

David A. Bahr (D.D.C. Bar # OR0001)
1035 ½ Monroe St
Eugene, OR 97402
(541) 566-6439
davebahr@mindspring.com

Kristine Akland (Montana Bar # 13787) (*pro hac vice*)
317 E Spruce St, P.O. Box 7274
Missoula, MT 59807
(406) 544-9863
aklandlawfirm@gmail.com

John Persell (D.D.C. Bar # ID0002)
Western Watersheds Project
P.O. Box 1770
Hailey, ID 83333
(503) 896-6472
jpersell@westernwatersheds.org

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WESTERN WATERSHEDS PROJECT,
ALLIANCE FOR THE WILD
ROCKIES, and YELLOWSTONE TO
UINTAS CONNECTION

Plaintiffs,

v.

DAVID BERNHARDT, in his official
capacity as Secretary, U.S. Department
of the Interior, UNITED STATES FISH
AND WILDLIFE SERVICE, and
UNITED STATES FOREST SERVICE,

Defendants.

Civil Action No. 1:20-cv-860-APM

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESiii

GLOSSARY OF ACRONYMS AND TERMSv

LIST OF EXHIBITSvi

I. INTRODUCTION1

II. FACTUAL BACKGROUND2

 A. Grizzly Bears in the Greater Yellowstone Ecosystem3

 B. The Upper Green River Area in the Greater Yellowstone Ecosystem5

 C. History of Incidental Take of Grizzly Bears in the Upper Green River Area6

 D. Kendall Warm Springs Dace7

III. LEGAL BACKGROUND8

 A. The Endangered Species Act’s Congressional Mandate8

 B. The Prohibition of Take9

 C. Section 7 Consultation9

IV. STANDARDS OF REVIEW10

 A. Preliminary Injunction10

 B. Endangered Species Act Claims12

V. ARGUMENT12

 A. Plaintiffs Will Succeed on the Merits13

 1. FWS failed to consider the most important aspect of the grizzly bear’s recovery and survival in the GYE in violation of the ESA13

 2. The UGRA Project will cause unauthorized take of the endangered Kendall Warm Springs dace in violation of the ESA16

B. Defendants’ Actions Will Cause Irreparable Injury Absent an Injunction19

C. The Balance of Equities and Public Interest Tip Sharply in Plaintiffs’ Favor21

VI. CONCLUSION25

ADDENDUM

TABLE OF AUTHORITIES

Cases

* *Am. Rivers v. U.S. Army Corps of Eng’rs*,
271 F. Supp. 2d 230 (D.D.C. 2003)19, 21, 22, 23, 24-25

Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987)11, 21, 23

Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 6879

Bluewater Network v. Env’tl. Prot. Agency, 370 F.3d 1 (D.C. Cir. 2004)12

CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738 (D.C. Cir. 1995)10-11

Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075 (9th Cir. 2015)11-12, 21, 22

Crow Indian Tribe v. United States, No. 17-cv-89-MD-DLC,
2018 WL 4145908 (D. Mont. Aug. 30, 2018)19, 20

Crow Indian Tribe v. United States, 343 F. Supp. 3d 999 (D. Mont. 2018)4, 5

Dallas Safari Club v. Bernhardt, No. 19-cv-3696-APM,
2020 WL 1809181 (D.D.C. April 9, 2020)11, 21

Fund for Animals v. Turner, No. 91-cv-2201, 1991 WL 206232 (D.D.C. Sept. 27, 1991)19

* *Hawaii Longline Ass’n v. Nat’l Marine Fisheries Serv.*, 281 F. Supp. 2d 1 (D.D.C. 2003)12

* *Humane Soc’y of the United States v. Kempthorne*,
481 F. Supp. 2d 53 (D.D.C. 2006)11, 20, 22, 23, 24, 25

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)8

Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 886 F.3d 803 (9th Cir. 2018)18-19

Public Employees for Env’tl. Responsibility v. Beaudreau, 25 F. Supp. 3d 67 (D.D.C. 2014)12

Sampson v. Murray, 415 U.S. 61 (1974)11

Sierra Club v. U.S. Army Corps of Eng’rs, 295 F.3d 1209 (11th Cir. 2002)12

* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978)8, 11, 18, 21-22

* *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)11, 21, 22

Winter v. Natural Res. Def. Council, 555 U.S. 710-11

Wis. Gas Co. v. Fed. Energy Regulatory Comm’n, 758 F.2d 669 (D.C. Cir. 1985)21

Statutes

5 U.S.C. § 706(2)(A)12

16 U.S.C. § 1531(b)8

16 U.S.C. § 1532(19)9, 20-21

16 U.S.C. § 1536(a)(2)9, 10

16 U.S.C. § 1536(b)(3)(A)10

16 U.S.C. § 1536(b)(4)9, 10

16 U.S.C. § 1536(c)9

16 U.S.C. § 1538(a)9, 17

16 U.S.C. § 1539(a)(1)(B)9

Regulations

50 C.F.R. § 17.39, 18, 20-21

50 C.F.R. § 402.0210

50 C.F.R. § 402.14(a)9-10

50 C.F.R. § 402.14(b)(1)9-10

50 C.F.R. § 402.14(g)10

Other Authorities

35 Fed. Reg. 16047 (Oct. 13, 1970)7, 16

39 Fed. Reg. 1175 (Jan. 4, 1974)16

40 Fed. Reg. 31736 (July 28, 1975)3

82 Fed. Reg. 30502 (June 30, 2017)4

GLOSSARY OF ACRONYMS AND TERMS

BiOp – Biological Opinion

ESA – Endangered Species Act

FEIS – Final Environmental Impact Statement

FWS – U.S. Fish and Wildlife Service

GYE – Greater Yellowstone Ecosystem

ITS – Incidental Take Statement

ROD – Record of Decision

UGRA Project – Upper Green River Area Rangeland Project

USFS – U.S. Forest Service

LIST OF EXHIBITS

Exhibit 1	2019 Upper Green River Area Rangeland Project Record of Decision (ROD)
Exhibit 2	2019 Biological Opinion for the Effects to the Grizzly Bear (<i>Ursus arctos horribilis</i>) from the Upper Green River Area Rangeland Project with the reference number 06E13000-2019-F-0012 and accompanying Incidental Take Statement (2019 BiOp)
Exhibit 3	2019 Upper Green River Area Rangeland Project Final Environmental Impact Statement (FEIS)
Exhibit 4	2019 Biological Opinion and Concurrence Letter (2019 Concurrence Letter)
Exhibit 5	Revised Grizzly Bear Recovery Plan, Part One (USFWS 1993)
Exhibit 6	George Wuerthner, <i>Wildlife Versus Livestock in the Upper Green</i> , available at https://www.thewildlifeneews.com/2019/02/03/wildlife-versus-livestock-in-the-upper-green/ (last visited May 7, 2020)
Exhibit 7	Biological Opinion for the 2014 Supplement to the 2013 Supplement and 2010 Amendment to the 1999 Biological Assessment for Livestock Grazing on the Northern Portions of the Pinedale Ranger District, 06813000-2014-F-0040 (2014 BiOp)
Exhibit 8	Upper Green River Area Rangeland Project Fisheries Report (Fisheries Report) (USFS Sept. 2015)
Exhibit 9	Kendall Warm Springs Draft Revised Recovery Plan (USFWS 2012)
Exhibit 10	Kendall Warm Springs Dace 5-Year Review (USFWS 2017)
Exhibit 11	2019 Known and Probable Grizzly Bear Mortalities in the Greater Yellowstone Ecosystem, Inter-Agency Grizzly Bear Study Team, available at https://www.usgs.gov/data-tools/2019-known-and-probable-grizzly-bear-mortalities-greater-yellowstone-ecosystem (last visited May 7, 2020)

I. INTRODUCTION

Plaintiffs Western Watersheds Project, Alliance for the Wild Rockies, and Yellowstone to Uintas Connection respectfully move this Court for a preliminary injunction to prevent the unlawful killing and harm (“take”) of two species protected by the Endangered Species Act (ESA): the grizzly bear, listed as “threatened,” and the Kendall Warm Springs dace, listed as “endangered.”

As part of the Upper Green River Area Rangeland (UGRA) Project, the U.S. Forest Service (USFS) has authorized ten-year livestock grazing permits for six allotments within suitable grizzly bear habitat on the Bridger-Teton National Forest. Because permitted livestock grazing will adversely impact grizzly bears in the Greater Yellowstone Ecosystem (GYE) population, USFS consulted with the U.S. Fish and Wildlife Service (FWS). However, FWS produced a flawed biological opinion and incidental take statement authorizing the lethal removal of up to 72 bears over ten years from the six allotments. Three bears have already been killed pursuant to this authorization. FWS placed no limits on the number of female grizzly bears that can be killed and failed to evaluate the effects of killing any number of female bears on the GYE population.

The Kendall Warm Springs on the Bridger-Teton National Forest provide the only known habitat in the world for the Kendall Warm Springs dace. Through the UGRA Project, USFS also authorized cattle herding and trailing through an enclosure surrounding the Kendall Warm Springs. Despite acknowledging that herding cattle through the enclosure could harm the dace and its habitat, USFS did not receive authorization under the ESA to allow such take. Thus, harm to the dace from cattle herding is unauthorized and in violation of the ESA.

Under the UGRA Project Record of Decision (ROD), USFS permits livestock grazing to begin on the six allotments on June 14, 2020. Plaintiffs request this Court enjoin the lethal removal of grizzly bears on these six allotments as authorized by FWS’s 2019 Biological Opinion and

Incidental Take Statement, and the herding of cattle through the Kendall Warm Springs enclosure as authorized by USFS's UGRA Project ROD. Plaintiffs do not request this Court enjoin livestock grazing at this time except as to herding cattle through the Kendall Warm Springs enclosure as specified below. This requested preliminary injunction, though narrow in scope, is warranted to maintain the *status quo* and prevent imminent, irreparable harm to grizzly bears, Kendall Warm Springs dace, and Plaintiffs' interests until this Court has the opportunity to issue a final decision on the merits of this case.

II. FACTUAL BACKGROUND

On October 11, 2019, USFS authorized domestic livestock grazing permits across 170,643 acres of suitable grizzly bear habitat within the Upper Green River area of the Greater Yellowstone Ecosystem. ROD/Exhibit 1 at 1¹. The UGRA Project allows 8,722 cow/calf pairs and 47 horses to graze six allotments on the Bridger-Teton National Forest from June 14 to October 15 for the next ten years. *Id.* at 15. Because the UGRA Project will adversely affect grizzly bears, USFS engaged in formal consultation with FWS pursuant to section 7 of the ESA. As the culmination of the formal consultation process, FWS issued a Biological Opinion for the Effects to the Grizzly Bear (*Ursus arctos horribilis*) from the Upper Green River Area Rangeland Project with the reference number 06E13000-2019-F-0012 (2019 BiOp), along with an accompanying Incidental Take Statement (Exhibit 2).

USFS also authorized cattle herding through the only known habitat for the Kendall Warm Springs dace. UGRA Project Final Environmental Impact Statement (FEIS)/Exhibit 3 at 289. Grazing permittees herd their cattle to and from the six allotments during spring and fall on a

¹ The documents cited within this Memorandum are provided as Exhibits (*see* Declaration of Kristine Akland) for the Court's convenience. The citations reference the following: (Document Name)/(Exhibit number) at (internal page number).

“driveway” along the Upper Green River. FEIS/Exhibit 3 at 65. When passing by the Kendall Warm Springs, USFS allows cattle to trail through the enclosure and the only known population of the endangered dace. 2019 Biological Opinion and Concurrence Letter (2019 Concurrence Letter)/Exhibit 4 at 6. Although both USFS and FWS acknowledged cattle herding through the Kendall Warm Springs enclosure will alter dace habitat, FWS concurred with USFS’s opinion that the UGRA Project would “not likely adversely affect” the dace. *Id.*

A. Grizzly Bears in the Greater Yellowstone Ecosystem

FWS listed grizzly bears in the “48 conterminous states” as “threatened” under the ESA in 1975. 40 Fed. Reg. 31736 (July 28, 1975). Since receiving federal protection, grizzly bear numbers have increased to about 2,000 individuals in the Lower 48, spread among five isolated population areas that constitute less than two percent of the species’ former range south of the Canadian border. *See* 2019 BiOp/Exhibit 2 at 13-14. One of the grizzly bear’s isolated population areas is the Greater Yellowstone Ecosystem. *Id.*

FWS first completed a recovery plan for the grizzly bear in 1982, and revised the plan in 1993, detailing recovery objectives and strategies for grizzly bears. *Id.* at 13. FWS supplemented the Revised Recovery Plan further in 2007 to include the “Final Conservation Strategy,” and in 2017 to include “Revised Demographic Recovery Criteria for the Yellowstone Ecosystem.” *Id.* at 13. The 2017 supplement’s revised criteria focus on maintaining a minimum population size with a specific number of females with cubs-of-the-year; ensuring occupancy of bear management units by female grizzly bears with young; and limiting mortality rates of females. *Id.* at 18.

Grizzly bears reproduce very slowly; most females do not give birth until the age of five years, and litter sizes are small. 2019 BiOp/Exhibit 2 at 12. Because cubs stay with the mother for up to two years, there are lengthy periods between litters. *Id.* According to FWS, “providing

maximum protection for females is essential to recovery” of grizzly bears, because females and dependent cubs are key to the species’ survival. Revised Grizzly Bear Recovery Plan, Part One/Exhibit 5 at 5 (USFWS 1993). FWS acknowledges that the GYE grizzly bear population is more sensitive to annual survival of adult females than to any other single vital rate (*e.g.*, Knight & Eberhardt 1985; Hovey & McLellan 1996; Schwartz *et al.* 2006). *See* 2019 BiOp/Exhibit 2 at 21. In other words, the recruitment and survival rates for reproductive-aged females strongly affect the increase or decrease of the whole GYE population. *See* Declaration of Dr. David Mattson ¶ 21.

According to FWS, “[t]he two primary challenges in grizzly bear conservation are the reduction of human caused mortality and the conservation of remaining habitat.” 2019 BiOp/Exhibit 2 at 13 (citing USFWS 1993). Grizzly bear persistence is “negatively associated with human and livestock densities.” *Id.* at 27 (citing Mattson & Merrill 2002). Between 1997 and 2017, over 70 percent of all grizzly bear mortalities in the GYE stemmed from anthropogenic causes, as opposed to natural causes. *Id.* at 20. Of these mortalities, at least 86 resulted from conflicts with livestock. *Id.* Meat from livestock and other large herbivores is a high-quality grizzly bear food. Mattson Decl. ¶ 9. If livestock are available to grizzly bears, some level of depredation will inevitably occur and can lead to local increases in bear densities. *Id.* ¶¶ 5 and 6. When other high-quality foods are not as abundant (such as whitebark pine seeds and army cutworm moths), bears depend more on meat from livestock. *Id.* ¶ 7.

In 2017, FWS removed ESA protections for grizzly bears in the Greater Yellowstone Ecosystem. 82 Fed. Reg. 30502 (June 30, 2017). However, following an order from the U.S. District Court for the District of Montana, FWS re-listed the GYE grizzly population as “threatened.” *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1013 (D. Mont. 2018). The court emphasized the importance of connectivity between grizzly bear populations:

[D]eased protections in the Greater Yellowstone Ecosystem necessarily translate to decreased chances for interbreeding. That the Greater Yellowstone grizzly delisting may influence the other continental populations should come as no surprise to the Service; indeed the isolation and lack of connectivity between grizzly populations was a recognized threat at the time of the original listing.

Crow Indian Tribe, 343 F. Supp. 3d at 1014. The Montana District Court ultimately held that FWS had failed to consider how removal of protections for the GYE grizzly population would affect other isolated grizzly populations. *Id.* at 1013.

B. The Upper Green River Area in the Greater Yellowstone Ecosystem

The Greater Yellowstone Ecosystem is one of the only places in the Lower 48 United States that still supports a full complement of native wildlife, including moose, elk, pronghorn, wolves, and grizzly bears. *See* FEIS/Exhibit 3 at 2. The region's forests, meadows, high plains, and mountainous terrain comprise one of Earth's largest temperate-zone ecosystems still existing in a mostly-intact state. *See id.* The Upper Green River area is in the southern end of the GYE, and has been compared to Yellowstone National Park's world-renowned Lamar Valley in terms of biodiversity richness. George Wuerthner, *Wildlife Versus Livestock in the Upper Green*, available at <https://www.thewildlifeneeds.com/2019/02/03/wildlife-versus-livestock-in-the-upper-green/> (last visited May 7, 2020) (Exhibit 6).

The Upper Green River area lies at an important crossroads and connection point for many species as they forage for food, migrate, and disperse into surrounding areas. *See* FEIS/Exhibit 3 at 448. Both the Wyoming Range, south of the Upper Green River area, and the Wind River Range, southeast of the Upper Green River area, contain ample potential suitable habitat for grizzly bears. Mattson Decl. ¶ 33. The UGRA Project allotments sit squarely astride connective habitat between the core of grizzly bear distribution in the GYE and this potential habitat. *See* FEIS/Exhibit 3 at xxxi. However, the amount of grizzly bear-related conflicts in the Upper Green River area is 9 to 24

times greater than any other complex of allotments in the GYE. Mattson Decl. ¶ 25. This creates a “fracture zone” between suitable grizzly bear habitat areas. *Id.* ¶ 34. USFS recognizes the UGRA Project area as a “mortality sink” for female grizzly bears due to past and expected lethal removal. FEIS/Exhibit 3 at 325. Dynamics associated with depredation of livestock in the Upper Green River area strongly resemble those of an “ecological trap,” as has been described for grizzly and brown bears elsewhere (Knight *et al.* 1988; Falucci *et al.* 2009; Northup *et al.* 2012; Lamb *et al.*, 2017). Mattson Decl. ¶ 29.

C. History of Incidental Take of Grizzly Bears in the Upper Green River Area.

In a 1999 biological opinion, FWS anticipated the lethal removal of five grizzly bears (four males and one female) over an indefinite period of time as a result of USFS-authorized livestock grazing on the Upper Green River area allotments. 2019 BiOp/Exhibit 2 at 38. By 2009, USFS had reached the level of anticipated take in the 1999 biological opinion. *See* Biological Opinion for the 2014 Supplement to the 2013 Supplement and 2010 Amendment to the 1999 Biological Assessment for Livestock Grazing on the Northern Portions of the Pinedale Ranger District, 06813000-2014-F-0040 (2014 BiOp)/Exhibit 7 at 2. FWS produced another biological opinion in January 2011 that anticipated the take of six grizzly bears within any consecutive three-year period. *Id.* USFS reached this level of take by August of 2012, and exceeded it later that month. *Id.* FWS opted to provide USFS a short-term incidental take statement that allowed three bears to be lethally removed during the 2012 grazing season. *Id.* at 3.

In 2013, FWS again produced another biological opinion that increased the anticipated lethal take to 11 grizzly bears within any consecutive three-year period as a result of USFS-authorized livestock grazing in the Upper Green River area. *Id.* FWS directed USFS to limit the proportion of lethally removed bears to three females and eight males. *Id.* However, four grizzly

bears (two males and two females) were lethally removed during the 2013 grazing season alone. 2014 BiOp/Exhibit 7 at 3. USFS believed it would exceed the anticipated lethal take of female grizzly bears during the first three-year consecutive period. *Id.* at 3. In 2014, FWS produced yet another biological opinion supplement in which it anticipated and exempted the lethal removal of 11 grizzly bears within any consecutive three-year period. *See id.* at 39. That biological opinion required 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.” *Id.* at 43 (emphasis added). Between 2010 and 2018, 35 grizzly bears were lethally removed from the UGRA Project allotments. 2019 BiOp/Exhibit 2 at 31.

D. Kendall Warm Springs Dace

The Kendall Warm Springs dace (*Rhinichthys osculus thermalis*) is a small fish found in the Kendall Warm Springs on the Bridger-Teton National Forest and nowhere else in the world. FEIS/Exhibit 3 at 275. Due to its incredibly limited range and threats to its continued existence, including livestock impacts, the Kendall Warm Springs dace has been considered “endangered” since 1970. 35 Fed. Reg. 16047 (Oct. 13, 1970). The Kendall Warm Springs consists of a 328-yard-long tributary to the Green River warmed to a constant temperature of 85 degrees Fahrenheit by numerous thermal seeps. FEIS/Exhibit 3 at 275. According to FWS, the dace shelters in the Springs’ underwater plants: “[a]quatic vegetation provides important hiding cover for the dace.” *Id.*

USFS maintains a 160-acre fenced enclosure around the Kendall Warm Springs to protect the dace from livestock impacts. 2019 Concurrence Letter/Exhibit 4 at 6. However, through the UGRA Project, USFS allows cattle within the enclosure when herded by permittees to and from the Project area’s grazing allotments. FEIS/Exhibit 3 at 289. Also, USFS acknowledges that at times the fence could fail and cattle could access the springs, resulting in livestock-related impacts to the

dace. Upper Green River Area Rangeland Project Fisheries Report (Fisheries Report)/Exhibit 8 at 46 (USFS Sept. 2015). USFS and FWS have not engaged in formal section 7 ESA consultation regarding the UGRA Project's impacts on the Kendall Warm Springs dace.

III. LEGAL BACKGROUND

A. The Endangered Species Act's Congressional Mandate

The Endangered Species Act “seeks to protect species of animals against threats to their continuing existence caused by man.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558 (1992). Its purposes are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species” 16 U.S.C. § 1531(b). In *Tennessee Valley Authority v. Hill*, the Supreme Court determined that “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” 437 U.S. 153, 184 (1978). “This is reflected not only in the stated policies of the Act, but in literally every section of the statute.” *Id.*

The Supreme Court also recognized that enactment of the ESA constituted “an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species,” and “reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Id.* at 185. As such, “[a]ll persons, including federal agencies, are specifically instructed not to ‘take’ endangered species,” and “[a]gencies in particular are directed by . . . the Act to ‘use . . . all methods and procedures which are necessary’ to preserve endangered species.” *Id.* at 184 (citations omitted) (emphasis in original).

B. The Prohibition of Take

Section 9 of the ESA strictly prohibits “take” of endangered species. 16 U.S.C. § 1538(a). The ESA’s wide-ranging definition of “take” underscores the broad scope of this prohibition: “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Under operative ESA implementing regulations, “harm” is further defined to mean:

an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3. Harm to a species may be indirect, in that the harm may be caused by habitat modification. *See Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 700 (1995). Thus, if an action modifies a listed species’ habitat to such an extent that it “significantly impair[s] essential behavioral patterns, including breeding, feeding, or sheltering,” the actor has committed take. 50 C.F.R. § 17.3. Such take is unauthorized, *i.e.*, unlawful, unless covered by an “incidental take permit” issued by FWS pursuant to section 10 of the ESA, or as exempted by an “incidental take statement” issued at the conclusion of formal section 7 consultation. *See* 16 U.S.C. §§ 1539(a)(1)(B) and 1536(b)(4).

3. Section 7 Consultation

Section 7 of the ESA requires that every federal agency, in consultation with the Interior Secretary, “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). Under the consultation process, an action agency prepares a biological assessment that evaluates the impacts of its proposed actions on listed species. *Id.* § 1536(c). If the action agency determines a proposed action is likely to adversely affect a listed species, formal consultation with

FWS is required. 50 C.F.R. § 402.14(a) and (b)(1).² At the conclusion of formal consultation, FWS must issue a biological opinion detailing “how the agency action affects the species” and whether the action is “likely to jeopardize the continued existence” of the species. 16 U.S.C. §§ 1536(a)(2) and (b)(3)(A); 50 C.F.R. § 402.14(g). If FWS reaches a “no jeopardy” determination, it may provide for incidental take of the species. 16 U.S.C. § 1536(b)(4).

Through the section 7 formal consultation process, FWS must consider all “relevant information,” evaluate the “current status” of the species at issue, and evaluate effects of the proposed action using the “best scientific and commercial data available.” 50 C.F.R. § 402.14(g)(1)-(4) and (8). Under operative regulations in place at the time FWS produced the 2019 Biological Opinion at issue here, “effects of the action” include “direct and indirect effects of an action on the species . . . together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” *Id.* § 402.02. 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.* In addition, section 7 of the ESA requires an incidental take statement to specify the “impact” of the incidental take on the species. 16 U.S.C. § 1536(b)(4)(C)(i).

IV. STANDARDS OF REVIEW

A. Preliminary Injunction

According to the Supreme Court, “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is

² All citations to ESA implementing regulations are to those in effect at the time FWS produced the 2019 Biological Opinion and Incidental Take Statement, included as an addendum to this Memorandum.

in the public interest.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *see also CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). Courts within the D.C. Circuit use a “sliding scale” approach to these four factors, allowing an “unusually strong showing on one of the factors” to compensate for a less-strong showing on another factor. *Dallas Safari Club v. Bernhardt*, No. 19-cv-3696-APM, 2020 WL 1809181, at *3 (D.D.C. April 9, 2020). Still, “a movant must at a minimum demonstrate irreparable harm, which has ‘always’ been ‘[t]he basis of injunctive relief in the federal courts.’” *Id.* at *3 (citing *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quotation omitted)).

However, the Supreme Court has also stated that requests for injunctive relief to prevent harm to species protected by the Endangered Species Act are not subject to the traditional equitable discretion afforded to other requests for injunctive relief:

In *TVA v. Hill*, we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity. There, we thought that “[o]ne would be hard pressed to find a statutory provision whose terms were any plainer” than that before us . . . The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.

Weinberger v. Romero-Barcelo, 456 U.S. 305, 313-14 (1982) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978)); *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 543 n.9 and 544 (1987) (requests for injunctions under the Alaska National Interest Lands Conservation Act are subject to equitable discretion not afforded to requests under the ESA). Accordingly, this Court has found that the “Congressional intent behind the adoption of the ESA and iterated throughout the language of the Act itself makes crystal clear that the ‘public interest’ lies in the protection of the endangered [species]” *Humane Soc’y of the United States v. Kempthorne*, 481 F. Supp. 2d 53, 71 (D.D.C. 2006) (vacated on other grounds). Similarly, the Ninth Circuit held that in ESA cases, Congress altered the injunction test so that “the equities and public interest factors always tip in

favor of the protected species.” *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1090-91 (9th Cir. 2015).

B. Endangered Species Act Claims

Claims that agency actions violate the ESA are subject to review under the arbitrary and capricious standard defined by the Administrative Procedure Act. *Hawaii Longline Ass’n v. Nat’l Marine Fisheries Serv.*, 281 F. Supp. 2d 1, 31 (D.D.C. 2003) (citing *Sierra Club v. U.S. Army Corps of Eng’rs*, 295 F.3d 1209, 1216 (11th Cir. 2002); *see also* 5 U.S.C. § 706(2)(A)). Under this standard,

[t]he court will overturn an agency’s decision as arbitrary and capricious under “hard look” review if it suffers from one of the following: (1) the decision does not rely on the factors that Congress intended that Congress the agency to consider; (2) the agency failed entirely to consider an important aspect of the problem; (3) the agency offers an explanation which runs counter to the evidence; or (4) the decision is so implausible that it cannot be the result of differing viewpoints or the result of agency expertise.

Hawaii Longline Ass’n, 281 F. Supp. 2d at 31 (citation omitted). When evaluating whether an agency acted arbitrarily or capriciously, a court must “ascertain whether the administrative record demonstrates that the agency has considered the ‘relevant data and articulate[d] a satisfactory explanation for its action’ and whether the agency’s choice reflects ‘a rational connection between the facts found and the choice made.’” *Public Employees for Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 112 (D.D.C. 2014) (citing *Bluewater Network v. Envtl. Prot. Agency*, 370 F.3d 1, 11 (D.C. Cir. 2004)).

V. ARGUMENT

Plaintiffs are entitled to the requested preliminary injunction because the public interest and balance of equities tip sharply in their favor, there is a likelihood of irreparable harm in the absence of preliminary injunctive relief, and Plaintiffs are likely to succeed on the merits.

A. Plaintiffs Will Succeed on the Merits.

FWS's 2019 Biological Opinion and Incidental Take Statement (ITS) are arbitrary and capricious and violate section 7 of the ESA. FWS failed to consider the effects a high number of female grizzly bears killed could have relative to the total authorized take of 72 bears as well as to the broader GYE population. In addition, USFS's adoption of the UGRA Project Record of Decision violates section 9 of the ESA by allowing unauthorized take of the endangered Kendall Warm Springs dace.

1. FWS failed to consider the most important aspect of the grizzly bear's recovery and survival in the GYE in violation of the ESA.

Here, in its 2019 Biological Opinion and Incidental Take Statement, FWS failed to consider and apply perhaps the most important factor regarding the recovery and survival of the GYE grizzly bear population: minimizing female grizzly bear mortality. Neither the Biological Opinion nor the accompanying ITS evaluate the possibility of a disproportionately high number of female grizzly bears being lethally taken among the total anticipated 72 bears killed. Further, neither document estimates or limits the incidental take of female grizzly bears in the UGRA Project allotments over the next ten years. FWS's failure to consider this key aspect of grizzly bear recovery and survival before reaching its "no jeopardy" determination renders both the 2019 Biological Opinion and ITS arbitrary and capricious, in violation of the ESA.

FWS has long recognized that "providing maximum protection for females is essential to recovery" of grizzly bears, because females and dependent cubs are key to the species' survival. Revised Recovery Plan, Part One/Exhibit 5 at 5 (USFWS 1993). In the 2019 Biological Opinion, FWS states that "[t]he long-term survival of the Yellowstone grizzly bear population over the next 100 to 200 years is contingent upon minimizing average annual mortality within the total population *and especially that of adult females* (Knight and Eberhardt, 1984, 1985)." 2019 BiOp/Exhibit 2 at

21 (emphasis added). Further, according to FWS, “[t]he low survival rate of adult female grizzly bears was identified as the single most important factor in causing the decline of the Yellowstone population prior to the mid-1980’s (Knight and Eberhardt 1985).” 2019 BiOp/Exhibit 2 at 17.

Outside experts agree: “[The] increase or decline of the population will be strongly affected by the rates at which reproductive-aged females are recruited and survive.” Mattson Decl. ¶ 21.

The recovery criteria FWS purports to follow for the GYE grizzly population include demographic monitoring area annual mortality thresholds that are lower for independent females than independent males (9 percent versus 20 percent). 2019 BiOp/Exhibit 2 at 22. As FWS acknowledges, grizzly bears reproduce very slowly; most females do not give birth until the age of five years, and litter sizes are small. *Id.* at 12. Further, cubs stay with their mother for up to two years, so multiple years may pass between litters. *Id.* For these reasons, any female mortality has a much greater impact on the GYE population’s stability as a whole than male mortality does.

Nowhere in the 2019 Biological Opinion does FWS indicate that emphasis on minimizing female grizzly bear mortality no longer reflects the best available science. Yet neither the 2019 Biological Opinion nor the accompanying ITS evaluate the effects that any proportion of lethally removed female grizzly bears among the anticipated 72 deaths might have on the UGRA Project allotments or the GYE grizzly bear population. Both USFS and FWS have previously identified the UGRA Project allotments as a “population sink” for female grizzlies, *i.e.*, where mortality is greater than survival. *See* FEIS/Exhibit 3 at 325; *see also* 2014 BiOp/Exhibit 7 at 30-31. Even with that knowledge, FWS places no temporal or numerical limits on take of females within the total 72 exempted lethal removals authorized by the current ITS. *See* 2019 BiOp/Exhibit 2 at 48. All or a majority of the bears killed pursuant to the ITS *could* be female. This stands in stark contrast to

previous biological opinions and incidental take statements for the Upper Green River area allotments.

In its 1999 biological opinion, FWS anticipated and authorized the lethal removal of five grizzly bears—specifically, four males and just one female. 2014 BiOp/Exhibit 7 at 43. Successive opinions and statements specifically differentiated between lethal take of male and female grizzly bears. 2019 BiOp/Exhibit 2 at 38; 2014 BiOp/Exhibit 7 at 43. FWS’s 2013 ITS allowed up to 11 grizzlies to be killed within a three-year consecutive period, with no more than three female grizzly bears among the authorized 11 lethal removals. 2019 BiOp/Exhibit 2 at 38. FWS’s 2014 ITS for the allotments required USFS to “contact [FWS] to discuss the adequacy of existing mechanisms to minimize additional take” if a certain number of female grizzly bears were lethally removed among the total number in a given year. 2014 BiOp/Exhibit 7 at 43.

Here, despite exponentially increasing the total exempted lethal removals of grizzly bears from the 2014 ITS (11 over five years versus 72 over ten years), the 2019 Biological Opinion and ITS specify no reporting triggers or other limitations on the lethal take of female grizzly bears in the UGRA Project allotments. *See* 2019 BiOp/Exhibit 2 at 48. Nor does FWS assess the impact any given number of female grizzlies taken will have, either in the UGRA Project allotments or on the GYE population as a whole. Further, the agency draws no connections between its past identification of the UGRA Project allotments as a “mortality sink” for female grizzlies and its authorization of 72 additional grizzly bear deaths over ten years without sex-based limitations. Without explanation, FWS’s ITS decision runs counter to the Revised Recovery Plan’s clear statement that “providing maximum protection for females is essential to [the species’] recovery.” Revised Recovery Plan, Part One/Exhibit 5 at 5 (USFWS 1993).

If minimizing annual mortality of female grizzly bears is key to the GYE population's long-term survival, FWS must address the proportion of female grizzly bears that may be killed among the total anticipated take within the UGRA Project allotments. Merely stating how important female grizzly bears are to the population's recovery and survival does not address this relevant factor in a meaningful way when it has not been incorporated into any analysis regarding anticipated take. Rather, FWS must apply the best available science to its analysis of the effects of the proposed action.

FWS has failed to engage in this analysis or application here; absent such analysis, FWS has not fulfilled its duty to evaluate the effects of livestock grazing in the UGRA Project allotments as required, nor has it specified the impact of authorized incidental take. The 2019 Biological Opinion and accompanying ITS offer no explanation for why FWS has deviated from its past practice of differentiating between male and female grizzly deaths in the same allotments. Neither do they articulate a rational connection between the science before FWS—that protection of female grizzlies is paramount, and the UGRA Project allotments currently pose a “population sink” for female grizzlies—and FWS's decision not to limit lethal take of females among the 72 total anticipated bears killed. In sum, FWS has not used the best available scientific data, has failed to consider an important aspect of the problem before it, and its “no jeopardy” determination and the ITS are arbitrary and capricious and violate the ESA.

2. The UGRA Project will cause unauthorized take of the endangered Kendall Warm Springs dace in violation of the ESA.

The endangered Kendall Warm Springs dace lives in the Kendall Warm Springs and nowhere else in the world. FEIS/Exhibit 3 at 275. Its habitat is extremely limited, part of the reason FWS listed the dace as endangered. 35 Fed. Reg. 16047 (Oct. 13, 1970); 39 Fed. Reg. 1175 (Jan. 4, 1974). USFS's authorization of cattle herding through the Kendall Warm Springs enclosure as part

of the UGRA Project will result in take of the Kendall Warm Springs dace with neither an incidental take permit issued pursuant to section 10 of the ESA, nor an incidental take statement issued pursuant to section 7 of the ESA. This violates the ESA's section 9 prohibition of take of endangered species. 16 U.S.C. § 1538(a).

FWS has long identified livestock impacts as one of the historic threats to the Kendall Warm Springs dace. Kendall Warm Springs Draft Revised Recovery Plan/Exhibit 9 at A-3 (USFWS 2012). According to FWS, “[g]iven the narrow distribution and small population size of [the dace], threats to habitat have the potential to cause catastrophic impacts to the entire species.” Kendall Warm Springs Dace 5-Year Review/Exhibit 10 at 1 (USFWS 2017). Because “[a]quatic vegetation provides important hiding cover for the dace,” the “destruction of riparian streamside vegetation or in-stream habitat” as a potential threat for the dace. Fisheries Report/Exhibit 8 at 7; 2019 Concurrence Letter/Exhibit 4 at 6. USFS further concedes that livestock can erode stream banks and cause bank instability, which increases the discharge of sediment load and decreases channel stability. FEIS/Exhibit 3 at 283. According to USFS, “[s]uch degraded riparian and channel conditions can affect fish by . . . reducing cover through lack of undercut banks or overhead vegetation, and decreasing terrestrial and aquatic fish food items (Platts 1991).” *Id.*

USFS admits that herding cattle through the Kendall Warm Spring enclosure “could cause dace to temporarily switch habitat, elevate turbidity [in the springs], and alter submergent vegetation cover.” FEIS/Exhibit 3 at 289. Yet given the extremely limited habitat available within the 328-yard-long Kendall Warm Springs, it is unclear to what habitat dace could temporarily switch. USFS admits that livestock can cause a reduction of deep-rooted vegetation in the riparian area, vegetation that “provides important hiding cover for the dace.” Fisheries Report/Exhibit 8 at 7. In addition,

livestock also cause decreased stream bank stability and increased sediment delivery, which further negatively impact the dace. FEIS/Exhibit 3 at 287-88.

USFS's conclusion that impacts from herding thousands of cattle twice yearly through the Kendall Warm Springs exclosure will not adversely affect the endangered dace is not grounded in the facts before the agency. *See* FEIS/Exhibit 3 at 286. The Kendall Warm Springs provide the *only* habitat for this endangered species; protection of the dace's habitat is critical to ensure its survival. If the dace's habitat in the springs is degraded, no alternate habitat is available for it. By allowing thousands of cattle through the exclosure twice a year, USFS facilitates "a threat to habitat [that has] the potential to cause catastrophic impacts to the entire species." *See* Kendall Warm Springs Dace 5-Year Review/Exhibit 10 at 1 (USFWS 2017). Further, USFS concedes that herding through the exclosure is not necessary to access the UGRA Project allotments: "permittees . . . often opt to herd the cattle around the exclosure or allow them to drift around the exclosure." FEIS/Exhibit 3 at 289. By allowing harm to the dace that is not even necessary to facilitate permittees' livestock trailing, USFS ignores Congress's mandate to "afford first priority to the national policy of saving endangered species." *Tenn. Valley Auth. v. Hill*, 437 U.S. at 185.

Despite these impacts to the dace's only known habitat, USFS authorized the herding of 8,722 cow/calf pairs twice a year through the Kendall Warm Springs exclosure as permittees trail their cattle to and from the UGRA Project allotments. By allowing thousands of cattle to displace dace and alter the aquatic vegetation dace rely on for hiding cover, USFS authorized the impairment of the dace's "essential behavioral patterns, including . . . *sheltering*." 50 C.F.R. § 17.3 (emphasis added). This constitutes harm to the dace, and unlawful take under the ESA. Because the UGRA Project allows unauthorized take of the Kendall Warm Springs dace, USFS is in violation of section 9 of the ESA.

B. Defendants' Actions Will Cause Irreparable Injury Absent an Injunction.

Absent an injunction in this case, grizzly bears and Kendall Warm Springs dace will be taken in the UGRA Project allotments. Plaintiffs actively engage in scientific research and observation of grizzly bears in the project area, and they will suffer concrete and irreparable injury from the lethal take of grizzly bears pursuant to the 2019 Biological Opinion and Incidental Take Statement. Similarly, Plaintiffs observe and enjoy the Kendall Warm Springs dace and its functioning habitat, and will suffer concrete and irreparable injury from the damage to dace habitat and individual fish that herding cattle through the Kendall Warm Springs enclosure will cause.

The take of an individual ESA-listed species constitutes irreparable harm. *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 258-59 (D.D.C. 2003) (citing *Fund for Animals v. Turner*, No. 91-cv-2201, 1991 WL 206232, at *8 (D.D.C. Sept. 27, 1991)). According to this Court,

even where there was “not the remotest possibility that [the planned agency activity] during the period in which a preliminary injunction would be in place [would] eradicate the species,” the strong congressional mandate contained in the ESA to protect endangered and threatened species supported the finding that “the loss even of the relatively few [individuals] that are likely to be taken through [an agency action] during the time it will take to reach a final decision in this case is a significant, and undoubtedly irreparable, harm.

Am. Rivers, 271 F. Supp. 2d at 258-59 (citation omitted). Specifically citing the ESA's strong congressional mandate, in *Fund for Animals v. Turner* this Court held that killing between three and nine grizzly bears during a case's pendency constituted irreparable harm. No. 91-cv-2201, 1991 WL 206232, at *8. Similarly, the Montana District Court recently held that “the threat of death to individual grizzly bears posed by [a] scheduled hunt is sufficient” to show irreparable harm. *Crow Indian Tribe v. United States*, No. 17-cv-89-MD-DLC, 2018 WL 4145908, at *1 (D. Mont. Aug. 30, 2018). Harm to members of a listed species “is irreparable because once a member of an endangered species has been injured, the task of preserving that species becomes all the more

difficult.” *Crow Indian Tribe*, 2020 WL 4145908, at *1 (quoting *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018)).

In *Humane Society of the United States v. Kempthorne*, this Court reiterated that in order to establish irreparable injury in an ESA case, a plaintiff need not show jeopardy to the continued existence of a species. 481 F. Supp. 2d 53, 69 (D.D.C. 2006). There, “[t]he Court agree[d] with Plaintiffs’ contention that ‘[r]equiring Plaintiffs to show jeopardy to the existence of a species in order to secure injunctive relief would stand the ESA on its head.’” *Id.* To hold otherwise, “courts would be without power to prevent harm to endangered species before a species was on the brink of extinction.” *Humane Soc’y of the United States*, 481 F. Supp. 2d at 69.

Here, it is undisputed that grizzly bears, a threatened species, will be killed as a result of FWS’s authorization of 72 lethal grizzly removals. As of the date of this filing, at least three grizzly bears have already been killed in the UGRA Project allotments since the 2019 Biological Opinion and Incidental Take Statement took effect. *See* 2019 Known and Probable Grizzly Bear Mortalities in the Greater Yellowstone Ecosystem, Inter-Agency Grizzly Bear Study Team/Exhibit 11, available at <https://www.usgs.gov/data-tools/2019-known-and-probable-grizzly-bear-mortalities-greater-yellowstone-ecosystem> (last visited May 7, 2020). FWS estimates five additional bears could be lethally removed from the allotments in 2020, and another six in 2021. 2019 BiOp/Exhibit 2 at 44 and 49. Thus, more grizzly bears will be killed while the Court reaches a final decision on the merits of this case in the absence of a preliminary injunction, an unlimited proportion of which could be females. In addition, USFS admits that herding cattle through the only known habitat and population of the endangered Kendall Warm Springs dace will “cause dace to temporarily switch habitat, elevate turbidity, and alter submergent vegetation cover,” all of which falls within the ESA

definition of “harm”—and “take”—as set forth above. FEIS/Exhibit 3 at 289; 50 C.F.R. § 17.3; 16 U.S.C. § 1532(19).

Livestock are set to return to the UGRA Project allotments on June 14 of this year; the harm is imminent, as well as “actual and not theoretical.” *Dallas Safari Club*, 2020 WL 1809181, at *4 (citing *Wis. Gas Co. v. Fed. Energy Regulatory Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985)). The deaths of grizzly bears and harm to the Kendall Warm Springs dace are final, and the injury suffered by Plaintiffs as a result of this take is irreparable. Once individual bears are lethally removed, they cannot be replaced; their loss is permanent. And as FWS admits, grizzly bears as a species reproduce very slowly; restoration of similar numbers of bears in the allotments and GYE population may not occur for years and is not guaranteed. *See* 2019 BiOp/Exhibit 2 at 12. Further, significant impairment of the dace’s essential behavioral patterns, including sheltering, cannot be undone or repaired; once “take” occurs, an individual listed species cannot be “untaken.”

Irreparable harm can be avoided only by the issuance of an injunction. *Am. Rivers*, 271 F. Supp. 2d at 258. The Supreme Court has recognized that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, that is irreparable; if such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco Prod. Co.*, 480 U.S. at 545. Absent an injunction, the lethal removal of grizzly bears and harm to the Kendall Warm Springs dace as authorized here will cause irreparable harm to the two species and to Plaintiffs.

C. The Balance of Equities and Public Interest Tip Sharply in Plaintiffs’ Favor.

According to the Supreme Court, “only an injunction [can] vindicate the objectives of the [ESA].” *Weinberger*, 456 U.S. at 314. Thus, when considering motions for injunctive relief involving the application of the ESA, “courts do not have discretion to balance the parties’

competing interests in ESA cases.” *Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1090 (citing *Tenn. Valley Auth.*, 437 U.S. at 185)). Rather, the preservation of ESA-listed species constitutes “an unparalleled public interest.” *Id.* (citing *Tenn. Valley Auth.*, 437 U.S. at 187-88). Because “Congress’ enactment of the ESA clearly indicates that the balance of interests weighs heavily in favor of protected species,” this Court has also suggested the traditional four-factor preliminary injunction test has been effectively altered in ESA cases so that plaintiffs need only demonstrate a likelihood of irreparable harm and serious questions on the merits in order to be granted injunctive relief. *Am. Rivers*, 271 F. Supp. 2d at 248-49 and 261.

The case at hand involves claims that FWS violated section 7 of the ESA by failing to adequately analyze and evaluate the UGRA Project’s effects on threatened grizzly bears in a lawful biological opinion, as required by the statute and implementing regulations. This case also involves a claim that USFS violated section 9 of the ESA by allowing unauthorized take of the endangered Kendall Warm Springs dace. Because Plaintiffs’ claims challenge the agencies’ failure to comply with their ESA duties to protect threatened and endangered species, the balance of hardships and public interest tip sharply in Plaintiffs’ favor. *See Weinberger*, 456 U.S. at 313-14; *see also Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1090-91. Even if this Court adopts a “conservative” approach and applies all four parts of the test, the public interest and balance of harms weigh in Plaintiffs’ favor in this case. *See Am. Rivers*, 271 F. Supp. 2d at 249.

In an analogous case, this Court preliminarily enjoined FWS and the Wisconsin Department of Natural Resources from killing endangered gray wolves in *Humane Society of the United States v. Kempthorne*, 481 F. Supp. 2d at 57. In that case, FWS issued a permit authorizing the killing of 43 gray wolves pursuant to a lethal depredation control program. *Id.* at 58. There, the defendants claimed that an injunction would harm the state by eliminating its ability to effectively manage

depredating wolves—a necessary action, according to the defendants, “because the wolf population has grown so rapidly . . . occupy[ing] nearly all areas of suitable habitat.” *Humane Soc’y of the United States*, 481 F. Supp. 2d at 70. Regardless, this Court found that the balance of harms tipped in favor of an injunction:

As the lethal take of 43 wolves allowed by the permit at issue qualifies as irreparable environmental injury [] such that “injury is sufficiently likely,” the Court shall apply the principle that “the balance of harms will usually favor the issuance of an injunction to protect the environment” in granting Plaintiffs’ request for preliminary injunctive relief. *See Amoco Prod. Co.*, 480 U.S. at 545, 107 S.Ct. 1396. While 17 wolves had been killed as of August 1, 2006, more wolves would be lethally taken while the Parties await a final decision on the merits in the absence of preliminary injunctive relief.

Id. at 70-71. According to the Court, “Congress’ enactment of the ESA clearly indicates that the balance of interests weighs *heavily* in favor of protected species.” *Id.* at 71 (quoting *Am. Rivers*, 271 F. Supp. 2d at 261) (emphasis in original).

This Court went on to find that the public interest also clearly weighs in favor of an injunction to protect ESA-listed species:

Congressional intent behind the adoption of the ESA and iterated throughout the language of the Act itself makes crystal clear that the “public interest” lies in the protection of the endangered gray wolf—not in the lethal taking of “problem” gray wolves in the hopes of creating a selected-for gray wolf population that never interferes with livestock or hunters’ kills.

Humane Soc’y of the United States, 481 F. Supp. 2d at 71-72.

Similarly, in *American Rivers*, this Court held that harm to listed species that would result from dam operations outweighed the impacts consumers, businesses, and state economies might suffer from the limited injunctive relief the plaintiffs requested in that case—a low flow rate in the Missouri River. *Am. Rivers*, 271 F. Supp. 2d at 238. According to the Court, “[t]he primary economic injuries that would result from the requested injunction” did not outweigh the loss of the

listed species at issue “because, as the Supreme Court noted, the ‘value [of] this genetic heritage is, quite literally, incalculable.’” *Am. Rivers*, 271 F. Supp. 2d at 261.

Here, absent the limited injunctive relief Plaintiffs request, threatened and endangered species will be killed and harmed by Defendants’ actions and authorizations. Lethal removal of grizzly bears pursuant to the 2019 Incidental Take Statement will cause the deaths of individual grizzly bears, likely create orphaned cubs, perpetuate the population sink in the UGRA Project allotments, and decrease the GYE grizzly bear population. Mattson Decl. ¶ 42. At least three bears have already been killed since the ITS took effect, and more bears will be lethally taken while the Parties await a final decision on the merits of this case, according to FWS’s projections. The lethal take of grizzly bears “qualifies as irreparable environmental injury,” tipping the balance of harms to “favor issuance of an injunction” *Humane Soc’y of the United States*, 481 F. Supp. 2d at 71.

In addition, the herding of cattle through the Kendall Warm Springs enclosure will cause the fish “to temporarily switch habitat,” and will “elevate turbidity” in the springs and “alter submergent vegetation cover” the species relies on for shelter. FEIS/Exhibit 3 at 289. Because the Kendall Warm Springs support the only population of the Kendall Warm Springs dace in the entire world, protection of the springs is critical to ensure the species’ survival. Harm to the dace outweighs any harm from excluding cattle from the Kendall Warm Springs enclosure.

On the other hand, Defendants in this case will not suffer any cognizable harm if the Court grants Plaintiffs the limited injunctive relief requested. Defendants will not be allowed to lethally remove grizzly bears from the allotments while this case is pending before the Court, but will suffer no direct harm. Grazing permittees will still be able to turn out cattle on June 14. The turn-out of cattle into habitat historically and presently occupied by native predator species represents a voluntary decision by the UGRA Project allotments’ grazing permittees. Any economic harm to

permittees from livestock lost to grizzly depredation is outweighed by the “incalculable” loss of listed species’ genetic heritage that would result from grizzly deaths. *See Am. Rivers*, 271 F. Supp. 2d at 281. In addition, as indicated above, the permittees often opt to herd their cattle *around* the Kendall Warm Springs enclosure rather than through it. Fisheries Report/Exhibit 8 at 46. Thus, enjoining USFS’s authorization of cattle herding *through* the enclosure will not harm Defendants (or grazing permittees) because herding cattle through the enclosure is not necessary for permittees to access their respective grazing allotments.

Finally, under relevant precedent, the public interest lies in protecting ESA-listed species and not in lethal removal of “problem” grizzly bears or facilitating harm to the only known habitat for an endangered species. *See Humane Soc’y of the United States*, 481 F. Supp. 2d at 72. According to this Court’s and the Supreme Court’s past decisions considering injunctions in ESA cases, and in the absence of cognizable harm to Defendants, here the balance of harms and public interest both tip sharply in favor of issuing the limited injunctive relief Plaintiffs request.

VI. CONCLUSION

For the reasons specified above, Plaintiffs request this Court issue an injunction against the lethal removal of grizzly bears from the UGRA Project allotments pursuant to the 2019 Biological Opinion and Incidental Take Statement and the herding of cattle through the Kendall Warm Springs enclosure as authorized by the UGRA Project Record of Decision. Plaintiffs request this limited injunctive relief in order to maintain the *status quo* and prevent imminent, irreparable harm to grizzly bears, Kendall Warm Springs dace, and Plaintiffs’ interests until this Court has the opportunity to issue a final decision on the merits of this case.

//

Respectfully submitted for the Court's consideration this 7th day of May, 2020.

/s/ David A. Bahr

David A. Bahr
1035 ½ Monroe St
Eugene, OR 97402
(541) 566-6439
davebahr@mindspring.com

/s/ Kristine Akland

Kristine Akland
317 E Spruce St, P.O. Box 7274
Missoula, MT 59807
(406) 544-9863
aklandlawfirm@gmail.com

/s/ John Persell

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

Addendum

Code of Federal Regulations

Title 50. Wildlife and Fisheries

Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations

Subchapter A

Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended ([Refs & Annos](#))

Subpart A. General

This section has been updated. Click [here](#) for the updated version.

50 C.F.R. § 402.02

§ 402.02 Definitions.

Effective: March 14, 2016 to October 27, 2019

Act means the Endangered Species Act of 1973, as amended, [16 U.S.C. 1531 et seq.](#)

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

- (a) actions intended to conserve listed species or their habitat;
- (b) the promulgation of regulations;
- (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
- (d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

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.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

<Text of definition effective until Oct. 28, 2019.>

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

<Text of definition effective Oct. 28, 2019.>

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

<Text of definition effective until Oct. 28, 2019.>

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

<Text of definition effective Oct. 28, 2019.>

Director refers to the Assistant Administrator for Fisheries for the National Marine Fisheries Service, or his or her authorized representative; or the Director of the U.S. Fish and Wildlife Service, or his or her authorized representative.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

<Text of definition effective until Oct. 28, 2019.>

Effects of the action refers to the 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. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain

to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

<Text of definition effective Oct. 28, 2019.>

Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).

<Text of definition added by 84 FR 45016, effective Oct. 28, 2019, as amended by 84 FR 50333.>

Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Framework programmatic action means, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Mixed programmatic action means, for purposes of an incidental take statement, a Federal action that approves action(s) that will not be subject to further section 7 consultation, and also approves a framework for the development of future action(s) that

are authorized, funded, or carried out at a later time and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

<Text of definition added by [84 FR 45016](#), effective Oct. 28, 2019, as amended by [84 FR 50333](#).>

Programmatic consultation is a consultation addressing an agency's multiple actions on a program, region, or other basis. Programmatic consultations allow the Services to consult on the effects of programmatic actions such as:

- (1) Multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas; and
- (2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions.

Proposed critical habitat means habitat proposed in the Federal Register to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

Credits

[[73 FR 76286](#), Dec. 16, 2008; [74 FR 20422](#), May 4, 2009; [80 FR 26844](#), May 11, 2015; [81 FR 7225](#), Feb. 11, 2016; [84 FR 45016](#), Aug. 27, 2019; [84 FR 50333](#), Sept. 25, 2019]

AUTHORITY: [16 U.S.C. 1531 et seq.](#)

Code of Federal Regulations

Title 50. Wildlife and Fisheries

Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations

Subchapter A

Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended ([Refs & Annos](#))

Subpart B. Consultation Procedures

This section has been updated. Click [here](#) for the updated version.

50 C.F.R. § 402.14

§ 402.14 Formal consultation.

Effective: June 10, 2015 to October 27, 2019

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) Exceptions.

(1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

<Text of subsection (c) effective until Oct. 28, 2019.>

(c) Initiation of formal consultation. A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

- (3) A description of any listed species or critical habitat that may be affected by the action;
- (4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
- (5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and
- (6) Any other relevant available information on the action, the affected listed species, or critical habitat.

<Text of paragraph effective until Oct. 28, 2019.>

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

<Text of subsection (c) effective Oct. 28, 2019.>

(c) Initiation of formal consultation.

- (1) A written request to initiate formal consultation shall be submitted to the Director and shall include:
 - (i) A description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action. Consistent with the nature and scope of the proposed action, the description shall provide sufficient detail to assess the effects of the action on listed species and critical habitat, including:
 - (A) The purpose of the action;
 - (B) The duration and timing of the action;
 - (C) The location of the action;
 - (D) The specific components of the action and how they will be carried out;
 - (E) Maps, drawings, blueprints, or similar schematics of the action; and
 - (F) Any other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat.

(ii) A map or description of all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action (i.e., the action area as defined at § 402.02).

(iii) Information obtained by or in the possession of the Federal agency and any applicant on the listed species and designated critical habitat in the action area (as required by paragraph (c)(1)(ii) of this section), including available information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat.

(iv) A description of the effects of the action and an analysis of any cumulative effects.

(v) A summary of any relevant information provided by the applicant, if available.

(vi) Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments.

(2) A Federal agency may submit existing documents prepared for the proposed action such as NEPA analyses or other reports in substitution for the initiation package outlined in this paragraph (c). However, any such substitution shall be accompanied by a written summary specifying the location of the information that satisfies the elements above in the submitted document(s).

(3) Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12.

(4) Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan. The provision in this paragraph (c)(4) does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole.

(d) Responsibility to provide best scientific and commercial data available. The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) Duration and extension of formal consultation. Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

- (1) The reasons why a longer period is required,
- (2) The information that is required to complete the consultation, and
- (3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) Additional data. When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) Service responsibilities. Service responsibilities during formal consultation are as follows:

- (1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

<Text of subsection (g)(2) effective until Oct. 28, 2019.>

- (2) Evaluate the current status of the listed species or critical habitat.

<Text of subsection (g)(2) effective Oct. 28, 2019.>

- (2) Evaluate the current status and environmental baseline of the listed species or critical habitat.

- (3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

<Text of subsection (g)(4) effective until Oct. 28, 2019.>

- (4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

<Text of subsection (g)(4) effective Oct. 28, 2019.>

(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g) (1)–(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45–day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45–day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10–day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

<Text of subsection (g)(8) effective until Oct. 28, 2019.>

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

<Text of subsection (g)(8) effective Oct. 28, 2019.>

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.

<Text of subsection (h) effective until Oct. 28, 2019.>

(h) Biological opinions. The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

<Text of subsection (h) effective Oct. 28, 2019.>

(h) Biological opinions.

(1) The biological opinion shall include:

(i) A summary of the information on which the opinion is based;

(ii) A detailed discussion of the environmental baseline of the listed species and critical habitat;

(iii) A detailed discussion of the effects of the action on listed species or critical habitat; and

(iv) The Service's opinion on whether the action is:

(A) Likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy" biological opinion); or

(B) Not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion).

(2) A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, the Service will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(3) The Service may adopt all or part of:

(i) A Federal agency's initiation package; or

(ii) The Service's analysis required to issue a permit under section 10(a) of the Act in its biological opinion.

(4) A Federal agency and the Service may agree to follow an optional collaborative process that would further the ability of the Service to adopt the information and analysis provided by the Federal agency during consultation in the development of the Service's biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. The Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat, and other relevant factors to determine whether an action or a class of actions is appropriate for this process. The Federal agency and the Service may develop coordination procedures that would facilitate adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service, if appropriate, as the Service's biological opinion in fulfillment of section 7(b) of the Act.

(i) Incidental take.

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species (A surrogate (e.g., similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with [50 CFR 13.45](#) and [18.27](#) for FWS and [50 CFR 216.105](#) and [222.301\(h\)](#) for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinstate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

(j) Conservation recommendations. The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) Incremental steps. When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

<Text of subsection (l) effective until Oct. 28, 2019.>

(l) Termination of consultation.

(1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

<Text of subsection (l) effective Oct. 28, 2019.>

(l) Expedited consultations. Expedited consultation is an optional formal consultation process that a Federal agency and the Service may enter into upon mutual agreement. To determine whether an action or a class of actions is appropriate for this type of consultation, the Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors. Conservation actions whose primary purpose is to have beneficial effects on listed species will likely be considered appropriate for expedited consultation.

(1) Expedited timelines. Upon agreement to use this expedited consultation process, the Federal agency and the Service shall establish the expedited timelines for the completion of this consultation process.

(2) Federal agency responsibilities. To request initiation of expedited consultation, the Federal agency shall provide all the information required to initiate consultation under paragraph (c) of this section. To maximize efficiency and ensure that it develops the appropriate level of information, the Federal agency is encouraged to develop its initiation package in coordination with the Service.

(3) Service responsibilities. In addition to the Service's responsibilities under the provisions of this section, the Service will:

(i) Provide relevant species information to the Federal agency and guidance to assist the Federal agency in completing its effects analysis in the initiation package; and

(ii) Conclude the consultation and issue a biological opinion within the agreed-upon timeframes.

<Text of subsection (m) effective Oct. 28, 2019.>

(m) Termination of consultation.

(1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

Credits

[54 FR 40350, Sept. 29, 1989; 73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 80 FR 26844, May 11, 2015; 84 FR 45016, Aug. 27, 2019; 84 FR 50333, Sept. 25, 2019]

AUTHORITY: [16 U.S.C. 1531 et seq.](#)

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.