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

WILDEARTH GUARDIANS;
WESTERN WATERSHEDS PROJECT,

Plaintiffs,

vs.

BNSF RAILWAY COMPANY;
BURLINGTON NORTHERN SANTA FE
LLC,

Defendants.

No.:

COMPLAINT

INTRODUCTION

1. Plaintiffs WildEarth Guardians and Western Watersheds Project hereby respectfully file this civil action against Defendants BNSF Railway Company et al. ("BNSF") for violating and continuing to violate Section 9 of the Endangered Species Act ("ESA") by operating or authorizing trains that unlawfully "take" grizzly bears listed as threatened with extinction under the ESA in Montana and Idaho.

JURISDICTION

2. This Court has jurisdiction based on the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), and because this case involves a federal question. 28 U.S.C. § 1331. On October 19, 2019, Plaintiffs gave BNSF notice of intent to sue for its violations of the ESA. On October 5, 2023, Plaintiffs gave BNSF supplemental notice of intent to sue for its violations of the ESA. More than 60 days have elapsed since Plaintiffs gave BNSF notice and supplemental notice. BNSF's violations of the ESA have not been cured and are ongoing. The relief Plaintiffs seek is authorized by the ESA and by the Declaratory Judgment Act. 16 U.S.C. § 1540; 28 U.S.C. §§ 2201 & 2202.

VENUE

3. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e). Pursuant to L.R. CR 1.2(c)(5), the Missoula Division is the

appropriate division because acts complained of herein occurred and are reasonably likely to recur in Flathead, Lincoln, and Sanders Counties.

PARTIES

4. Plaintiff WildEarth Guardians ("Guardians") is non-profit conservation group with offices in Missoula, Montana; Santa Fe, New Mexico; Denver, Colorado; Portland, Oregon; and Tucson, Arizona. Guardians' mission is to protect and restore wildlife, wild places, and wild rivers in the West. Its mission encompasses ensuring the long-term survival and recovery of grizzlies bears in the coterminous United States, including in Montana and Idaho. Guardians has over 4,500 members. Many of Guardians' members live in or visit Montana and Idaho. Guardians' members have been, and continue to be, injured by BNSF's actions that have caused grizzly bear deaths in Montana and in Idaho. Guardians' members' injuries are based on professional, educational, inspirational, personal, aesthetic, and recreational interests. The Court can redress Guardians' members' injuries.

5. Plaintiff Western Watersheds Project ("Western Watersheds") is a non-profit conservation group headquartered in Idaho, with offices and staff in Idaho, Arizona, California, Colorado, Montana, Nevada, Oregon, Washington, Wyoming, and Utah. Western Watersheds is dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. Western Watersheds has over 14,000 members and supporters. Western Watersheds'

members use grizzly habitat in Montana and in Idaho for recreation, scientific study, and aesthetic purposes, and will continue to do so in the future. Western Watersheds' members have been, and continue to be, injured by BNSF's actions that have caused grizzly bear deaths in Montana and in Idaho. Western Watersheds' members' injuries are based on professional, educational, inspirational, personal, aesthetic, and recreational interests. The Court can redress Western Watersheds' members' injuries.

6. Defendant BNSF Railway Company is registered in Montana as a foreign profit corporation that is active and in good standing and whose principal address is in Fort Worth, Texas.

7. Defendant Burlington Northern Santa Fe LLC is the parent company of its subsidiary BNSF Railway Company.

FACTS

8. BNSF owns a railway in Montana. BNSF owns a railway in Idaho. BNSF owns a railway between Shelby, Montana and Sandpoint, Idaho. BNSF owns a railway between Kalispell, Montana and Columbia Falls, Montana.

9. BNSF operates trains on its railways in Montana. BNSF operates trains on its railways in Idaho. BNSF operates its trains on the railway between Shelby, Montana and Sandpoint, Idaho. BNSF operates its trains on the railway between Kalispell, Montana and Columbia Falls, Montana.

10. BNSF authorizes or allows others to run trains on a railway in Montana. BNSF authorizes or allow others to run trains on a railway in Idaho. BNSF authorizes or allow others to run trains on the railway between Shelby, Montana and Sandpoint, Idaho. BNSF authorizes or allows others to run trains on the railway between Kalispell, Montana and Columbia Falls, Montana.

11. BNSF purchased from Montana Rail Link the railway between Jones Junction, Montana and Sandpoint, Idaho. In 2024, BNSF will operate trains on the railway between Jones Junction, Montana and Sandpoint, Idaho. In 2024, BNSF will authorize or allow others to operate trains on the railway between Jones Junction, Montana and Sandpoint, Idaho.

12. In 1975, the U.S. Fish and Wildlife Service ("FWS") listed the grizzly bear in the coterminous United States as threatened with extinction under the ESA. In 1993, FWS issued a Recovery Plan for grizzly bears. FWS has designated six "recovery" zones for grizzly bear. One recovery zone is the Northern Continental Divide ("NCDE") grizzly bear recovery zone in north-central Montana. One recovery zone is the Cabinet-Yaak grizzly bear recovery zone in northwest Montana and northern Idaho.

13. The railway between Shelby, Montana and Sandpoint, Idaho crosses the NCDE grizzly bear recovery zone. Trains owned or operated by BNSF have struck and killed grizzly bears on the railway between Shelby, Montana and Sandpoint,

Idaho within the NCDE grizzly bear recovery zone. Trains operated by others BNSF has authorized or allowed to operate on the railway between Shelby, Montana and Sandpoint, Idaho have struck and killed grizzly bears within the NCDE grizzly bear recovery zone. It is reasonably certain that trains operated by BNSF or trains BNSF authorizes or allows to operate on the railway between Shelby, Montana and Sandpoint, Idaho will continue to strike grizzly bears within the NCDE grizzly bear recovery zone.

14. From 2008 to 2018, trains operating on BNSF railways killed or contributed to the deaths of approximately 52 grizzly bears from the NCDE grizzly bear recovery zone. In 2019, eight grizzly bears from the NCDE grizzly bear recovery zone were killed by trains on BNSF railways. In 2023, three grizzly bears from the NCDE grizzly bear recovery zone were killed by trains on BNSF or Montana Rail Link railways.

15. The railway between Shelby, Montana and Sandpoint, Idaho crosses the Cabinet-Yaak grizzly bear recovery zone. Trains owned or operated by BNSF have struck and killed grizzly bears on the railway between Shelby, Montana and Sandpoint, Idaho within the Cabinet-Yaak grizzly bear recovery zone. BNSF has authorized or allowed others to operate trains on the railway between Shelby, Montana and Sandpoint, Idaho. Trains BNSF has authorized or allowed to operate on the railway between Shelby, Montana and Sandpoint, Idaho have struck and

killed grizzly bears within the Cabinet-Yaak grizzly bear recovery zone. It is reasonably likely that trains operating on the railway between Shelby, Montana and Sandpoint, Idaho will continue to strike grizzly bears in the Cabinet-Yaak grizzly bear recovery zone.

16. The railway between Jones Junction, Montana, and Sandpoint, Idaho crosses the Cabinet-Yaak grizzly bear recovery zone. Trains operating on the railway between Jones Junction, Montana, and Sandpoint, Idaho have struck and killed grizzly bears within the Cabinet-Yaak grizzly bear recovery zone. It is reasonably likely trains operated by BNSF on the railway between Jones Junction, Montana, and Sandpoint, Idaho will continue to strike and kill grizzly bears within the Cabinet-Yaak grizzly bear recovery zone. It is reasonably likely trains authorized or allowed by BNSF to operate on the railway between Jones Junction, Montana, and Sandpoint, Idaho will continue to strike and kill grizzly bears within the Cabinet-Yaak grizzly bear recovery zone.

17. Grizzly bears in the coterminous United States frequent or reside in areas outside of the grizzly bear recovery zones. Grizzly bears in the coterminous United States frequent or reside in demarcated grizzly bear demographic monitoring areas. Connectivity between grizzly bear recovery zones is necessary for isolated populations to increase and sustain themselves at recovery levels.

18. Trains operated by BNSF, or operated by others BNSF has authorized or allowed to use its railway, have struck grizzly bears in demarcated grizzly bear monitoring areas outside of grizzly bear recovery zones. Trains operated by BNSF, or operated by others BNSF has authorized or allowed to use its railway, have struck grizzly bears outside of both grizzly bear recovery zones and demarcated grizzly bear demographic monitoring areas.

19. In 2004, BNSF prepared a habitat conservation plan and applied to FWS for an incidental take permit related to trains and grizzly bears. In 2020, BNSF prepared a habitat conservation plan and applied to FWS for an incidental take permit related to trains and grizzly bears. In 2023, BNSF prepared a habitat conservation plan and applied to FWS for an incidental take permit related to trains and grizzly bears. None of these habitat conservation plans nor incidental take permits has been finalized.

20. On or about September 6, 2023, a grizzly bear was struck and killed by a train in the Cutbank drainage in Montana. BNSF owns the railway on which the grizzly bear was struck and killed on or about September 6, 2023. BNSF owns the train that struck and killed the grizzly bear on or about September 6, 2023.

21. On or about September 7, 2023, a grizzly bear was struck and killed by a train in the Flathead Lake drainage in Montana. BNSF owns the railway on which the grizzly bear was struck and killed on or about September 7, 2023. BNSF owns

the train that struck and killed the grizzly bear on or about September 7, 2023. The grizzly bear that was struck and killed on or about September 7, 2023 was struck on a railway trestle.

22. On or about September 18, 2023, a grizzly bear was struck and killed by a train in the Stillwater drainage in Montana. BNSF owns the railway on which the grizzly bear was struck and killed by a train on or about September 18, 2023.

BNSF owns the train that struck and killed the grizzly bear on or about September 18, 2023.

23. Grizzly bears avoid heavily-trafficked highways during daylight, which is when traffic tends to be concentrated. Grizzly bears near transportation corridors are displaced towards foraging in and crossing corridors during nighttime hours.

24. Grizzly bears are more vulnerable to train strikes when trains are operating under natural low-light or dark conditions. Trains strike grizzly bears more often at night than during daylight hours.

25. Methods exist to lessen the chance a train will strike a grizzly bear.

26. Reducing train speeds can lessen the chance a train will strike a grizzly bear.

Reducing train speeds around railway curves can lessen the chance a train will strike a grizzly bear. Reducing train speeds in canyons or areas with few escape routes for grizzly bears can lessen the chance a train will strike a grizzly bear.

27. Train-triggered warning systems that signal the impending arrival of a train can lessen the chance a train will strike a grizzly bear. Warning systems such as flashing lights and bell sounds can lessen the chance a train will strike a grizzly bear. Motion-sensor alarms near a trestle can lessen the chance a grizzly bear will enter the trestle. Electrified mats near a trestle can lessen the chance a grizzly bear will enter the trestle.

28. Preventing grain from spilling or leaking on to railways can lessen the chance of spills that attract grizzly bears.

29. Preventing livestock from accessing railways can lessen the chance that trains will strike and kill livestock, which then attract grizzly bears to a carcass.

30. Promptly removing all livestock carcasses from railways and their verges can lessen the chance that trains owned, operated, authorized or allowed by BNSF will strike or kill grizzly bears.

CLAIM FOR RELIEF

31. Plaintiffs reallege all previous paragraphs.

32. Section 9 of the ESA prohibits any person from causing "take" of an endangered species. 16 U.S.C. § 1538(a)(1)(B). FWS has extended the prohibition on take to grizzly bears in the conterminous United States. 50 C.F.R. § 17.40(b)(1)(i)(A). The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such

conduct.” 16 U.S.C. § 1532(19). BNSF has operated trains and authorized or allowed others to operate trains that have struck and killed grizzly bears in Montana or Idaho, thereby unlawfully causing take. It is reasonably likely that BNSF trains or trains BNSF authorizes or allows to operate on its railways will continue to strike and kill grizzly bears in Montana and Idaho, thereby unlawfully causing take.

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

- A. Declare BNSF has violated, and continues to violate, Section 9 of the ESA;
- B. Enjoin BNSF from violating the ESA by ordering it to cease causing take of grizzly bears;
- C. Grant such other relief as the Court deems appropriate and just.

Date: December 14, 2023.

Respectfully submitted,

/s/ Sarah K. McMillan

Sarah K. McMillan
Attorney for Plaintiffs