and recover threatened and endangered species and their habitats.

SF0093 purports to authorize the Wyoming Game and Fish Commission to license the hunting of grizzly bears in the face of unequivocal federal law prohibitions on such harm and harassment imposed by the Endangered Species Act and the regulations thereunder. The text of SF0093 asserts that the state has the authority to license this hunting because the Tenth Amendment reserves such authority to the states. It is plain here that no such authority is reserved because the Endangered Species Act and the regulations thereunder directly prohibit the authorization of grizzly bear hunting described in SF0093, and reflect a proper exercise of Congressional authority pursuant to the Commerce Clause. Consequently, SF0093 is unconstitutional in light of the Supremacy Clause, and is preempted by the Endangered Species Act and the regulations thereunder.

LEGAL BACKGROUND

The citizen suit provision of the Endangered Species Act provides that “any person may commence a civil suit on his own behalf []to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g)(1)(A).

Section 9 of the ESA provides “it is unlawful for any person . . . to . . . [G] violate any regulation pertaining . . . to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.” 16 U.S.C. § 1538(a)(1). By rule, the Secretary extended protections for “take” afforded

to endangered species under ESA section 9 to all threatened species, but provided that the provisions of a species-specific “special rule” would contain all applicable prohibitions and exceptions instead. 50 C.F.R. §17.31 (a),(c). The Secretary established a species-specific rule for the grizzly bear. *See* 50 C.F.R. §17.40(b) (attached).

Take means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or any attempt to do the above actions. 16 U.S.C. § 1532(19). Federal regulations further define harm, within the scope of a taking, to mean an “act which actually kills or injures wildlife.” 50 C.F.R. § 17.3. “Harass” in the definition of “take” in the ESA means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.*

FACTUAL BACKGROUND

The grizzly bear was listed as “threatened” under the ESA throughout the lower 48 coterminous states of the United States in 1975. *See* 40 Fed. Reg. 31,374. Despite multiple unlawful attempts to remove the Greater Yellowstone Ecosystem grizzly bear population from the listed entity, at present, the grizzly bear is still listed as threatened under the ESA throughout the lower 48 coterminous states, including the grizzly bears in Wyoming.

In June 2017, the U.S. Fish and Wildlife Service promulgated a rule to remove ESA protections for the grizzly bear population in the Greater Yellowstone Ecosystem area, but the U.S. District Court for the District of Montana vacated that rule because the Service “entirely failed to consider an issue of extreme importance”—“the impact of delisting on other continental grizzly populations.” *Crow Indian Tribe v. United States*, 343 F.Supp.3d 999, 1021 (2018). The effect of vacating that rule is that the bears in the Greater Yellowstone population, including the grizzly bears in Wyoming, are once again listed as “threatened” under the ESA, and are protected from killing and hunting under the terms of applicable federal regulations implementing the ESA.

ALLEGED VIOLATIONS

SF0093 asserts that the Wyoming Game and Fish Commission can ignore the District Court's decision, and the restrictions imposed by the federal regulations, on the ground that the Tenth Amendment recognizes the authority of Wyoming to do so. It does not.

The species-specific 4d rule for the grizzly bear, attached, allows lethal "take" only under two narrow circumstances, where there is an immediate danger to a person, or where an identified "nuisance bear" causes a threat that cannot be resolved by relocating the bear unharmed to a remote area. 50 C.F.R. §17.40(b)(1). "Grizzly bears may be taken in self-defense or in defense of others." *Id.* at § 17.40(b)(1)(i)(B). "A grizzly bear constituting a demonstrable but non immediate threat to human safety or committing significant depredations to lawfully present livestock, crops, or beehives may be taken, but only if:

- (1) It has not been reasonably possible to eliminate such threat or depredation by live-capturing and releasing unharmed in a remote area the grizzly bear involved; and
- (2) The taking is done in a humane manner by authorized Federal, State, or Tribal authorities, and in accordance with current interagency guidelines covering the taking of such nuisance bears; and
- (3) The taking is reported within 5 days of occurrence to the appropriate U.S. Fish and Wildlife Service law enforcement office, as indicated in paragraph (b)(1)(i)(B) of this section, and to appropriate State and Tribal authorities."

Id. at § 17.40(b)(1)(i)(C).

By contrast, SF0093 purports to authorize the Wyoming Game and Fish Commission to "conduct a grizzly bear hunt" and "issue licenses" to the public for such a hunt if the commission "determines under the laws of the state of Wyoming that a grizzly bear hunt would be beneficial

for managing Wyoming's wildlife and for protecting Wyoming workers and other citizens and tourists of the state." Thus SF0093 authorizes grizzly bear killing under circumstances that are far broader than the very narrow circumstances allowed under the federal rule, and which do not satisfy the criteria of the federal rule. SF0093 authorizes grizzly bear hunting where there is no immediate danger to a person from a particular bear, and where there has been no demonstration that a particular bear is a "nuisance," or that live-capture and relocation of that bear is not reasonably possible. Whereas the federal rule only authorizes lethal removal of a bear where that particular bear has been identified as a "nuisance" or is causing immediate danger, SF0093 authorizes killing, harm, and harassment of bears more generally, without regard to the behavior of the particular bear. Further, SF0093 authorizes the killing to be conducted by members of the public, rather than by state, federal, or tribal officials, which plainly conflicts with the text of the federal rule. *See* 50 C.F.R. § 17.40(b)(1)(i)(B)(2).

Consequently, a hunt authorized by the Wyoming Game and Fish Commission pursuant to SF0093 would make the Commission and the Department of Game and Fish subject to liability for unlawful take of grizzly bears in violation of section 9 of the ESA. *See, e.g., Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) ("a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.").

The Tenth Amendment does not provide a basis for the legislature or the Game and Fish Commission to ignore the prohibitions imposed by the Endangered Species Act. Nor does it provide a basis for ignoring the decision of the District Court. Courts have repeatedly recognized that where a federal law reflects a valid exercise of Congressional authority, state laws or regulations conflicting with that federal law are preempted due to the Supremacy Clause. *See, e.g., Strahan v. Coxe*, 127 F.3d 155, 167 (1st Cir. 1997) (finding that state regulations for fishing were preempted by ESA and rejecting argument that Tenth Amendment barred relief against state for ESA section 9 violations resulting from state regulations for fishing); *cf. Wyoming v. U.S. Dep't of Interior*, 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005), *aff'd sub nom. State of Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006) ("If the Constitution empowers Congress to exercise management and preservation of endangered species through its power to regulate interstate commerce, 'the Tenth Amendment expressly disclaims any

reservation of that power to the States.” (quoting *Wyoming v. U.S.*, 279 F.3d 1214, 1226 (10th Cir.2002))).

“[T]he Tenth Circuit has plainly held that while the States have historically possessed broad powers over wildlife within their borders, such powers are not constitutionally based-and thus are susceptible to pre-emption.” *Wyoming v. U.S. Dep’t of Interior*, 360 F. Supp. 2d 1214, 1241 (D. Wyo. 2005), *aff’d sub nom. State of Wyoming v. U.S. Dep’t of Interior*, 442 F.3d 1262 (10th Cir. 2006) (citing *Wyoming v. United States of America*, 279 F.3d 1214, 1226–1227 (10th Cir. 2002)). The Court of Appeals for the Tenth Circuit also very recently affirmed that the ESA provisions providing for the prohibition of take of threatened species on nonfederal lands are a proper exercise of Congressional power under the Commerce Clause. *People for Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv.*, 852 F.3d 990, 1002, 1008 (10th Cir. 2017), *cert. denied sub nom. People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 138 S. Ct. 649, 199 L. Ed. 2d 586 (2018) (“the regulation on nonfederal land of take ... under the ESA is a constitutional exercise of congressional authority under the Commerce Clause. And if Congress could itself regulate take of the Utah prairie dog on nonfederal land, it could also constitutionally authorize the Secretary of the Interior to promulgate regulations to achieve this end.”).

SF0093 asserts that language in the ESA requiring “cooperation” with the states somehow provides a basis for Wyoming to ignore applicable federal rules governing lethal take of grizzly bears, and the order of the District Court. It does not. The same section of the ESA that addresses “cooperation” with states expressly and unequivocally provides: “Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter *but not less restrictive* than the prohibitions so defined.” 16 U.S.C. § 1535(f) (emphasis added). Thus, the more restrictive prohibitions on grizzly bear take imposed by the federal regulations preempt the terms of SF0093 that would allow take to occur under broader circumstances.

In sum, for the reasons stated above, any attempt by the Wyoming Game and Fish Commission and the Wyoming Game and Fish Department to authorize and hold a hunt pursuant to SF0093, as enacted on February 15th, would violate the Endangered Species Act and the

regulations thereunder, which clearly preempt the proposed state law due to the Supremacy Clause.

PERSONS GIVING NOTICE

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CONCLUSION

If a lawsuit is necessary to resolve this matter, Sierra Club, the Center for Biological Diversity, Wyoming Wildlife Advocates, Western Watersheds Project, and the Humane Society of the United States may seek declaratory and injunctive relief, as well as costs of litigation.

If you believe any of the contents of this letter to be in error, or otherwise wish to discuss the violations alleged in this letter, please contact the representatives specified below.

Sincerely,



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