



**Western
Watersheds
Project**

John Persell, Staff Attorney
Western Watersheds Project
PO Box 1770
Hailey, ID 83333
Tel: (503) 896-6472
Fax: (208) 475-4702
Email: JPersell@WesternWatersheds.org
Web site: www.WesternWatersheds.org

Working to protect and restore Western Watersheds

January 21, 2020

By E-Mail and Certified Mail

David Bernhardt, Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240
exsec@ios.doi.gov

Aurelia Skipwith, Director
U.S. Fish and Wildlife Service
1849 C Street NW, Room 3358
Washington, DC 20240
aurelia_skipwith@fws.gov

Tyler A. Abbott, Field Supervisor
Wyoming Ecological Services Field Office
U.S. Fish and Wildlife Service
5353 Yellowstone Road, Suite 308A
Cheyenne, WY 82009-4178
tyler_abbott@fws.gov

Rob Hoelscher, District Ranger
Pinedale Ranger District
Bridger-Teton National Forest
29 East Fremont Lake Road
Pinedale, WY 82941
rob.hoelscher@usda.gov

**RE: Notice of Intent to Sue to Remedy Violations of the Endangered Species Act in
Regard to the U.S. Fish and Wildlife Service's Biological Opinion for the Effects to
the Grizzly Bear (*Ursus arctos horribilis*) from the Upper Green River Area
Rangeland Project, 06E13000-2019-F-0012 (April 29, 2019)**

Dear Secretary Bernhardt, Director Skipwith, Field Supervisor Abbott, and District Ranger Hoelscher:

On behalf of Western Watersheds Project, the Alliance for the Wild Rockies, and the Yellowstone to Uintas Connection, I am writing to provide notice that the United States Fish and Wildlife Service (FWS) is in violation of the Endangered Species Act (ESA), 16 U.S.C. § 1536, with regard to its Biological Opinion for the Effects to the Grizzly Bear (*Ursus arctos horribilis*) from the Upper Green River Area Rangeland Project, 06E13000-2019-F-0012 (April 29, 2019) (hereinafter 2019 BiOp) and the accompanying Incidental Take Statement (ITS). Further, we provide notice that the United States Forest Service (USFS) is also in violation of the ESA for its reliance on the 2019 BiOp to satisfy its ESA obligations for the Upper Green River Area Rangeland Project (hereinafter UGRA Project).

In its 2019 BiOp for the UGRA Project, FWS authorized the lethal “take” of an astonishing 72 grizzly bears over the next ten years, nearly twice the total number of grizzlies killed in the area since 1999. Despite the growth rate of the Greater Yellowstone Ecosystem’s (GYE’s) grizzly population slowing to nearly zero, the BiOp contains no evaluation of how a disproportionate number of female bears killed could impact the population, or whether the killing of 72 grizzly bears on top of other authorized “take” across the GYE could trigger mortality limits set by the Interagency Grizzly Bear Study Team (IGBST). Further, FWS fails to require the removal of dead cattle and sheep from bear habitat, perpetuating the killing of “conflict” bears by allowing continued habituation of grizzlies to livestock as food.

Specifically, FWS violated section 7 of the ESA in several ways in issuing the 2019 BiOp and accompanying ITS. First, FWS violated section 7 of the ESA by improperly defining the action area within which impacts of the project area are analyzed. FWS used outdated data while simultaneously ignoring important information to define the action area boundaries. FWS also failed to justify its decision to rely upon data regarding how far away a grizzly may be drawn to carcasses to delineate the action area, when grizzly bears that have home ranges overlapping the project area allotments would be excluded by such a delineation. In doing so, FWS failed use the best scientific and commercial data available and failed to appropriately define the action area to encompass “all areas to be affected directly or indirectly” by the project, as required by the ESA.

Second, FWS entirely failed to consider important aspects of the authorized project and its impacts on grizzly bears. For example, FWS failed to evaluate the added effects of the take authorized through this ITS in conjunction with additional authorized take across the GYE, including take authorized in and close to the project area. Additionally, FWS failed to analyze the potential loss of important grizzly bear occupied habitat in the project area. FWS also failed to estimate, evaluate, or limit the take of female grizzly bears, despite the importance of minimizing female grizzly bear mortality to the recovery and survival of the grizzly bear population. Finally, FWS failed to consider impacts to grizzly bears from past, present, and potential future timber harvest.

Third, FWS premised its “no jeopardy” conclusion on USFS’s commitment to implement specified conservation measures. None of the conservation measures itemized in the 2019 BiOp provide measurable, concrete protections for grizzly bears, and in some cases perpetuate, rather than address, threats to grizzly bears. The conservation measures involve non-mandatory guidelines, additional reporting requirements, non-binding recommendations for livestock permittees, and weak rules for carcass removal and movement riddled with discretionary exceptions. Moreover, the conservation measures are not certain to occur because FWS relies upon voluntary implementation by permittees and discretionary enforcement by USFS. FWS thus failed to critically assess the level of implementation, enforcement, and effectiveness of these measures before relying on them to justify its “no jeopardy” conclusion.

Finally, given the legal flaws of FWS’s 2019 BiOp, it was arbitrary and capricious for USFS to rely on the BiOp to satisfy its ESA section 7 obligations regarding the UGRA Project.

Pursuant to section 11(g) of the ESA, 16 U.S.C. § 1536(g), this letter provides notice that, unless within 60 days of receipt of this letter FWS withdraws the 2019 BiOp and ITS, the parties to this letter intend to challenge the agencies' unlawful conduct in federal district court.

I. THE PARTIES TO THIS LETTER

Western Watersheds Project (WWP) is a non-profit conservation organization founded in 1993 with the mission of protecting and restoring western watersheds and wildlife through education, public policy initiatives, and litigation. Headquartered in Hailey, Idaho, WWP has over 11,000 members and supporters and field offices in Wyoming, Montana, Idaho, Nevada, and Arizona, as well as additional staff covering Washington, Oregon, California, Utah, New Mexico, and Colorado.

The Alliance for the Wild Rockies is a non-profit organization dedicated to preserving and restoring wildlife habitat in the Northern Rockies Bioregion.

Yellowstone to Uintas Connection is a non-profit entity working to restore fish and wildlife habitat, including the regionally significant wildlife corridor connecting the Greater Yellowstone Ecosystem to the Uintas Mountains and Southern Rockies through the application of science, education, and advocacy.

II. LEGAL FRAMEWORK

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Enacted in 1973, the law is meant to provide a means to conserve the ecosystems upon which endangered and threatened species depend and to provide a program to conserve listed species. 16 U.S.C. § 1531(b). To receive the full protections of the ESA, a species must first be listed by the Secretary of the Interior as “endangered” or “threatened” pursuant to ESA section 4. *See id.* § 1533. FWS listed the grizzly bear as “threatened” in 1975.

Section 7 of the ESA requires each federal agency, in consultation with a federal wildlife agency (FWS for the grizzly bear) to ensure that any proposed action is not likely to jeopardize the continued existence of a threatened endangered species, or result in the destruction or adverse modification of its critical habitat. *Id.* § 1536(a)(2). When a listed species may be present in the action area and the proposed action may affect a listed species, the action agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14.

Regulations lay out the requirements of formal consultation: FWS must “review all relevant information” regarding the action area, whether provided by the action agency or not. 50 § C.F.R. 402.14(g)(1). FWS must evaluate both the current status of listed species as well as the effects of the proposed action and cumulative effects on listed species. *Id.* § 402.14(g)(2)-(3). Agencies are required to “use the best scientific and commercial data available” in assessing impacts to protected species during the consultation process. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). Based on this information, FWS must reach a “biological opinion as to whether the

action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species” 50 C.F.R. § 402.14(g)(4).

Through formal consultation FWS must evaluate effects of the proposed action, both direct and indirect, as well as cumulative effects, within the action area. By regulatory definition, the “action area” for section 7 consultation purposes must include “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. Under the operative regulations at the time FWS produced the 2019 BiOp, “effects of the action” to be evaluated include “direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” *Id.* In the context of section 7 formal consultation, “[e]ffects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.” *Id.* § 402.02. “Cumulative effects” are “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.*

The environmental baseline for a project “includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area that have already undergone formal or early section 7 consultation, and the impacts of State or private actions which are contemporaneous with the consultation in process.” 50 C.F.R. § 402.02.

A biological opinion produced through section 7 formal consultation is a final agency action subject to judicial review under the arbitrary and capricious standard. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1105 n.3 (10th Cir. 2010) (citing *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 709 (9th Cir. 2005)); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 12, 146 F.3d 1249, 1252 (10th Cir. 1998). Under this standard, agency action must be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). An “agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Veh. Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962)).

“An agency’s decision is arbitrary and capricious if the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.” *Superior v. U.S. Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087, 1100-01 (D. Colo. 2012) (citing *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009) (internal citation omitted)).

“In addition to requiring a reasoned basis for agency action, the ‘arbitrary or capricious’ standard requires an agency’s decision to be supported by the facts in the record.” *Superior v. U.S. Fish & Wildlife Serv.*, 913 F. Supp. 2d 1087, 1101 (D. Colo. 2012) (citing *Olenhouse v.*

Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994)). “An agency’s decision, therefore, is arbitrary if not supported by ‘substantial evidence.’” *Id.*

Even after the procedural requirements of consultation are complete, however, the ultimate duty to ensure that an activity does not jeopardize a listed species lies with the action agency. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion to satisfy its ESA section 7 duty is arbitrary and capricious. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005) (rev’d on other grounds, *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007)); *see also WildEarth Guardians v. U.S. Bureau of Reclamation*, 2015 WL 13651243, at *5 (D.N.M. Sept. 23, 2015) (citations omitted); *Mayo v. Jarvis*, 177 F. Supp. 3d 91, 146 (D.D.C. 2016).

III. FACTUAL BACKGROUND

A. Grizzly Bears and the Greater Yellowstone Ecosystem.

Grizzly bears once ranged throughout most of western North America. Scientists believe there once were approximately 50,000 grizzly bears in the western United States. Because the population collapsed due to loss of habitat and over-hunting, FWS listed the grizzly bear as a threatened species in the lower 48 states under the ESA in 1975. 40 Fed. Reg. 31734 (July 28, 1975). Today, there are less than 2,000 grizzly bears estimated in the lower 48 states in five isolated populations. The Greater Yellowstone Ecosystem, including the Upper Green, is one of those populations.

Grizzly bears reproduce very slowly; most females do not give birth until the age of five years, and litter sizes are small. 2019 BiOp, p. 12. Cubs stay with their mother for up to two years, so there are lengthy periods between litters. *Id.* According to the IGBST, grizzly bear population growth in the GYE has slowed to between 0 to 2.2%. *Id.*, p. 16. Female grizzly bears and their cubs are key to the species’ survival, so “providing maximum protection for females is essential to recovery.” 1993 Grizzly Bear Recovery Plan, Part One, p. 5.

Grizzly bears in the GYE have large home ranges (81 square miles for females and 309 square miles for males). 2019 BiOp, p. 12 (citing Bjornlie *et al.* 2014). According to FWS, “[l]oss and fragmentation of habitat is particularly relevant to the survival of grizzly bears.” *Id.* As recognized by the agency, “[t]he two primary challenges in grizzly bear conservation are the reduction of human-caused mortality and the conservation of remaining habitat.” *Id.*, p. 13 (citing USFWS 1993). Grizzly bear persistence is “negatively associated with human and livestock densities.” *Id.*, p. 27 (citing Mattson and Merrill 1992).

In the GYE, FWS and partner agencies manage grizzly bears and their habitat by combining the “Primary Conservation Area” with “adjacent areas where occupancy by grizzly bears is anticipated and acceptable.” 2016 Final Conservation Strategy, p. 1 (IGBST 2016), available at http://igbconline.org/wp-content/uploads/2016/03/161216_Final-Conservation-Strategy_signed.pdf (last visited Jan. 10, 2020). Combined, this forms the “Demographic Monitoring Area” (DMA) within which recovery criteria for grizzly bears are assessed. *Id.*, p. 4.

All allotments included in the UGRA Project, as well as most of FWS's delineated action area, lie within the DMA. 2019 BiOp, p. 28.

The IGBST has developed “demographic recovery criteria to maintain a minimum population size, a well-distributed population, and establish mortality limits based on scientific data and direct monitoring of the population.” 2016 Final Conservation Strategy, p. 21. Demographic Recovery Criterion 3 now requires the grizzly bear population in the DMA be maintained through “annual mortality limits for independent females, independent males, and dependent young.” *Id.*, p. 35; *see also* 2019 BiOp, p. 18.

Based on 2017 population estimate of 718 grizzly bears in the DMA, “total mortality thresholds independent females, independent males, and dependent young are 9%, 20% and 9%, respectively.” Yellowstone Grizzly Bear Investigations 2017, Annual Report of the Interagency Grizzly Bear Study Team, p. 2 (IGBST 2017), available at https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/s3fs-public/atoms/files/2017_AnnualReport_Final_tagged_Secured_v3.pdf (last visited Jan. 10, 2020). According to the IGBST, “[i]f mortality limits are exceeded for any sex or age class for three consecutive years and any annual population estimate falls below 612,” IGBST must review the situation “to inform the appropriate management response.” *Id.*; *see also* 2019 BiOp, p. 18. Grizzly bear mortalities have been increasing across the GYE. 2019 BiOp, p. 31.

B. The UGRA Project and the 2019 BiOp.

In approving the UGRA Project, USFS continued livestock grazing on allotments for ten years. 2019 BiOp, pp. 4 and 9. Associated permits will authorize grazing of 46,148 animal unit months¹ for cattle across roughly 176,641 acres. 2019 BiOp, pp. 4 and 9. As the culmination of formal consultation between USFS and FWS regarding impacts of the UGRA Project to grizzly bears, FWS issued the 2019 BiOp and associated ITS.

FWS delineated the action area as “a distance of 7.5 mile[s] beyond the perimeter of the collective allotment boundaries based on the maximum distance many of the bears traveled to carcasses in Craighead and Mitchell's (1982) study.” 2019 BiOp, pp. 7-8. The 2019 BiOp premised its conclusion of “no jeopardy” to GYE grizzly bears, in part, on USFS's “commitment to implement their Conservation Measures.” 2019 BiOp, p. 46. These conservation measures include:

- Bear sanitation guidelines for livestock operation camps;
- A requirement that riders watch livestock closely for sick, injured, or stray animals;
- Regular monitoring of grazing allotments by USFS;

¹ “An animal unit month is the amount of forage for one mature cow or equivalent for one month based upon an average daily forage consumption of 26 pounds of dry matter per day. One animal unit month is equivalent to 1.32 animal unit months for a cow/calf pair and 0.7 animal unit month for a yearling.” UGRA Project FEIS Glossary, p. 598.

- Removal or movement of carcasses away from roads or specified recreation facilities to reduce the risk to public safety, with exceptions when removal or movement is not physically possible or when rider safety is deemed an issue;
- A recommendation that permittees and their representatives carry bear spray;
- Continued identification and implementation of opportunities to reduce the potential of grizzly bear conflicts;
- Communication to permittees by USFS of ESA responsibilities related to take of grizzly bears;
- Continued cooperation between USFS, FWS, the IGBST, and the Wyoming Game and Fish Department to identify and collect information about grizzly bears in the grazing allotments.

2019 BiOp, pp. 7-8.

FWS asserts these conservation measures will minimize the risk of conflicts between cattle and grizzly bears, and “lower the number of management removals within the action area.” *Id.*, pp. 41 and 7. FWS presumes enforcement of the conservation measures by USFS against permittees. *Id.*, p. 41. FWS also directs USFS to prepare annual reports for FWS so that FWS can better understand the measures’ effectiveness. *Id.*, p. 51.

The 2019 BiOp lists previous biological opinions related to the UGRA Project. The 2014 supplement to the 2013 BiOp authorized the “take” of 11 grizzly bears within any consecutive three-year period. 2019 BiOp, p. 38. 37 grizzlies have been lethally “taken” in the action area since 1999, including 35 in the UGRA Project allotments. *Id.*

In the ITS accompanying the 2019 BiOp, FWS authorized the taking of up to 72 bears over the ten-year UGRA Project. *Id.*, p. 48. The ITS does not limit the number of female grizzlies or cubs may be killed, although females with cubs occupy the area. *Id.*, pp. 21 and 30. FWS does not estimate how many female bears may be killed or evaluate how potentially high numbers of female mortalities may impact the grizzly bear population. FWS concludes the killing of 72 grizzlies “is not likely to jeopardize the continued existence of the” species. *Id.*, p. 49.

IV. VIOLATIONS OF THE ESA

A. FWS Failed to Properly Define the Action Area Within Which Impacts Are Analyzed.

The “action area” for ESA section 7 consultation purposes must include “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. “An agency cannot fulfill [its section 7 consultation duties] by narrowly defining the action area to exclude federal activities that are impacting [listed species].” *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 126 (D.D.C. 2001). Use of an “overly narrow definition of action area [] results in the exclusion of certain relevant impacts from the environmental baseline,” in violation of the ESA. *Id.* at 128.

Here, FWS arbitrarily established an action area that includes the nine livestock grazing allotments plus a perimeter boundary extending 7.5 miles around the allotments. 2019 BiOp, pp. 8-9. FWS stated that it defined the action area “based on the maximum distance many of the bears traveled to carcasses in Craighead and Mitchell’s (1982) study.” *Id.* But contrary to FWS’s assertion, the Craighead and Mitchell study never discussed the maximum distance bears traveled to carcasses. Rather, FWS seems to rely upon a single paragraph in this 1982 study within which scientists summarized how quickly grizzly bears had been documented moving to carrion directed by scent. *Id.* (citing Craighead and Mitchell 1982). The information in the study thus does not stand for the proposition upon which FWS relies to define the action area, and FWS’s misinterpretation of the science reflects a failure to use the “best scientific and commercial data available,” in violation of the ESA. *See* 16 U.S.C. § 1536(a)(2).

FWS ignores information that grizzly bears travel more than 18 miles to feed on carcasses. *Id.*, p. 8. FWS similarly notes that “grizzly bear movement towards the scent of [] carcasses is highly variable” and that “the smell emanating from carcasses is different from live animals,” which occur on the project area allotments but were not included in the 1982 article. *Id.* Thus, the data in the article may not even apply to the UGRA project area. Nevertheless, FWS relies solely upon the “highly variable” and perhaps irrelevant data contained within the single paragraph from this decades-old article to define the action area, upon which the evaluation of all impacts of the project on grizzly bears will be based. This does not constitute using the best scientific and commercial data available as envisioned by the ESA.

FWS also fails entirely to explain why the distance within which grizzly bears are drawn to carcasses is a reasonable measure upon which to define the action area boundaries. FWS must provide support for its choice of an action area and must explain the scientific methodology, relevant factors, and rational connections linking the project’s potential impacts with the action area boundaries. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002) (finding action area delineation was arbitrary and capricious where agency failed to adequately support action area boundaries). Here, FWS chooses an action area based upon a single factor—the distance within which grizzly bears have traveled to carrion—and fails to explain why relying on that factor is reasonable in defining the action area here.

In fact, relying upon the distance upon which grizzly bears, in an outdated study, traveled to carrion to define the action area does not encompass “*all areas to be affected directly or indirectly* by the Federal action and not merely the immediate area involved in the action,” as required by law. *See* 50 C.F.R. § 402.02 (emphasis added). Grizzly bears in the GYE have large home ranges, and any grizzly bear with a home range overlapping the grazing allotments may move to the area and be negatively impacted by the project, regardless of whether they are originally drawn to the area by the scent of carcasses.

In the biological opinion, FWS asserts that grizzly bear home ranges average approximately 81 square miles for females and 309 square miles for males. BiOp, p. 12 (citing Bjornlie *et al.* 2014). Yet FWS fails to explain how grizzly bears that have home ranges overlapping the grazing allotments are unlikely to be impacted by the project, and the data included within the biological opinion demonstrates otherwise. For example, FWS notes that grizzly bears “move[] freely in and out of the action area during summer through fall, and made

extensive use of adjacent watersheds[.]” *Id.*, p. 27. Some bears traveled at least 29 miles between the action area and the east boundary of Grand Teton National Park. *Id.*, p. 28. But FWS’s action area as defined would not capture all of these bears. The delineation of an “action area” “cannot be narrowly applied so as to avoid taking into account the impacts of other federal activities” on the species. *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d at 128-30 (biological opinions violated ESA because the delineations of the action areas were overly narrow). FWS’s use of an overly narrow definition of the action area therefore violates the ESA.

The action area defines the baseline against which other federal actions must be considered. If FWS used a more reasonable action area, such as grizzly bear home ranges that overlap the allotments, FWS would account for take that is likely occurring due to other federal actions in the vicinity, such as grizzly bear take associated with elk hunting in Grand Teton National Park. These additional authorized takings would then be part of the environmental baseline against which FWS would determine whether the project may jeopardize the survival and recovery of grizzly bears. *See* BiOp, p. 3. By arbitrarily and narrowly defining the action area, FWS ignores these highly relevant authorizations of additional grizzly bear take. *See, e.g., Mayo v. Jarvis*, 177 F. Supp. 3d 91, 137-38 (D.D.C. 2016) (discussing FWS’s failure to consider other biological opinions in the vicinity of the action area that authorized take of grizzly bears).

In short, because FWS improperly limited the action area and scope within which impacts from the project on grizzly bears will be determined without a rational explanation, the action area is arbitrary and capricious and violates the ESA.

B. FWS Entirely Failed to Consider Important Aspects of the Problem.

A biological opinion is arbitrary and capricious when it has failed to consider an important aspect of the problem. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (agency must “offer a rational connection between the facts found and the choice made”) (citation omitted); *Greenpeace v. Nat’l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1147 (W.D. Wash. 2000) (“A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions or it has entirely failed to consider an important aspect of the problem.”). FWS failed to consider several important factors in evaluating the impact of the killing of 72 grizzly bears over the next ten years on the GYE population.

1. FWS Does Not Evaluate the Effects of the Take of 72 Bears Added to Previously Authorized Take Across the GYE.

In the 2019 BiOp and accompanying ITS, FWS has authorized the lethal take of up to 72 grizzly bears over the ten-year life of the UGRA Project. Nowhere in the 2019 BiOp’s ITS, however, did FWS analyze the implications of take authorized in the 2019 BiOp and ITS in connection with take that FWS has determined is reasonably likely to occur elsewhere in the GYE, even though operative incidental take statements exist for activities in other parts of the GYE. This significant omission does not comply with the requirements of the ESA’s mandate to evaluate impacts and the newly authorized take against the current baseline.

The impact of anticipated take of listed species “cannot be determined in a vacuum, but must necessarily be addressed in the context of other incidental take authorized by FWS.” *Mayo v. Jarvis*, 177 F. Supp. 3d at 137 (citing *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 127 (D.D.C. 2001)). Additionally, such an analysis should also address any take authorized with respect to grizzly bears as an anticipated future impact. *Defenders of Wildlife*, 130 F. Supp. 2d at 127. There must be analysis of the impact of the total amount of take authorized, not simply a listing of those numbers. *Id.* at 128. The ESA is violated when “FWS has authorized a total level of take greater than the incidental take provided for in any individual BO without analyzing whether that total level jeopardizes the survival” of the species. *Id.* at 130. Thus, it is important that FWS analyze the “aggregate take” of grizzly bears in the GYE, an analysis not present in the 2019 BiOp. *See id.* By failing to do so FWS has entirely failed to consider an important aspect of the problem, rendering the 2019 BiOp arbitrary and capricious. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Although the 2019 BiOp asserts that the authorized take under the ITS for this project is unlikely to surpass current mortality thresholds, the 2019 BiOp is silent on whether annual mortality thresholds may be exceeded if the authorized take from the 2019 BiOp in addition to all authorized and anticipated take across the GYE. For example, FWS does not consider whether potential zero population growth, in combination with authorized take across the GYE, could lead to the 9% annual mortality limits exceeded for independent female bears or dependent young, or the 20% annual mortality limit exceeded for independent male bears. *See* 2019 BiOp, p. 17. Without such an analysis, it is impossible to determine the accuracy and validity of FWS’s “no jeopardy” conclusion, rendering this conclusion arbitrary and capricious.

At the very least, the BiOp must analyze the impact of authorized take added to an environmental baseline that includes FWS’s authorization of other takes in and around the action area. As noted above, the action area must be defined more broadly because the current delineation is not based in science and arbitrarily fails to analyze the impact to bears whose home ranges overlap with the grazing allotments and thus are likely to be impacted by the project. This may include, for example, takes authorized in Grand Teton National Park in connection with elk hunting in the park.

2. FWS Does Not Analyze the Potential Loss of Occupied Habitat in the Project Area.

The 2019 BiOp does not estimate how many bears it expects to occupy the UGRA Project area at any given time. The most recent data provided in the 2019 BiOp show that 12 bears used the action area from spring to fall of 2013. 2019 BiOp, p. 27. The BiOp also notes that grizzly bear population growth in the GYE has slowed to between 0 to 2%, with most growth occurring beyond the Demographic Monitoring Area. *Id.*, p. 29. Without current data, it is impossible to determine if the agency is anticipating removal of all bears entering the action area, or just a fraction of bears present. If FWS is anticipating the potential removal of all bears entering the area, for example, because it anticipates that all bears in the action area are likely to create conflicts with cattle, the Upper Green area could essentially become unoccupied grizzly bear habitat, representing a significant hole in an otherwise contiguous area of suitable occupied

habitat. This is not a worst-case scenario that is unlikely to occur, but rather is a reasonably foreseeable impact that should be analyzed. In the Final Environmental Impact Statement for this Project, for example, USFS noted that the Upper Green area is an “existing mortality sink” for grizzly bears, although FWS failed acknowledge this important point in the 2019 BiOp. *See* FEIS at 317 (citing Schwartz *et al.* 2010). If FWS has authorized the take of all or even most grizzly bears anticipated to disperse to the UGRA Project action area, the BiOp must analyze the loss of this important occupied habitat for grizzly bears.

3. FWS Failed to Estimate, Evaluate, or Limit the Take of Female Grizzly Bears.

FWS did not consider how the failure to include a limit on killing female bears in the ITS could negatively impact the grizzly bear population in the GYE. FWS acknowledges that “female bears have established territories within the action area” (2019 BiOp, p. 21), and recognizes the importance of minimizing female grizzly bear mortality for the long-term survival of the GYE grizzly bear population (*id.*), yet places no limits on the number of female bears that may be killed under the 2019 BiOp and ITS. The complete failure to analyze or limit the take of female grizzly bears is unlike past incidental take statements for the UGRA Project. *See* 2019 BiOp, p. 38; *see also* 2014 BiOp, p. 43.²

As discussed *supra*, protections for female bears are critical for long-term survival of the GYA grizzly bear population. *See* 2019 BiOp, p. 21. Indeed, FWS acknowledge that the low survival of adult females was considered the most important factor leading to the decline of the GYE grizzly population prior to the mid-1980’s. *Id.*, p. 17. As early as 1986, Interagency Grizzly Bear Committee guidelines “outline[d] a plan for determining conflict status and controlling conflict grizzly bears based on the nature of the offense and sex/age class of the bear” *Id.*, p. 25. Despite USFS admitting that the Upper Green area has become a population sink for female grizzlies, FWS places no constraints on the proportion of female bears that can be taken in any given period or over the course of the ten years of the life of the UGRA Project. Without such constraints, FWS cannot reasonably conclude that mortality thresholds for independent female bears will not be exceeded and that the authorized level of take will not jeopardize the survival and recovery of the grizzly bear.

Because FWS has not considered the impact that the loss of numerous female grizzly bears as authorized under the 2019 BiOp and ITS could have on the GYE grizzly bear population, the agency’s conclusion that the lethal take of 72 bears will not jeopardize the GYE population is unsupported by the facts, and thus is arbitrary and capricious.

² Although the 2014 BiOp’s ITS did not place a specific limit of lethal take of female grizzly bears, it included a term and condition requiring USFS to contact FWS “[i]f 5 or more grizzly bears are lethally removed, including 3 or more females . . . to discuss the adequacy of existing mechanisms to minimize additional take.” 2014 BiOp, p. 43.

4 FWS Failed to Consider Impacts to Grizzly Bear Habitat from Past, Present, and Potential Future Timber Harvest in the Environmental Baseline.

As part of the environmental baseline, FWS must consider “the past and present impacts of all Federal, State, or private actions and other human activities in the action area that have already undergone formal or early section 7 consultation, and the impacts of State or private actions which are contemporaneous with the consultation in process.” 50 C.F.R. § 402.02. Numerous timber harvest projects of varying size and scope have occurred on the Pinedale Ranger District in the vicinity of the Upper Green area, yet the 2019 BiOp is conspicuously silent on how such timber harvest has impacted grizzly bear habitat in the area, and whether any proposed timber harvest projects have undergone formal or early section 7 consultation.

A review of the FEIS for the UGRA Project indicates two timber sales being “currently implemented,” the Lost Creek Timber Salvage and Red Cliff Timber sales. FEIS, p. 250. The FEIS notes that historically, many timber harvest projects have occurred in the analysis area considered by USFS. *Id.* In Appendix A to the FEIS, USFS lists the Lost Creek and Red Cliff sales, as well as the Bend in the River, Battle Mountain Timber Salvage, and Washakie Timber sales as “present activities” for its own cumulative effects analysis.

Because the FEIS is now more than two years old, there may be additional timber harvest projects proposed for the area. According to the Bridger-Teton National Forest’s list of projects on its website, the Tepee Creek Project appears to be a new timber project in the action area. *See* <https://www.fs.usda.gov/projects/btnf/landmanagement/projects> (last visited Jan. 10, 2020).

Because timber harvest projects authorized by USFS are “past and present impacts” and potentially future impacts that have begun section 7 consultation, any such impacts must be included in the environmental baseline for grizzly bears in the Upper Green area. FWS cannot lawfully assess the direct and indirect effects of the UGRA Project in conjunction with the environmental baseline if the environmental baseline is incomplete. Without considering the impacts of timber harvest projects to grizzly bears and their habitat, FWS has failed to consider all relevant factors.

C. FWS’s Reliance on the Conservation Measures to Support Its “No Jeopardy” Conclusion is Arbitrary and Capricious.

A “no jeopardy” opinion may not be based on conservation measures that are not “reasonably specific, certain to occur, and capable of implementation.” *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987)). To support a “no jeopardy” opinion, conservation measures “must be subject to deadlines or otherwise-enforceable obligations.” *Id.* In addition, measures that are not effective in protecting listed species cannot support a “no jeopardy” opinion. Conservation measures “must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.” *Id.*

Here, FWS premised its conclusion that the UGRA Project is not likely to jeopardize grizzly bears on USFS’s commitment to implement and enforce identified conservation

measures. 2019 BiOp, p. 46. In a conclusory statement, FWS contends “[t]he risk of cattle/bear conflicts is minimized by implementation of conservation measures that are part of the grazing permit as a term and condition of the permits.” 2019 BiOp, p. 41. FWS assumed the conservation measures would be effective without question, even though many of the measures are voluntary, discretionary, and contain so many exceptions as to render them toothless.

FWS acknowledges that “[l]ivestock grazing on Forest-authorized grazing allotments, and the associated human presence and livestock carrion associated with livestock management, could have detrimental effects to the grizzly bear (Knight and Judd 1983).” 2019 BiOp, p. 39. Yet despite dead cattle and sheep habituating bears to livestock as food, Conservation Measure 4 only directs the removal of carcasses “if possible,” or otherwise moved 0.5 mile or 0.25 mile away from human-associated infrastructure, including roads. *Id.*, p. 7.

Bears tend to avoid roads anyway, particularly roads with significant motor vehicle traffic. *See Northup et al., Vehicle Traffic Shapes Grizzly Bear Behaviour on a Multiple-Use Landscape, Journal of Applied Ecology (July 2012).* Moving carcasses away from roads simply moves the food source closer to where grizzlies are likely to be present. Movement of carcasses does nothing to minimize the risk of cattle/bear conflicts, because bears will continue to find the carcasses wherever they are moved to, further habituating them to associate livestock with food. In turn, more grizzlies will be killed when conflicts inevitably arise. Reliance on Conservation Measure 4 does not actually “address the threats to [grizzlies],” but perpetuates those threats. *See Rumsfeld, 198 F. Supp. 2d at 1152.*

The carcass removal and/or movement requirements in Conservation Measure 4 are also riddled with discretionary exceptions, including when “compliance . . . is not physically possible,” and “if human rider or herder safety is of concern.” 2019 BiOp, p. 7. This includes “the presence of a grizzly bear in the immediate vicinity of carcasses, and carcasses being located in hazardous terrain such that attempting to move or remove may not be possible or unsafe.” *Id.* Moreover, the allotments in question are in notably remote, rough terrain, making it difficult to find and remove carcasses. *See BiOp, p. 40* (“We recognize that complete cattle carcass removal from the allotments is not possible due to the large and remote areas grazed by livestock on the Allotments and the difficulty in locating all carcasses over such vast areas, or locating them in a timely manner.”).

The other identified conservation measures similarly lack specificity, certainty, and assurances of implementation. *See Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002).* Under Measure 1, “Bear Sanitation Guidelines will be followed” 2019 BiOp, p. 7. Under Measure 2, “[r]iders are required to watch all livestock closely” *Id.* Under Measure 3, USFS “will monitor allotments on a regular basis.” *Id.* Under Measure 6, USFS “will recommend that all permittees and their representatives [] carry bear spray while working in the allotments.” *Id.*, p. 8. None of these measures identify mechanisms by which implementation can be assured, and some by their very language are mere recommendations. Measures 7 through 9 do not require any substantive action whatsoever, only aspirations of cooperation and direction to attend meetings and keep *trying* to “reduce the potential for grizzly bear conflicts.” *Id.*, p. 8.

FWS acknowledges that it does not know the actual effectiveness of the conservation measures offered by USFS; as part of the reporting requirements under ITS, FWS directs USFS to review its management efforts “to improve understanding of the effectiveness of the Conservation Measures.” 2019 BiOp, pp. 50-51. Yet the agency does not offer any assessment of how similar conservation measures set forth in previous biological opinions and biological assessments have minimized, or not, the number of conflicts between grizzly bears and livestock. Despite similar measures being in place for years, FWS admits “the number of livestock-bear conflicts and removals has steadily increased since 2010.” *Id.*, p. 43. A commitment to monitor measures’ currently unestablished effectiveness cannot support a “no jeopardy” determination. *Rumsfeld*, 198 F. Supp. 2d at 1156.

Given the failure of similar conservation measures to minimize livestock-bear conflicts (*see* 2014 BiOp, pp. 7-10), and FWS’s failure to critically assess the past and expected future effectiveness of USFS’s conservation measures, FWS’s blanket acceptance of the current measures as a basis for reaching its “no jeopardy” opinion is arbitrary and capricious.

The conservation measures relied upon by FWS are not “certain to occur.” *Rumsfeld*, 198 F. Supp. 2d at 1152. FWS assumes grazing permittees will implement them, and that USFS “will require implementation” of the measures. 2019 BiOp, p. 7. But action agencies must insure their actions will not jeopardize listed species, and reliance on the hoped-for actions by others, such as permittees, does not meet this ESA requirement. *See Sierra Club v. Marsh*, 816 F.2d at 1385 (citation omitted).

Courts have found “even a sincere general commitment” to implement conservation measures insufficient “absent specific and binding plans.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008). FWS does not offer specific and binding plans for the conservation measures’ implementation here. FWS assumes permittees will follow them and that USFS will enforce them. But enforcement by USFS is discretionary, adding another layer of inconsistency on top of the measures’ built-in exceptions. With so much uncertainty regarding the measures’ likelihood of actual, consistent implementation, FWS’s reliance on the measures to support its “no jeopardy” conclusion is arbitrary and capricious, and not in accordance with the law.

D. USFS Failed to Satisfy Its Independent Obligations Under the ESA by Relying on the Legally Flawed 2019 BiOp Produced by FWS.

An action agency cannot rely on a faulty biological opinion to fulfill its substantive section 7 duties to ensure it does not jeopardize the continued existence of ESA-listed species. *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005) (*rev’d on other grounds*, *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007)); *Mayo v. Jarvis*, 177 F. Supp. 3d at 146. Here, USFS has relied on the 2019 BiOp produced by FWS in order to satisfy its ESA obligation regarding the authorization of livestock grazing through the UGRA Project. Yet, as discussed above, the 2019 BiOp does not comply with the ESA or its implementing regulations, and reliance on it by USFS is arbitrary and capricious, and in violation of the law. USFS and FWS must reinitiate and lawfully complete section 7 consultation in order to fulfill both agencies’ ESA duties to protect and conserve ESA-listed species.

V. CONCLUSION

As set forth above, the parties to this letter intend to pursue litigation in federal court after sixty days, and will seek injunctive, declaratory, and other relief, including an award of fees and expenses incurred in investigating and prosecuting this action. To avoid litigation, FWS and USFS should immediately halt any lethal take of grizzly bears in the project area until the agencies reinstate and lawfully complete formal consultation under section 7 of the ESA and its implementing regulations.

If you have any questions or wish to discuss this matter further, please contact me.

Sincerely,



John S. Persell, Staff Attorney
Western Watersheds Project
P.O. Box 1770
Hailey, ID 83333
(503) 896-6472
jpersell@westernwatersheds.org

Michael Garrity, Executive Director
Alliance for the Wild Rockies
P.O. Box 505
Helena, MT 59624
(406) 459-5903
wildrockies@gmail.com

Jason Christensen, Director
Yellowstone to Uintas Connection
P.O. Box 280
Mendon, UT 84325
(435) 881-6917
jason@yellowstoneuintas.org