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Grizzly Bears and the Endangered Species Act

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Grizzly Bears and the Endangered Species Act

Grizzly bears (*Ursus arctos horribilis*) are an iconic species that once roamed large swaths of the United States, Canada, and Mexico. In the United States, grizzly bear populations declined in the 19th century; grizzly bears now exist in several populations in the lower 48 states of the United States and throughout Alaska. Grizzly bears are listed as *threatened* under the Endangered Species Act (ESA) (16 U.S.C. §§1531-1544) in the lower 48 states, which gives them certain statutory protections.

Congress is interested in the status of grizzly bears under the ESA because of the species' high profile and constituents' competing concerns. For example, some stakeholders assert that grizzly bears should be removed (*delisted*) from the ESA; they contend that grizzly bear populations are recovered and do not face the threat of extinction in the future. These stakeholders support state management of grizzly bears rather than federal management through the ESA. Some other stakeholders support keeping grizzly bears listed under the ESA, which they contend is necessary to prevent the extinction of the species and facilitate its recovery. Some stakeholders also assert that if grizzly bears were delisted, state management of grizzly bears would be detrimental to the species.

Under the ESA, grizzly bears are protected through a rule that generally prohibits the import, commercial export, commercial transportation, sale, or take of grizzly bears in the lower 48 states. The rule also prohibits certain activities with unlawfully taken grizzly bears. The rule provides for certain exceptions to the prohibited acts, notably that federal and state employees are allowed to pursue, capture, collect, and import grizzly bears and to possess, move, or export unlawfully taken grizzly bears, so long as those activities are for scientific or educational purposes. The regulations also allow grizzly bears to be taken in self-defense or in defense of others or to be removed if they are threatening human safety or livestock, so long as certain conditions are met.

The U.S. Fish and Wildlife Service (FWS) has created a recovery plan for the conservation and survival of grizzly bears. The latest iteration of this plan was published in 1993, and it identified five recovery zones in the lower 48 states with known populations of grizzly bears: (1) the Northern Continental Divide Ecosystem (NCDE) in Montana, (2) the Cabinet-Yaak Ecosystem (CYE) in Montana, (3) the Selkirk Ecosystem (SE) in Idaho and Washington, (4) the North Cascades Ecosystem (NCE) in Washington, and (5) the Greater Yellowstone Ecosystem (GYE) in Montana and Wyoming. A potential sixth region in the Bitterroot Ecosystem in Idaho also was identified with sufficient habitat for grizzly bears and later became a recovery zone. The plan stated an intent to delist individual populations as they achieved recovery.

FWS has attempted to designate the GYE grizzly bear population as a distinct population segment (DPS) and delist that DPS on two occasions. (A DPS is a population of a species that must be discrete from the remainder of the species and significant to that species.) In 2007 and 2017, FWS published final rules designating the GYE population as a DPS and delisting it; both attempts resulted in litigation. Courts vacated each of the rules, and the GYE population remains listed as threatened under the ESA. On February 6, 2023, FWS found that petitions to delist grizzly bears in the NCDE and GYE populations had presented sufficient information to indicate that delisting may be warranted. Accordingly, FWS announced it was initiating a status review of the NCDE and GYE populations to determine whether delisting is warranted.

The 118th Congress has held oversight hearings addressing the listing of grizzly bears and introduced several bills that would direct the Secretary of the Interior to delist grizzly bears (none have been enacted). Most of the legislative debate in the 118th Congress centers on the listing status of the GYE and NCDE populations of grizzly bears and whether grizzly bears in the lower 48 states should be listed under the ESA. For example, Congress is considering H.R. 1419 and H.R. 1245, which would direct the Secretary of the Interior to issue a final rule to delist the NCDE grizzly bear population and reissue a final rule to delist the GYE population. Both bills also would preclude judicial review of the listing rules. In considering these and other measures addressing grizzly bears, Congress may consider certain issues, including (1) state versus federal management of grizzly bear populations, (2) conflicts between bears and humans and livestock, and (3) science and the conservation of grizzly bears.

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Introduction

Grizzly bears (*Ursus arctos horribilis*) are an iconic apex predator that once roamed large swaths of the United States, Canada, and parts of Mexico.¹ In the United States, grizzly bears were historically one contiguous population with an estimated 50,000 bears prior to 1800.² This population declined in the 19th century following the expansion of settlers in the western United States, Mexico, and Canada. Settlers viewed grizzly bears as a threat to human settlement and safety, and bears were widely hunted wherever they were found.³ In some cases, hunters were compensated for killing grizzly bears by government-sponsored bounty programs. Grizzly bear populations also declined due to the conversion of their habitat to agricultural uses. Grizzly bears are currently separated into several populations in the contiguous 48 states of the United States and are considered locally extinct in Mexico and the central and southwestern United States, according to scientists.⁴

Grizzly bears have been listed as *threatened* under the Endangered Species Act (ESA) in the contiguous 48 states since 1975,⁵ which gives the species certain statutory protections. Stakeholders have long debated whether the species should remain listed or should be *delisted* (i.e., taken off the list of endangered and threatened species). Some stakeholders assert that grizzly bears should be removed from the list; they contend that grizzly bear populations are recovered and do not face the threat of extinction in the future. Some of these stakeholders also contend that expanding grizzly bear populations are leading to more livestock losses and human-bear conflicts that would be easier to manage under state law than under the ESA.⁶ They argue that delisting grizzly bears would allow states to manage populations with greater flexibility than the federal government.⁷ In contrast, some stakeholders support continued listing and contend that it is necessary to prevent the extinction of the species.⁸ They argue that keeping the grizzly bear listed under the ESA will lead to the conservation and recovery of the species.⁹ Some stakeholders assert that if grizzly bears were delisted, state management of the species would be inadequate and potentially detrimental to the species.¹⁰

¹ U.S. Fish and Wildlife Service (FWS), Environmental Conservation Online System (ECOS), “Grizzly Bear (*Ursus arctos horribilis*),” <https://ecos.fws.gov/ecp/species/7642><https://ecos.fws.gov/ecp/species/7642> (hereinafter cited as ECOS).

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ 16 U.S.C. §§1531-1544.

⁶ National Cattlemen’s Beef Association, “FWS Keeps ESA Status for Grizzly Bears Despite Recovered Populations,” press release, March 31, 2021, <https://www.ncba.org/ncba-news/news-releases/news/details/26273/fws-keeps-esa-status-for-grizzly-bears-despite-recovered-populations><https://www.ncba.org/ncba-news/news-releases/news/details/26273/fws-keeps-esa-status-for-grizzly-bears-despite-recovered-populations>.

⁷ Mark Gordon, Governor of Wyoming, “Petition: To Establish the Greater Yellowstone Ecosystem (GYE) Grizzly Bear (*Ursus arctos horribilis*) Distinct Population Segment (DPS) and Remove the GYE Grizzly Bear DPS from the Federal List of Endangered and Threatened Wildlife,” State of Wyoming, Office of the Governor, January 10, 2022, <https://wyofile.com/wp-content/uploads/2022/01/GYE-Grizzly-Bear-Petition.pdf><https://wyofile.com/wp-content/uploads/2022/01/GYE-Grizzly-Bear-Petition.pdf> (hereinafter cited as Gordon, Petition).

⁸ Defenders of Wildlife, “U.S. Fish and Wildlife Service Announces Status Review of Grizzly Bears,” press release, February 3, 2023, <https://defenders.org/newsroom/us-fish-and-wildlife-service-announces-status-review-of-grizzly-bears><https://defenders.org/newsroom/us-fish-and-wildlife-service-announces-status-review-of-grizzly-bears>.

⁹ *Ibid.*

¹⁰ Center for Biological Diversity, “State Efforts to Remove Federal Grizzly Protections Move Forward,” press release, (continued...)

In oversight hearings, Members of Congress have addressed varying perspectives on the grizzly bear's listing under the ESA, the grizzly bear's population status, and the effects of grizzly bears on livestock. Members also have introduced related legislation in the 118th Congress. For example, S. 2571 would direct the Secretary of the Interior to remove all listings of grizzly bears under the ESA, and H.R. 1419 would direct the Secretary of the Interior to delist a particular population of grizzly bears in Montana under the ESA.

This report provides background on the status and biology of grizzly bears, a history of the species' listing under the ESA, an overview of litigation surrounding listing decisions, and considerations for Congress on issues related to listing grizzly bears under the ESA.

Biology, Population, and Range of Grizzly Bears

The species "brown bear" (*Ursus arctos*) comprises several subspecies, with disparate populations distributed across North America, Europe, and Asia.¹¹ The grizzly bear (*Ursus arctos horribilis*) is a subspecies of the brown bear.¹² In the conterminous United States, there are isolated populations of grizzly bears in Washington, Idaho, Montana, and Wyoming.¹³ Grizzly bears live until their mid- to late 20s in the wild, with multiple opportunities for reproduction in a lifetime.¹⁴ They have one of the slowest reproductive rates among terrestrial animals, which influences the species' status and population trends.¹⁵ They generally mate between May and July and hibernate for four to six months in dens over the winter.¹⁶ It takes five to six years for female grizzly bears to reach reproductive age, and, due to small litter sizes (generally two cubs) and cub mortality rates, it can take a female grizzly bear 10-15 years to replace itself in the population.¹⁷ This slow replacement rate limits the potential for rapid population growth and makes population growth rates sensitive to female mortality.¹⁸

Grizzly bears occupy multiple habitat types that vary by water, vegetative cover, den sites, and food.¹⁹ Available habitat for grizzly bears is influenced by human activities (e.g., settlements, vehicles, noise). According to the U.S. Fish and Wildlife Service (FWS), grizzly bears seek open areas for feeding sites with vegetative cover nearby to conceal themselves and create bedding areas.²⁰

February 3, 2023, <https://biologicaldiversity.org/w/news/press-releases/state-efforts-to-remove-federal-grizzly-protections-move-forward-2023-02-03/><https://biologicaldiversity.org/w/news/press-releases/state-efforts-to-remove-federal-grizzly-protections-move-forward-2023-02-03/>.

¹¹ FWS, "Grizzly Bear," <https://www.fws.gov/species/grizzly-bear-ursus-arctos-horribilis><https://www.fws.gov/species/grizzly-bear-ursus-arctos-horribilis>.

¹² Ibid.

¹³ Ibid.

¹⁴ Charles C. Schwartz et al., "Temporal, Spatial, and Environmental Influences on the Demographics of Grizzly Bears in the Greater Yellowstone Ecosystem," *Journal of Wildlife Monographs*, vol. 161, no. 1 (December 13, 2010); hereinafter cited as Schwartz et al., "Temporal, Spatial, and Environmental Influences".

¹⁵ FWS, *Species Status Assessment for the Grizzly Bear (Ursus arctos horribilis) in the Lower-48 States*, January 2022, <https://ecos.fws.gov/ServCat/DownloadFile/213247> (hereinafter cited as FWS, *Species Status Assessment*).

¹⁶ Ibid.

¹⁷ Ibid.

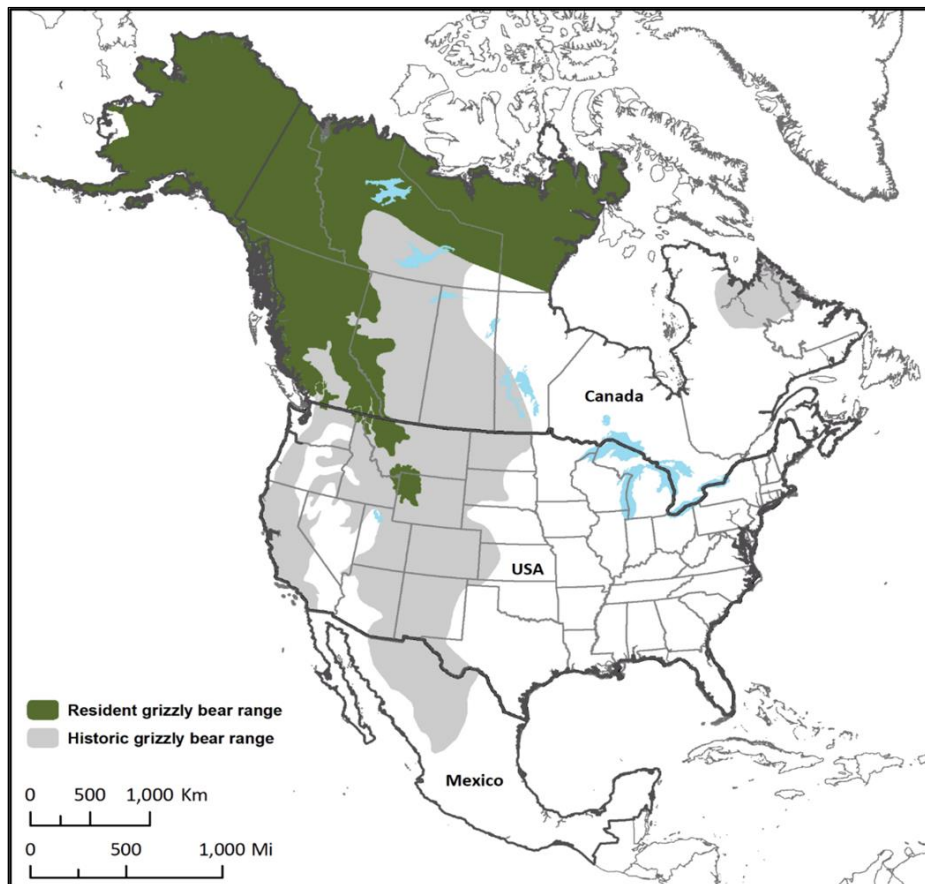
¹⁸ Schwartz et al., "Temporal, Spatial, and Environmental Influences."

¹⁹ Ibid.

²⁰ FWS, *Species Status Assessment*.

Grizzly bears are large animals, with males generally weighing from 400 to 800 pounds.²¹ Grizzly bears support this body mass with a diverse omnivorous diet that includes up to 260 species of plants and animals.²² Wild sources of food for grizzly bears include berries (e.g., blueberries, bearberries), roots, plant bulbs, whitebark pine seeds, rodents, moose, elk, mountain goats, and mountain sheep.²³ Grizzly bears are opportunistic feeders that shift their diet throughout the year based on food availability and explore several potential food sources, including anthropogenic sources such as livestock, crops (e.g., grain, corn, melons), and garbage.²⁴ This opportunistic behavior sometimes leads to conflicts with humans, especially around ranches, farms, and areas with large amounts of food waste.²⁵ For example, some studies suggest that higher bear densities are associated with higher depredation rates of cattle and sheep.²⁶

Figure 1. Resident and Historic Grizzly Bear Range



Source: Interagency Grizzly Bear Committee, “About Us,” <https://igbconline.org/about-us/><https://igbconline.org/about-us/>.

Notes: Resident range is the approximate area where grizzly bears are currently found.

²¹ Ibid.

²² ECOS.

²³ North American Bear Center, “Brown and Grizzly Bear Facts,” <https://bear.org/brown-grizzly-bear-facts/>.

²⁴ Ibid.

²⁵ Ibid.

²⁶ ECOS.

The historical range of grizzly bears covered most of the western half of the United States, western Canada, north-central Mexico, and Alaska, as shown in **Figure 1**. Westward expansion of settlers and the associated habitat alteration and hunting led to a significant reduction in the range of grizzly bears in the United States, Canada, and Mexico, according to FWS.²⁷ In the lower 48 states, the range of grizzly bears was reduced to 2% of its estimated historical size by the 1930s.²⁸ This reduction paralleled a decrease in grizzly bear population size from approximately 50,000 bears prior to 1800 to between 700 and 800 bears in the lower 48 states when the grizzly bear was listed under the ESA in 1975.²⁹ Most of these bears were in national parks and wilderness areas in Washington, Idaho, Montana, and Wyoming.³⁰

Grizzly bear population sizes and the extent of their range in some areas have increased since the ESA listing. As of 2021, there were an estimated 1,926 grizzly bears in the lower 48 states, primarily in Washington, Idaho, Montana, and Wyoming.³¹ In Alaska and Canada, there are an estimated 55,000 grizzly bears.³² The range of grizzly bears in the lower 48 states has expanded since grizzly bears were listed and now covers approximately 6% of their estimated historical range.³³ **Table 1** contains the population estimates in six recovery zones in the lower 48 states, identified by FWS, that support or may support grizzly bear populations. These ecosystems include (1) the Northern Continental Divide Ecosystem (NCDE) in Montana, (2) the Cabinet-Yaak Ecosystem (CYE) in Montana, (3) the Selkirk Ecosystem (SE) in Idaho and Washington, (4) the North Cascades Ecosystem (NCE) in Washington, (5) the Greater Yellowstone Ecosystem (GYE) in Montana and Wyoming, and (6) the Bitterroot Ecosystem (BE) in Idaho.

Table 1. Population Estimates of Grizzly Bears in Six Recovery Zones in the Lower 48 States as of 2021

Ecosystem (State)	Estimated Number of Bears
Northern Continental Divide (MT)	1,095
Greater Yellowstone (MT, WY)	727
Cabinet-Yaak (MT)	60
Selkirk (ID, WA)	Minimum of 44 in U.S. portion
Bitterroot (ID)	No known population
North Cascades (WA)	No known population

Source: U.S. Fish and Wildlife Service (FWS), Upper Colorado Region, *Grizzly Bear in the Lower-48 States (Ursus arctos horribilis)—5-Year Status Review: Summary and Evaluation*, March 2021, https://ecos.fws.gov/docs/tess/species_nonpublish/942.pdf; Frank T. Van Manen et al., *Yellowstone Grizzly Bear Investigations 2022: Annual Report of the Interagency Grizzly Bear Study Team*, U.S. Geological Survey, 2023, <https://igbconline.org/wp-content/uploads/2023/09/Yellowstone-Grizzly-Bear-Investigations-2022-IGBST-Annual-Report.pdf>.

²⁷ FWS, Upper Colorado Region, *Grizzly Bear in the Lower-48 States (Ursus arctos horribilis)—5-Year Status Review: Summary and Evaluation*, March 2021, https://ecos.fws.gov/docs/tess/species_nonpublish/942.pdf (hereinafter cited as FWS, *Grizzly Bear in the Lower-48 States*).

²⁸ ECOS.

²⁹ FWS, *Species Status Assessment*.

³⁰ FWS, *Grizzly Bear in the Lower-48 States*.

³¹ FWS, *Species Status Assessment*.

³² *Ibid.*

³³ *Ibid.*

Grizzly Bear Listing Under the Endangered Species Act

The ESA aims to conserve threatened and endangered species and their ecosystems through mechanisms such as prohibitions on private and government conduct (ESA §9), federal agency consultations (ESA §7), recovery plans (ESA §4(f)), and cooperation with and funding for states (ESA §6).³⁴ Under the ESA, FWS in the U.S. Department of the Interior and the National Marine Fisheries Service (NMFS) in the U.S. Department of Commerce (together, the Services) are jointly responsible for administering the law.³⁵ FWS manages terrestrial species, such as the grizzly bear, as well as freshwater and catadromous species.³⁶ NMFS manages marine species and anadromous fish.³⁷

The ESA's various protections and recovery mechanisms are triggered for a species when the relevant Service lists the species as endangered or threatened. *Endangered species* are species that are "in danger of extinction in all or a significant portion of [their] range."³⁸ *Threatened species*, such as the grizzly bear, are species that are "likely to become an endangered species within the foreseeable future throughout all or a significant portion of [their] range."³⁹

Species are listed as endangered or threatened following a determination that they meet the relevant definition based on five statutory factors.⁴⁰ The factors address destruction of habitat, overutilization by humans, disease or predation, inadequate regulatory protection, and other natural or man-made factors.⁴¹ Species may be listed (i.e., added to the list of endangered and threatened species), reclassified (i.e., moved from the list of endangered species to threatened species or vice versa), or delisted (i.e., removed from the list of endangered and threatened species).⁴²

FWS first listed the grizzly bear in the contiguous 48 states as threatened under the ESA in 1975.⁴³ In its 1975 final rule, FWS identified several threats affecting the species.⁴⁴ FWS noted that the grizzly bear's range had been reduced from much of the western United States to isolated areas of Montana, Idaho, and Wyoming (see **Figure 1**). Within that range, FWS stated that new roads and trails for timber harvesting and outdoor recreation had increased access to previously inaccessible areas, leading to increased legal and illegal hunting of grizzly bears, predation of livestock, and conflicts between grizzly bears and humans.⁴⁵ FWS also observed that people were increasingly visiting Yellowstone and Glacier National Parks and letting livestock graze in surrounding national forests, thereby increasing detrimental pressure on the grizzly bear's

³⁴ See generally 16 U.S.C. §§1531-1540.

³⁵ 16 U.S.C. §1532(15).

³⁶ 50 C.F.R. §17.2(b); FWS, *Endangered Species*, <https://www.fws.gov/endangered>.

³⁷ 50 C.F.R. §17.2(b); National Oceanic and Atmospheric Administration, *Endangered Species Conservation*, <https://www.fisheries.noaa.gov/topic/endangered-species-conservation>.

³⁸ 16 U.S.C. §1532(6).

³⁹ 16 U.S.C. §1532(20).

⁴⁰ 16 U.S.C. §1533(a)(1).

⁴¹ *Ibid.*

⁴² 16 U.S.C. §1533(c).

⁴³ Department of the Interior (DOI), FWS, "Endangered and Threatened Wildlife, Grizzly Bear," 40 *Federal Register* 31734, July 28, 1975 (hereinafter cited as 40 *Federal Register* 31734).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

remaining range.⁴⁶ In addition, actual and perceived threats from grizzly bears to livestock and humans led to regular legal and illegal killing of bears in certain states.⁴⁷ FWS also pointed to insufficient data on the grizzly bears' population trends and habitat as impeding adequate management and regulatory protection.⁴⁸ Finally, FWS noted that the grizzly bear populations were isolated from one another, making it difficult for other populations to reinforce their numbers or increase their genetic diversity.⁴⁹

In its 1975 listing rule, FWS also promulgated regulations governing the protection of grizzly bears.⁵⁰ For threatened species, the protections established under Section 9 of the ESA (e.g., the prohibitions on importing, exporting, or taking the species) do not automatically apply;⁵¹ instead, Section 4(d) of the ESA provides that these protections generally may be extended to the species by regulations referred to as *4(d) rules* or *species-specific rules*.⁵² For the grizzly bear, FWS generally prohibited the import, commercial export, commercial transportation, sale, or take of grizzly bears in the lower 48 states and certain activities with unlawfully taken grizzly bears.⁵³

In its 1975 4(d) rule, FWS also allowed for certain exceptions from these prohibitions, particularly with respect to take.⁵⁴ For example, the regulations generally allowed federal and state employees to pursue, capture, collect, and import grizzly bears and to possess, move, or export unlawfully taken grizzly bears, so long as those activities were for scientific or educational purposes.⁵⁵ In addition, public zoos were allowed to import, commercially export, commercially transport, and sell grizzly bears, so long as any sales were to other public zoos.⁵⁶ The regulations also allowed grizzly bears to be taken in self-defense, to defend others, or to remove nuisance grizzly bears threatening human safety or livestock, so long as certain conditions were met.⁵⁷ Finally, the regulations allowed for certain limited hunting in specified areas of northwestern Montana.⁵⁸

Although FWS has amended the grizzly bear 4(d) rule since it was promulgated, the regulations remain largely the same as when they were enacted in 1975.⁵⁹ In 1986, FWS extended the provisions that applied to federal and state employees to tribal authorities.⁶⁰ The 1986 rule also

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ 16 U.S.C. §1538.

⁵² 16 U.S.C. §§1533(d), 1539(a).

⁵³ 40 *Federal Register* 31734; 50 C.F.R. §17.40(b). The Endangered Species Act (ESA; 16 U.S.C. §§ 1531-1544) defines *take* to mean “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).

⁵⁴ 50 C.F.R. §17.40(b).

⁵⁵ 50 C.F.R. §17.40(b)(1)(i)(D).

⁵⁶ 50 C.F.R. §17.40(b)(1)(iv)(B).

⁵⁷ 50 C.F.R. §17.40(b)(1)(i)(B)-(C).

⁵⁸ 40 *Federal Register* 31734, pp. 31734-31736.

⁵⁹ See DOI, FWS, “Endangered and Threatened Wildlife and Plants; Modification of the Special Regulations for the Grizzly Bear,” 50 *Federal Register* 35086, August 29, 1985; DOI, FWS, “Endangered and Threatened Wildlife and Plants; Revision of Special Regulations for the Grizzly Bear,” 51 *Federal Register* 33753, September 23, 1986 (hereinafter cited as 51 *Federal Register* 33753); DOI, FWS, “Endangered and Threatened Wildlife and Plants; Grizzly Bear; Removal of the Special Rule Allowing a Limited Special Hunt,” 57 *Federal Register* 37478, August 19, 1992 (hereinafter cited as 57 *Federal Register* 37478).

⁶⁰ 51 *Federal Register* 33753.

expanded the exception for removing nuisance bears to include grizzly bears affecting crops and beehives.⁶¹ In 1992, a court determined that a provision of the 4(d) rule allowing a limited hunt in northwestern Montana was invalid, and FWS amended the rule to remove that provision.⁶²

In 1976, FWS proposed to designate critical habitat for the grizzly bear.⁶³ In 1978, the ESA was amended to define the existing phrase *critical habitat*; the amendments required the designation of critical habitat “to the maximum extent prudent and determinable” at the time of listing based on “the best scientific data available” after considering the economic impact, national security impacts, and “any other relevant impact” of specifying a particular area as critical habitat.⁶⁴ FWS subsequently withdrew its grizzly bear critical habitat proposed rule in 1979.⁶⁵ FWS concluded that it must reevaluate whether it should propose critical habitat for the grizzly bear, among other species, based on the criteria added in the 1978 amendments.⁶⁶ FWS did not issue a new proposal for grizzly bear critical habitat, and, in 1995, a federal district court upheld FWS’s decision not to designate grizzly bear habitat.⁶⁷ FWS has not subsequently proposed to designate critical habitat for the grizzly bear.⁶⁸

Grizzly Bear Recovery

Section 4(f) of the ESA provides for the creation of plans for the conservation and survival of listed species, referred to as *recovery plans*.⁶⁹ Recovery plans must be developed and implemented for listed species unless the relevant Service determines that a recovery plan would not help conserve the species.⁷⁰ Section 4(f) directs the Services, to the maximum extent practicable, to incorporate (1) site-specific management actions as necessary to achieve the plan’s goals; (2) objective, measurable criteria that—when met—would result in a determination that the species should be delisted; and (3) estimates of the time and cost needed to achieve intermediate and ultimate measures to achieve the plan’s goals.⁷¹

⁶¹ Ibid. at p. 33759.

⁶² 57 *Federal Register* 37478; *The Fund for Animals, Inc. v. Turner*, No. 91-2201, 1991 WL 206232, at *9 (D.D.C. Sept. 27, 1991).

⁶³ DOI, FWS, “Endangered and Threatened Wildlife and Plants Proposed Determination of Critical Habitat for the Grizzly Bear,” 41 *Federal Register* 48757, November 5, 1976. The ESA defines *critical habitat* as (1) the areas within the geographical area occupied by the species, at the time it is listed, which contain physical or biological features essential to the conservation of the species and which may require special management considerations or protection and (2) specific areas outside the geographical area occupied by the species at the time it is listed that are essential for the conservation of the species. 16 U.S.C. §1532.

⁶⁴ 92 Stat. 3751. The amendments also provided for certain exceptions for areas controlled by the Department of Defense subject to an integrated natural resources management plan if FWS or the National Marine Fisheries Service concluded the plan was beneficial for the species. See 16 U.S.C. §1533(a)(3)(B). In addition, the amendments included provisions related to petitions to revise a critical habitat designation. 16 U.S.C. §1533(b)(3)(D). Before the 1978 amendments, Section 7 required federal agencies to ensure their actions did not result in the destruction or modification of “habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical” but did not otherwise address critical habitat. See 87 Stat. 892.

⁶⁵ DOI, FWS, “Requirement to Withdraw or Supplement Proposals to Determine Various U.S. Taxa of Plants and Wildlife as Endangered or Threatened or to Determine Critical Habitat for Such Species,” 44 *Federal Register* 12382, March 6, 1979.

⁶⁶ Ibid.

⁶⁷ *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115-17 (D.D.C. 1995).

⁶⁸ ECOS.

⁶⁹ 16 U.S.C. §1533(f).

⁷⁰ Ibid.

⁷¹ 16 U.S.C. §1533(f)(1)(B).

Consistent with the requirements of ESA Section 4(f), FWS issued the *Grizzly Bear Recovery Plan* in 1982 (the 1982 Recovery Plan).⁷² That plan reviewed grizzly bear population goals, population and habitat limiting factors, and specific management measures to address limiting factors in order to recover at least three populations in three distinct ecosystems and allow for the delisting of the species.⁷³ The plan identified six areas where grizzly bears had been observed in the prior decade.⁷⁴ Of these six areas, FWS selected the GYE, the NCDE, and the CYE to prioritize for recovery.⁷⁵

In 1983, the Department of the Interior and the Department of Agriculture created the Interagency Grizzly Bear Committee (IGBC) by memorandum of agreement.⁷⁶ The IGBC's purpose is to coordinate grizzly bear policy, planning, management, research, and communication between federal, state, and tribal entities.⁷⁷ The IGBC includes representatives from FWS; the U.S. Forest Service (FS); the National Park Service (NPS); the Bureau of Land Management (BLM); the U.S. Geological Survey; and the state wildlife agencies in Idaho, Montana, Washington, and Wyoming.⁷⁸ Tribes that manage grizzly bear habitat have representation in specific ecosystem committees, as do local counties and other partners.⁷⁹

The IGBC operates pursuant to a charter and a memorandum of understanding between the federal and state agencies.⁸⁰ The IGBC coordinates implementation of the most recent Grizzly Bear Recovery Plan to best use resources and avoid duplicating efforts. It also supports the development of conservation strategies by various stakeholders (e.g., states, tribes), assists with communication to the public and between member agencies about grizzly bear management, and aims to support FWS in delisting efforts and grizzly bear conservation post-delisting.⁸¹

In 1986, the IGBC approved interagency guidelines that outlined specific management measures to be used in managing BLM, National Forest System, and National Park System lands in grizzly bear ecosystems in Idaho, Montana, Washington, and Wyoming.⁸² These guidelines are referred to as the *Interagency Grizzly Bear Guidelines*.⁸³

FWS revised the recovery plan in 1993.⁸⁴ In the 1993 *Grizzly Bear Recovery Plan* (1993 Recovery Plan), FWS identified five recovery zones with known populations of grizzly bears in

⁷² 16 U.S.C. §1533(f); FWS and Don L. Brown, Montana Department of Fish, Wildlife, and Parks, *Grizzly Bear Recovery Plan*, January 29, 1982, <https://ia800403.us.archive.org/17/items/grizzlybearrecov1982usfi/grizzlybearrecov1982usfi.pdf>.

⁷³ *Ibid.* at p. 11.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* at p. 12.

⁷⁶ Interagency Grizzly Bear Committee (IGBC), "About Us," <https://igbconline.org/about-us/#1634593061643-05f3cdaf-9bcb>.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ IGBC, "Interagency Grizzly Bear Committee, Charter," 2020, https://grizzlybear.wpengine.com/wp-content/uploads/2021/10/20190531_IGBC_CHARTER_FINAL.pdf; IGBC, "Memorandum of Understanding Amongst the Idaho Department of Fish and Game et al.," November 2015, https://grizzlybear.wpengine.com/wp-content/uploads/2021/10/151104_IGBC_MOU_rev.12-13-1.pdf.

⁸¹ IGBC, "About Us," <https://igbconline.org/about-us/#1634593061643-05f3cdaf-9bcb>.

⁸² Interagency Grizzly Bear Committee, *Interagency Grizzly Bear Guidelines*, 1986, pp. 3-4, <http://npshistory.com/publications/wildlife/interagency-grizzly-bear-guidelines.pdf>.

⁸³ *Ibid.* at p. 4.

⁸⁴ Christopher Servheen, *Grizzly Bear Recovery Plan*, FWS, University of Montana, September 10, 1993, p. ii, https://ecos.fws.gov/docs/recovery_plan/930910.pdf.

the lower 48 states: (1) the NCDE in Montana, (2) the CYE in Montana, (3) the SE in Idaho and Washington, (4) the NCE in Washington, and (5) the GYE in Montana and Wyoming.⁸⁵ Of these regions, the first four were contiguous with Canadian populations of grizzly bears; the GYE population was separate.⁸⁶ FWS also identified a potential sixth region in the BE in Idaho, which it stated contained sufficient habitat for grizzly bears but “few if any grizzly bears at this time.”⁸⁷ Finally, FWS noted that another area in Colorado, the San Juan Ecosystem, was being considered for evaluation of the potential for grizzly bear recovery but that no grizzly bears had been confirmed in that region since 1979.⁸⁸

For each of the six actual or potential grizzly bear populations FWS identified, the 1993 Recovery Plan identified distinct recovery zones and specific recovery criteria for the population (see **Figure 2**).⁸⁹ The recovery plan also stated an intent to delist individual populations as they achieved recovery.⁹⁰ Any such delisting would require FWS to undertake a rulemaking process to designate the population as a distinct population segment (DPS) and determine the DPS was no longer an endangered or threatened species based on an analysis of the five statutory factors using the best available scientific and commercial data.⁹¹ A DPS is a population of a species that, in order to be designated a DPS, must be discrete from the remainder of the species and significant to that species.⁹²

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

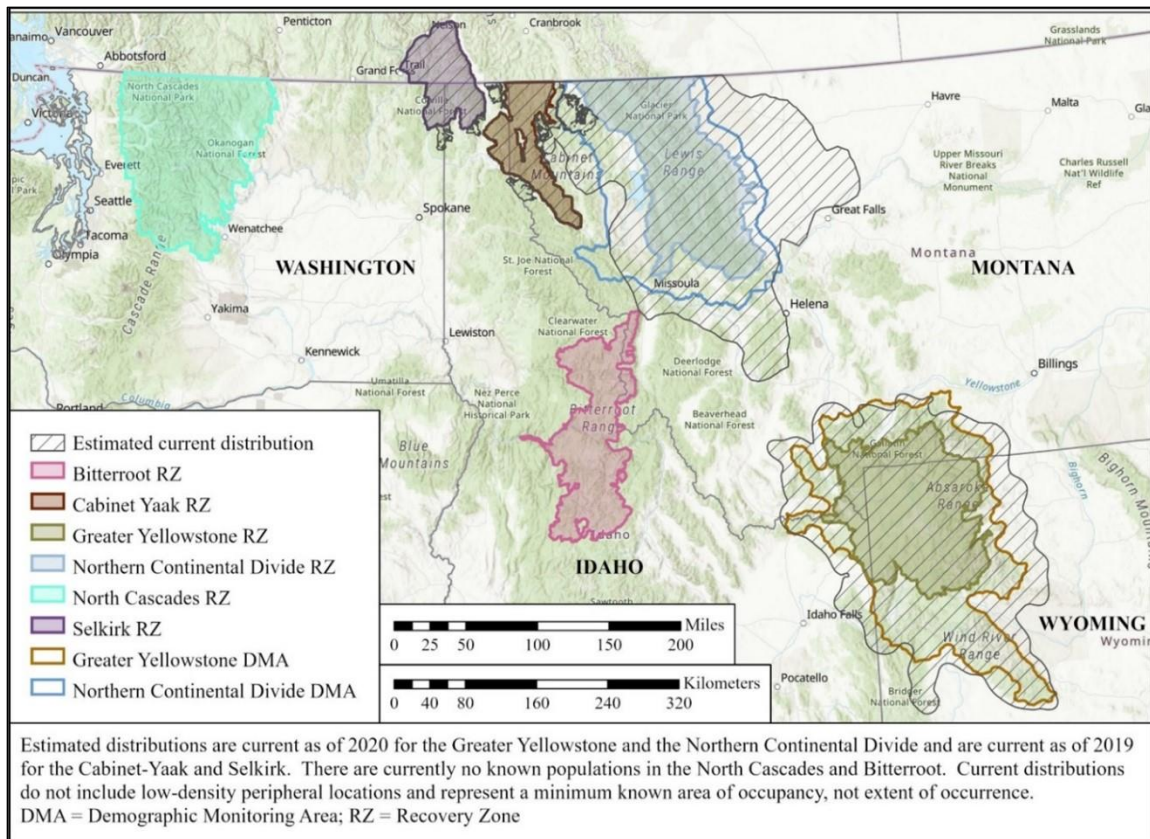
⁸⁸ Ibid.

⁸⁹ Ibid. at pp. ii, 33-34.

⁹⁰ Ibid.

⁹¹ 16 U.S.C. §§1532, 1533(a). See section “Designation and Delisting of the Greater Yellowstone Ecosystem Distinct Population Segment of Grizzly Bears.”

⁹² DOI et al., “Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act,” 61 *Federal Register* 4722, p. 4725 February 7, 1996.

Figure 2. Grizzly Bear Recovery Zones and Estimated Distributions

Source: Interagency Grizzly Bear Committee, "Grizzly Bear Recovery Zones and Estimated Occupied Range," <https://igbconline.org/https://igbconline.org/>.

Litigation Challenging the 1993 Recovery Plan

Following the issuance of the 1993 Recovery Plan, the nonprofit organization Fund for Animals challenged the plan, alleging that FWS had failed to include site-specific management actions and objective, measurable delisting criteria as required by the ESA.⁹³ In *Fund for Animals v. Babbitt*, a federal district court held that FWS had adequately included site-specific management actions in the recovery plan after assessing concerns related to hunting, road density standards, human activities related to resource management, and unprotected linkage zones between grizzly bear populations.⁹⁴ The court concluded, however, that FWS had not adequately included objective and measurable criteria in the recovery plan for ensuring that habitat degradation, human-caused mortality, and genetic isolation were addressed before delisting.⁹⁵ The court also concluded that FWS had not adequately justified its selection of a population monitoring methodology that the plan itself had acknowledged was unreliable and had limitations.⁹⁶ Additionally, the court concluded that FWS had relied on the existence of Canadian grizzly bear populations when setting population goals without explaining how threats to the Canadian populations might affect

⁹³ *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 102 (D.D.C. 1995).

⁹⁴ *Fund for Animals*, 903 F. Supp. at 106-10.

⁹⁵ *Fund for Animals*, 903 F. Supp. at 111-13.

⁹⁶ *Fund for Animals*, 903 F. Supp. at 113-15.

the analysis.⁹⁷ The court directed FWS to reconsider the portions of the 1993 Recovery Plan that it held to be inconsistent with the ESA requirements.⁹⁸

Fund for Animals and FWS subsequently reached a settlement agreement.⁹⁹ FWS discussed the terms and implementation of the settlement, as well as FWS's actions to address the court's opinion, in a subsequent rulemaking in 2007.¹⁰⁰ At that time, FWS stated that the settlement agreement required the agency to supplement the 1993 Recovery Plan to add habitat-based recovery criteria for an ecosystem's population before proposing to delist the population.¹⁰¹ FWS issued supplements to the 1993 Recovery Plan to include habitat-based recovery criteria for the GYE population in 2007 and for the NCDE population in 2018.¹⁰²

Greater Yellowstone Ecosystem Recovery Activities

In 1993, representatives from FWS; NPS; FS; the Interagency Grizzly Bear Study Team; and state wildlife agencies in Idaho, Montana, and Wyoming were appointed to an Interagency Conservation Strategy Team to develop a conservation strategy for the grizzly bear in the GYE.¹⁰³ In 2007, the Interagency Conservation Strategy Team released the final Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Area (2007 GYE Conservation Strategy).¹⁰⁴ Whereas the Interagency Grizzly Bear Guidelines were adopted to work toward recovery of the species, the 2007 GYE Conservation Strategy was prepared to guide management of the GYE grizzly bear population after delisting.¹⁰⁵

FWS updated the 2007 GYE Conservation Strategy in December 2016.¹⁰⁶ The 2016 GYE Conservation Strategy incorporated specific, measurable habitat criteria from the 2007 Recovery Plan Supplement.¹⁰⁷ The 2016 Conservation Strategy identified and provided a framework for managing two areas: the Primary Conservation Area (PCA; previously called the Yellowstone Recovery Zone) and the demographic monitoring area. The 2016 Conservation Strategy

⁹⁷ *Fund for Animals*, 903 F. Supp. at 115.

⁹⁸ *Fund for Animals*, 903 F. Supp. at 118.

⁹⁹ *Fund for Animals v. Babbitt*, 967 F. Supp. 6 (D.D.C. 1997).

¹⁰⁰ DOI, FWS, "Endangered and Threatened Wildlife and Plants; Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife; 90-Day Finding on a Petition To List as Endangered the Yellowstone Distinct Population Segment of Grizzly Bears," 72 *Federal Register* 14866, March 29, 2007, pp. 14869-14883 (hereinafter cited as 72 *Federal Register* 14866).

¹⁰¹ *Ibid.* at pp. 14869-14870, 14882.

¹⁰² FWS, *Grizzly Bear Recovery Plan Supplement: Habitat-Based Recovery Criteria for the Yellowstone Ecosystem*, March 6, 2007, https://ecos.fws.gov/docs/recovery_plan/070313_1.pdf; FWS, *Grizzly Bear Recovery Plan Supplement: Habitat-Based Recovery Criteria for the Northern Continental Divide Ecosystem*, May 15, 2018, https://ecos.fws.gov/docs/recovery_plan/Final%20HBRC%20NCDE%20Grizzly%20USFWS%202018.pdf.

¹⁰³ IGBC, "2016 Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Ecosystem," 2016, <https://myfwp.mt.gov/getRepositoryFile?objectID=93283> (hereinafter cited as IGBC, "2016 Conservation Strategy"). The Interagency Grizzly Bear Study Team was formed in 1973 as a cooperative effort between the U.S. Geological Survey, National Park Service, U.S. Forest Service, FWS, and the state wildlife agencies of Idaho, Montana, and Wyoming. The team serves as a centralized entity to "collect, manage, analyze, and distribute science-based information" about grizzly bears. *Ibid.*, p. 98.

¹⁰⁴ *Ibid.*, p. 19.

¹⁰⁵ DOI, FWS, "Endangered and Threatened Wildlife and Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife," 82 *Federal Register* 30520, June 30, 2017, p. 30521 (hereinafter cited as 82 *Federal Register* 30520).

¹⁰⁶ See IGBC, "2016 Conservation Strategy."

¹⁰⁷ 82 *Federal Register* 30520, p. 30521.

prioritized maintaining habitat and population standards within the PCA while allowing grizzly bears to expand beyond the PCA in “biologically suitable and socially acceptable areas.”¹⁰⁸ The strategy also addressed managing grizzly bear conflicts; conducting public information and education efforts; and allowing, as appropriate, hunting of grizzly bears by regulating them as game animals.¹⁰⁹ FWS announced the availability of the 2016 Conservation Strategy, as well as revised recovery criteria for the GYE population, in its 2017 final rule designating and delisting the GYE grizzly bear population.¹¹⁰

Idaho, Montana, Wyoming, and the Tribes of the Wind River Reservation also each adopted grizzly bear management plans.¹¹¹ The three states entered into a memorandum of understanding regarding how they would coordinate their management efforts.¹¹² FS and NPS also incorporated habitat standards and other aspects of the 2016 GYE Conservation Strategy into appropriate land management plans.¹¹³

Northern Continental Divide Ecosystem Grizzly Bear Recovery Activities

In 2009, the NCDE Subcommittee, a subcommittee of the IGBC, appointed the Interagency Conservation Strategy Team for the NCDE population.¹¹⁴ The team released its final conservation strategy in 2019.¹¹⁵ The NCDE conservation strategy noted that habitat objectives and other provisions of the document had been incorporated (or would be incorporated prior to delisting) into land management plans for relevant national forests, national parks, and BLM lands, as well as management plans for the Blackfeet Indian Reservation, Flathead Indian Reservation, and Montana state agencies.¹¹⁶

North Cascades Ecosystem Grizzly Bear Recovery Activities

In 1997, FWS released a supplement to its 1993 Recovery Plan with specific goals for the recovery of the grizzly bear in the NCE.¹¹⁷ The supplement set out two recovery goals: (1) for the population to be self-sustaining and large enough to offset some level of human-induced mortality

¹⁰⁸ IGBC, “2016 Conservation Strategy”.

¹⁰⁹ *Ibid.*

¹¹⁰ 82 *Federal Register* 30520, p. 30512. See section “Designation and Delisting of the Greater Yellowstone Ecosystem Distinct Population Segment of Grizzly Bears.”

¹¹¹ IGBC, “2016 Conservation Strategy”, Appendixes H, I, J, N, and O.

¹¹² *Ibid.* at p. 26.

¹¹³ *Ibid.*

¹¹⁴ Northern Continental Divide Ecosystem Subcommittee, *Conservation Strategy for the Grizzly Bear in the Northern Continental Divide Ecosystem*, 2019, p. 8, <https://myfwp.mt.gov/getRepositoryFile?objectID=93282>. The Interagency Conservation Strategy Team included representatives from FWS and the U.S. Forest Service, National Park Service, Bureau of Land Management, U.S. Geological Survey, U.S. Department of Agriculture Wildlife Services, Montana state wildlife agencies, Blackfeet Nation, and Confederated Salish and Kootenai Tribes.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* at p. 15.

¹¹⁷ Christopher Servheen, *Grizzly Bear Recovery Plan, Supplement: North Cascades Ecosystem Recovery Plan Chapter*, FWS, University of Montana, June 23, 1997, <http://npshistory.com/publications/noca/grizzly-bear/fws-supplement.pdf>.

and foreseeable influences of demographic and environmental variation and (2) for the population to reach 200-400 bears and for reproducing bears to be distributed throughout the NCE.¹¹⁸

After decades of finding that petitions to reclassify the NCE grizzly bear population as endangered were warranted but its listing as endangered was precluded by higher-priority listing activities for the agency (known as a *warranted but precluded* finding),¹¹⁹ FWS concluded in June 2023 that the NCE no longer contains a grizzly bear population to list.¹²⁰ In the FY2022 candidate notice of review, FWS affirmatively concluded that the population no longer exists based on the limited number of grizzly bear detections in the ecosystem over the last few decades and how long it had been since the last sighting in the area (in 1996).¹²¹ The notice observed that habitat evaluations have shown the NCE may be able to support a population of approximately 280 grizzly bears.¹²² Given the isolation from existing populations, however, FWS concluded that natural recolonization of the ecosystem was unlikely.¹²³

Following this determination, FWS proposed a rule in September 2023 to establish a nonessential experimental population of grizzly bears in the NCE in Washington State.¹²⁴ In April 2024, FWS and NPS issued a joint Environmental Impact Statement and record of decision (ROD) establishing a restoration plan to create a nonessential experimental population of grizzly bears in the NCE.¹²⁵ The following month, FWS issued a final rule in the Federal Register establishing a nonessential experimental population and establishing regulations to manage the population.¹²⁶ According to the ROD, FWS and NPS intend to introduce three to seven bears per year for 5-10 years until a population of 25 bears is reached. The agencies aim to reach approximately 200

¹¹⁸ *Ibid.* at p. 3.

¹¹⁹ 16 U.S.C. §1533(b)(3)(B)(iii). See also FWS, *Listing a Species as Threatened or Endangered*, August 2016, p. 2, <https://www.fws.gov/sites/default/files/documents/ESA-Section-4-Listing.pdf>.

¹²⁰ DOI, FWS, “Endangered and Threatened Wildlife and Plants; Review of Species That Are Candidates for Listing as Endangered or Threatened; Annual Notification of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions,” 88 *Federal Register* 41560, June 27, 2023 p. 41579 (hereinafter cited as 88 *Federal Register* 41560). FWS received five petitions between 1990 and 1998 to reclassify the North Cascades Ecosystem grizzly bear population as endangered. DOI, FWS, “Endangered and Threatened Wildlife and Plants; Finding on Petition to Reclassify the Grizzly Bear in the North Cascades Area as Endangered,” 55 *Federal Register* 32103, August 7, 1990; DOI, FWS, “Endangered and Threatened Wildlife and Plants; Finding on Petition to Reclassify the Grizzly Bear in the North Cascades Area as Endangered,” 56 *Federal Register* 33892, July 24, 1991; DOI, FWS, “Petitions to Change Status of Grizzly Bear Population in Selkirk Ecosystem of Idaho and Washington et al.,” 57 *Federal Register* 14372, April 20, 1992; DOI, FWS, “Endangered and Threatened Wildlife and Plants; Notice of Finding on a Petition to Delist the Grizzly Bear in the Northern Continental Divide Ecosystem, the Cabinet-Yaak Ecosystem, the Selkirk Ecosystem, and the North Cascades Ecosystem,” 58 *Federal Register* 43856, August 18, 1993; DOI, FWS, “Endangered and Threatened Wildlife and Plants: Finding on Petitions to Change the Status of Grizzly Bear Populations in the North Cascades Area of Washington and the Cabinet-Yaak Area of Montana and Idaho from Threatened to Endangered,” 63 *Federal Register* 30453, June 4, 1998.

¹²¹ 88 *Federal Register* 41560, p. 41579.

¹²² *Ibid.*

¹²³ *Ibid.* at p. 41580.

¹²⁴ DOI, FWS, “Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Grizzly Bear in the North Cascades Ecosystem, Washington State,” 88 *Federal Register* 67193, September 29, 2023 (hereinafter cited as 88 *Federal Register* 67193); see also CRS In Focus IF12407, *Experimental Populations Under the Endangered Species Act*, by Erin H. Ward and Benjamin M. Barczewski; CRS Report R47581, *Experimental Populations Under the Endangered Species Act and Gray Wolves*, by Erin H. Ward and Benjamin M. Barczewski.

¹²⁵ National Park Service and FWS, *Joint Record of Decision: Grizzly Bear Restoration Plan*, April 2024, <https://parkplanning.nps.gov/showFile.cfm?sfid=729955&projectID=112008>.

¹²⁶ U.S. Department of Interior, FWS, Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Grizzly Bear in the North Cascades Ecosystem, Washington State, 89 *Federal Register* 36982, May 3, 2024 (hereinafter cited as 89 *Federal Register* 36982).

bears in 60-100 years.¹²⁷ The geographic boundaries and the management of the nonessential population are the same as those in the proposed rule.

The final rule sets out the geographic area for the population. The nonessential population boundary includes all of Washington State except for the northeast corner, which currently hosts a grizzly bear population as part of the SE Recovery Zone.¹²⁸ The final rule creates three management zones within the state that correspond to the suitability of bear habitat and the likelihood for bear-human conflict, as shown in **Figure 3**. Zone A, for instance, centers on the NCE but excludes all state and private land and will be the core habitat for reintroduction, survival, and procreation of the experimental population.¹²⁹ Zone B, while including suitable habitat for grizzly bears in various national forests, is less likely to host a grizzly bear population because of its distance from the NCE.¹³⁰ Zone C includes the remainder of the covered area in the state of Washington and contains large areas not thought suitable for grizzly bear populations.¹³¹

¹²⁷ National Park Service and FWS, *Joint Record of Decision: Grizzly Bear Restoration Plan*, April 2024, <https://parkplanning.nps.gov/showFile.cfm?sfid=729955&projectID=112008>.

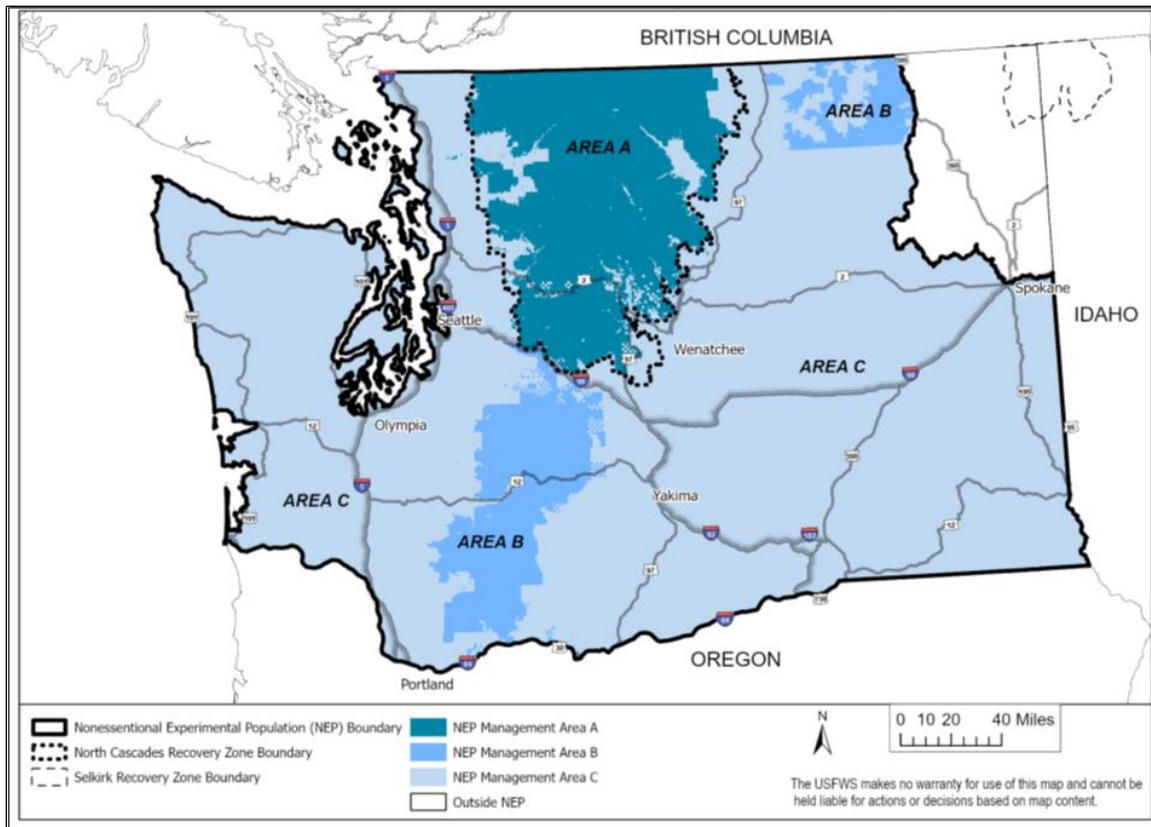
¹²⁸ 89 *Federal Register* 36982, pp. 37002-03.

¹²⁹ *Ibid.* at p. 37003.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

Figure 3. Management Zones for North Cascades Ecosystem Grizzly Bear Experimental Population



Source: U.S. Department of Interior, FWS, Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Grizzly Bear in the North Cascades Ecosystem, Washington State, 89 *Federal Register* 36982, p. 37003, May 3, 2024.

The final rule prohibits all take of a grizzly bear unless expressly excepted as well as the possession, sale, delivery, transportation, shipment, import, or export of any member of the experimental population.¹³² The final rule permits the intentional taking of grizzly bears to protect human life but otherwise would prohibit intentional take.¹³³ Incidental take would be permitted under the proposed rule but would be subject to additional restrictions on FS land.¹³⁴ Within Zone A, federal, state, and tribal authorities could lethally remove a bear involved in a conflict if it is not “reasonably possible to eliminate the threat through nonlethal means.”¹³⁵ Within Zone B, in addition to what is permitted in Zone A, FWS can issue a time-limited lethal take authorization to a livestock owner if a bear depredation were confirmed, the “bear is a demonstrable and ongoing threat, and it is not reasonably possible to eliminate the threat through nonlethal” means.¹³⁶ Finally, within Zone C, in addition to what is permitted in Zone A and B, FWS or another

¹³² *Ibid.* at p. 37011.

¹³³ *Ibid.* at p. 37010.

¹³⁴ *Ibid.* *Incidental take* “means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 50 C.F.R. §17.3.

¹³⁵ *Ibid.* at p. 37011.

¹³⁶ *Ibid.*

authorized agency can issue a time-limited lethal take authorization to a private land owner if it is deemed necessary for human safety or to protect property.¹³⁷

Bitterroot Ecosystem Grizzly Bear Recovery Activities

In 1996, FWS issued a supplement to its 1993 Recovery Plan that evaluated potential avenues to recover or reintroduce grizzly bears in the BE.¹³⁸ The supplement found that at the time there were no bears in the BE, the last tracks having been observed in 1946.¹³⁹ The supplement recommended that FWS explore the full range of grizzly bear recovery activities, including the creation of an experimental population and the preparation of an accompanying environmental impact statement (EIS) pursuant to National Environmental Policy Act (NEPA).¹⁴⁰ In 2000, FWS issued a final environmental impact statement (FEIS) and a ROD supporting the establishment of a nonessential experimental population in the BE.¹⁴¹ The ROD created a three-phase recovery plan: (1) creation of a Citizen Management Committee, (2) implementation of sanitation and education efforts to prepare the land and community for the presence of grizzly bears, and (3) placement of the bears themselves.¹⁴² FWS conditioned implementation of the last phase—relocation of bears to the BE—on the availability of funds so as not to detract from grizzly bear recovery efforts in other areas.¹⁴³ FWS simultaneously issued a final rule formally establishing a nonessential experimental population of grizzly bears in the BE and promulgating regulations for the management of the experimental population.¹⁴⁴ The final rule stated that FWS would reintroduce at least 25 bears, mainly from Canada.¹⁴⁵ The rule also formally created the 15-member Citizen Management Committee that would “facilitate recovery” of the grizzly bear population in the BE.¹⁴⁶

In 2001, citing agency funding constraints and local opposition, FWS issued two proposed actions (a proposed rule and a notice of intent) that, if finalized, would have abandoned the establishment of an experimental population in the BE.¹⁴⁷ The proposed actions would have permitted the natural expansion of the grizzly population into the BE from surrounding

¹³⁷ Ibid. FWS could issue such an authorization if a bear “present[s] a demonstrable and ongoing threat to human safety or to lawfully present livestock ... or other property [e.g., compost, chickens, beehives] and it is not reasonably possible to otherwise eliminate the threat by nonlethal” means. Ibid. at p. 37024.

¹³⁸ Christopher Servheen, *Grizzly Bear Recovery Plan Supplement: Bitterroot Recovery Ecosystem Plan Chapter*, FWS, University of Montana, September 10, 1996, p. 3, <http://npshistory.com/publications/noca/grizzly-bear/fws.pdf>.

¹³⁹ Ibid. at p. 1.

¹⁴⁰ Ibid. at p. 3.

¹⁴¹ Environmental Protection Agency, “Environmental Impact Statements; Notice of Availability,” 65 *Federal Register* 15903, March 24, 2000 (FWS, *Final Environmental Impact Statement: Grizzly Bear Recovery in the Bitterroot Ecosystem*, March 24, 2000); DOI, FWS, “Record of Decision Concerning Grizzly Bear Recovery in the Bitterroot Ecosystem,” 65 *Federal Register* 69644, November 17, 2000 (hereinafter cited as 65 *Federal Register* 69644).

¹⁴² 65 *Federal Register* 69644.

¹⁴³ Ibid. at p. 5.

¹⁴⁴ DOI, FWS, “Endangered and Threatened Wildlife and Plants: Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana,” 65 *Federal Register* 69624, November 17, 2000.

¹⁴⁵ Ibid. at p. 69627.

¹⁴⁶ Ibid. at p. 69628.

¹⁴⁷ DOI, FWS, “Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana; Removal of Regulations,” 66 *Federal Register* 33620, June 22, 2001; DOI, FWS, “Reevaluation of the Record of Decision for the Final Environmental Impact Statement and Selection of Alternative for Grizzly Bear Recovery in the Bitterroot Ecosystem,” 66 *Federal Register* 33623, June 22, 2001.

populations in the GYE, CYE, and NCDE.¹⁴⁸ The proposed actions were never finalized. Despite the final 2000 regulations establishing an experimental population, FWS did not reintroduce any bears in the BE or establish the Citizen Management Committee.¹⁴⁹

In 2023, a district court in Montana held that FWS’s delay in implementing the first two phases of the ROD violated the Administrative Procedure Act (APA).¹⁵⁰ Nonetheless, the court held that because the FEIS was prepared more than two decades ago, FWS must prepare a new EIS before implementing the ROD to account for any new information.¹⁵¹ In January 2024, FWS announced its intent to prepare a new EIS to evaluate the potential environmental impacts of restoring grizzly bears to the BE.¹⁵² The notice states that because “conditions have changed” FWS will evaluate a range of recovery options, including the establishment of an experimental population.¹⁵³

Designation and Delisting of the Greater Yellowstone Ecosystem Distinct Population Segment of Grizzly Bears

The ESA provides for the listing, protection, and recovery of “species.”¹⁵⁴ The term *species*, as defined by the ESA, may refer to a taxonomical species, a subspecies, or a *distinct population segment* (DPS).¹⁵⁵ The act does not define DPS; the Services provided their interpretation of the term in a policy document published in 1996.¹⁵⁶ In general, to qualify as a DPS, a population of a species must be discrete from the remainder of the species and significant to that species.¹⁵⁷ If the relevant Service determines that a population qualifies as a DPS, it may evaluate the DPS based on the factors for assessing threats to the species to determine if the DPS meets the definition of endangered or threatened species.¹⁵⁸ Based on that analysis, the Service may designate and list the DPS if it qualifies as an endangered or threatened species or, if the DPS is already listed on its own or as part of a larger listed entity, the Service may delist the DPS if it no longer qualifies.¹⁵⁹

¹⁴⁸ 66 *Federal Register* 33623, p. 33624.

¹⁴⁹ DOI, FWS, “Endangered and Threatened Wildlife and Plants; Establishment of an Experimental Population of the Grizzly Bear in the Bitterroot Ecosystem of the States of Idaho and Montana; Environmental Impact Statement,” 89 *Federal Register* 3411, January 18, 2024, p. 3413 (hereinafter cited as 89 *Federal Register* 3411).

¹⁵⁰ *All. for the Wild Rockies v. Cooley*, 661 F. Supp. 3d 1025, 1039 (D. Mont. 2023). Section 706(1) of the Administrative Procedure Act authorizes a court to compel agency action that is “unlawfully withheld or unreasonably delayed.” 5 U.S.C. §706(1). A court can only compel agency action, however, if that action is nondiscretionary or ministerial. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). The court in *Alliance for Wild Rockies* found that only the first two phases of the record of decision impose nondiscretionary duties on FWS. The third phase—the reintroduction of the bears—was conditioned on availability of funds, making the reintroduction discretionary. *All. for the Wild Rockies*, 661 F. Supp. 3d at 1038. The court, therefore, could not compel FWS to reintroduce bears to the Bitterroot Ecosystem. *All. for the Wild Rockies*, 661 F. Supp. 3d at 1038.

¹⁵¹ *All. for the Wild Rockies*, 661 F. Supp. 3d at 1042-1043.

¹⁵² 89 *Federal Register* 3411, p. 3413.

¹⁵³ *Ibid.*

¹⁵⁴ 16 U.S.C. §1533.

¹⁵⁵ 16 U.S.C. §1532(16).

¹⁵⁶ DOI et al., “Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act,” 61 *Federal Register* 4722, February 7, 1996.

¹⁵⁷ *Ibid.* at p. 4725.

¹⁵⁸ See 16 U.S.C. §1533(a).

¹⁵⁹ *Ibid.*

On two occasions, FWS has designated the GYE grizzly bear population as a DPS and delisted it (i.e., removed it from the list of threatened and endangered species).¹⁶⁰ In both cases, the designation and delisting were the subject of litigation and ultimately were vacated.¹⁶¹ On both occasions, courts found fault with FWS's predictions about the effectiveness of protective regulatory mechanisms that would persist after the species was delisted in light of the fact that state-level management could include hunting grizzly bears and may inadequately account for environmental changes caused by climate change.¹⁶² Further, these cases illustrate the difficulty FWS faces in predicting the long-term health and recovery of listed species such as the grizzly bear in a way that meets the ESA standard of using the best available scientific and commercial data and the APA requirements for supporting agency decisions.¹⁶³ These challenges in delisting decisions generally have stemmed from the uncertainty of the regulatory landscape after delisting, the possibility of substantial environmental change in the foreseeable future that may be difficult to predict with certainty, and the dynamic interaction between different populations and between the population at issue and other species that also are subject to environmental changes.

2007 GYE DPS Designation and Delisting Rule

In 2007, FWS designated the GYE grizzly bear population as a DPS and delisted it.¹⁶⁴ At the time, the grizzly bear was listed as threatened throughout the lower 48 states. FWS analyzed the GYE population pursuant to its DPS policy to determine whether the population qualified as a DPS. FWS first assessed whether the population was discrete from other grizzly bear populations.¹⁶⁵ FWS noted that the GYE population had been separated from other areas where grizzly bears occur “for at least 100 years” and that the populations were separated by barriers such as “land ownership, vegetation, and topographic patterns unsuitable for grizzly bears.”¹⁶⁶ FWS also concluded that the population was genetically distinct from other grizzly bears.¹⁶⁷

Having concluded the population was distinct from other grizzly bears, FWS analyzed the population's biological and ecological significance.¹⁶⁸ FWS determined that the GYE population existed in an “unusual and unique ecosystem” with food sources distinct from those of other populations.¹⁶⁹ In particular, FWS focused on the availability of large-bodied ungulates and other terrestrial mammals in the greater Yellowstone area, which resulted in a higher percentage of the population's diet consisting of meat compared with other populations that relied primarily on plants, such as fall berries, and insects.¹⁷⁰ FWS also noted the GYE population's unique reliance

¹⁶⁰ 72 *Federal Register* 14866; DOI, FWS, “Endangered and Threatened Wildlife and Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife,” 82 *Federal Register* 30502, June 30, 2017 (hereinafter cited as 82 *Federal Register* 30502).

¹⁶¹ *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1032 (9th Cir. 2011); *Crow Indian Tribe v. United States*, 965 F.3d 662, 681 (9th Cir. 2020).

¹⁶² *Greater Yellowstone Coal.*, 665 F.3d at 1030-32; *Crow Indian Tribe*, 965 F.3d at 678-80 (9th Cir. 2020).

¹⁶³ *Greater Yellowstone Coal.*, 665 F.3d at 1030-32; *Crow Indian Tribe*, 965 F.3d at 678-80 (9th Cir. 2020).

¹⁶⁴ 72 *Federal Register* 14866.

¹⁶⁵ *Ibid.* at pp. 14876-14877.

¹⁶⁶ *Ibid.* at pp. 14876-14877.

¹⁶⁷ *Ibid.* at p. 14877.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.* at p. 14878.

¹⁷⁰ *Ibid.*

on whitebark pine seeds as a major food source.¹⁷¹ These unique food sources made the GYE population a significant grizzly bear population, in FWS's view.¹⁷²

In addition to positing that the GYE population was significant due to its unique ecological setting, FWS emphasized the GYE population's contribution to the range of the species and its genetic characteristics.¹⁷³ FWS noted that losing the GYE population—the southernmost population of grizzly bears—would create a significant gap in the grizzly bear's range.¹⁷⁴ Finally, FWS observed that the GYE population was genetically distinct from other populations, likely due to its isolation from other populations for 100 years or more.¹⁷⁵

Having found the GYE population to be discrete and significant, FWS determined that the population warranted recognition as a DPS.¹⁷⁶ After reaching this conclusion, FWS evaluated the threats to the species using the five factors in Section 4 of the ESA. FWS concluded that the growth, health, and expanding range and distribution of the population showed it had recovered biologically.¹⁷⁷ Examining the threats to the GYE population, the agency determined that the DPS had sufficient suitable habitat and protections through federal and state management plans to ensure the population would not be threatened with extinction in the foreseeable future.¹⁷⁸

The Greater Yellowstone Coalition challenged the 2007 DPS designation and delisting rule under the APA and the ESA.¹⁷⁹ The coalition alleged that (1) the regulatory mechanisms would be inadequate to protect the grizzly bear population once delisted, (2) FWS failed to adequately consider the effects of global warming and factors affecting the whitebark pine, (3) the GYE population was too small and dependent on relocating bears from other populations to maintain genetic diversity, and (4) FWS failed to consider whether the population was recovered throughout a significant portion of its range.¹⁸⁰

In *Greater Yellowstone Coalition v. Servheen*, the district court vacated the 2007 delisting after holding that the rule was arbitrary and capricious and inconsistent with the ESA based on the first and second arguments described above.¹⁸¹ The court determined that FWS had relied on regulatory mechanisms for protection of the GYE grizzly bear population that were unenforceable or not sufficiently certain to occur.¹⁸² In addition, the court concluded that FWS had not articulated a rational connection between the best available scientific and commercial data and its conclusion that declines in the whitebark pine's availability would not negatively impact the GYE grizzly bear population.¹⁸³ Observing that the "best available science" anticipated whitebark pines

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid. The genetic aspect of FWS's analysis is relevant to the question of whether the GYE population is distinct and, separately, to the question of whether it is biologically significant.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid. at pp. 14935-14936.

¹⁷⁸ Ibid. at pp. 14934-14935.

¹⁷⁹ *Greater Yellowstone Coal., Inc. v. Servheen*, 672 F. Supp. 2d 1105, 1109 (D. Mont. 2009).

¹⁸⁰ *Greater Yellowstone Coal., Inc.*, 672 F. Supp. 2d at 1109.

¹⁸¹ *Greater Yellowstone Coal., Inc.*, 672 F. Supp. 2d at 1118, 1120, 1126. On the other two allegations, the court concluded that FWS had adequately explained its justification for concluding that the population had sufficient genetic diversity and that FWS was entitled to deference for its interpretation of "significant portion of their range." *Greater Yellowstone Coal., Inc.*, 672 F. Supp. 2d at 1120-26.

¹⁸² *Greater Yellowstone Coal., Inc.*, 672 F. Supp. 2d at 1113-18.

¹⁸³ *Greater Yellowstone Coal., Inc.*, 672 F. Supp. 2d at 1118-20.

declining due to such factors as climate change, increasing forest fires, a mountain pine beetle epidemic, and white pine blister rust infections, the court concluded that “much of the cited science directly contradicts the Service’s conclusions.”¹⁸⁴ Consistent with the court’s order, FWS issued a notice in March 2010 that ESA protections had been reinstated for the GYE grizzly bear.¹⁸⁵

On appeal, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed the district court’s decision to vacate the rule.¹⁸⁶ The appeals court agreed with the district court that FWS had not rationally supported its conclusion that potential whitebark pine declines would not threaten the GYE grizzly bear population.¹⁸⁷ Although the appeals court disagreed that the regulatory mechanisms were inadequate, finding that something less than the ESA’s protections could still be rationally deemed sufficient, the appeals court concluded that the flaws in the whitebark pine analysis were a sufficient basis for the district court to have vacated the rule.¹⁸⁸

2017 GYE DPS Designation and Delisting Rule

In 2017, FWS published a new final rule, once again designating the GYE population as a DPS and delisting it.¹⁸⁹ The agency concluded that the GYE population qualified as a DPS based on discreteness and significance considerations similar to those it relied upon in its 2007 rule.¹⁹⁰ FWS concluded that the whitebark pine had declined since 2002 and may no longer be a major food source for the GYE population.¹⁹¹ FWS determined, however, that the population’s new combination of food sources, which included army cutworm moths, whitebark pine, cutthroat trout, and ungulates (e.g., bison, elk), was similarly unique from other populations to support a finding that the population was discrete and significant.¹⁹²

In its threats analysis, FWS relied primarily on the post-delisting management mechanisms outlined in the 2016 Conservation Strategy to address potential concerns related to overutilization and human-caused predation as well as other factors such as genetic health, changes in available food resources, and climate change.¹⁹³ In general, FWS stated that the anticipated management response to changes in these potential threats would limit human-caused mortality through activities such as conflict management.¹⁹⁴ FWS also conducted a detailed analysis of the potential effect of changes in the availability of whitebark pine on the GYE population’s diet and anticipated mortality levels, to address the Ninth Circuit’s concerns with the 2007 rule.¹⁹⁵ Pointing to the availability of other food resources, the grizzly bear’s dietary diversity and ability to find other foods when one becomes less available, and stable grizzly bear population numbers despite the whitebark pine’s decline, FWS concluded that changes in food resources did not

¹⁸⁴ *Greater Yellowstone Coal., Inc.*, 672 F. Supp. 2d at 1118, 1120.

¹⁸⁵ DOI, FWS, “Endangered and Threatened Wildlife and Plants; Reinstatement of Protections for the Grizzly Bear in the Greater Yellowstone Ecosystem in Compliance with Court Order,” 75 *Federal Register* 14496, March 26, 2010.

¹⁸⁶ *Greater Yellowstone Coal., Inc.*, 672 F. Supp. 2d at 1030-32.

¹⁸⁷ *Greater Yellowstone Coal., Inc.*, 672 F. Supp. 2d at 1024-30.

¹⁸⁸ *Greater Yellowstone Coal., Inc.*, 672 F. Supp. 2d at 1030-32.

¹⁸⁹ 82 *Federal Register* 30502.

¹⁹⁰ *Ibid.* at pp. 30517-30519.

¹⁹¹ *Ibid.* at p. 30518.

¹⁹² *Ibid.* at pp. 30518-30519.

¹⁹³ *Ibid.* at p. 30545.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.* at pp. 30536-30540.

constitute a threat to the GYE grizzly bear in the foreseeable future.¹⁹⁶ Having addressed the Ninth Circuit's concerns and assessed the threats to the species, FWS concluded the GYE population was no longer a threatened species.¹⁹⁷

The Crow Indian Tribe challenged the 2017 final rule.¹⁹⁸ The tribe alleged that FWS had violated the ESA and the APA by delisting the GYE DPS without considering the effect of doing so on the remaining grizzly bears in the lower 48 states; the tribe also claimed that FWS had erred in its five-factor analysis of threats to the DPS.¹⁹⁹ The district court agreed.²⁰⁰ In *Crow Indian Tribe v. United States*, the court concluded that FWS's failure to analyze the impact of the delisting on the grizzly bears that remained listed "entirely failed to consider an important aspect of the problem," rendering the rule arbitrary and capricious.²⁰¹

In addition, the court determined that two flaws in the threats analysis also rendered the rule arbitrary and capricious. First, the court concluded that to satisfy the ESA's best available science requirement, FWS should have required three state management plans to calibrate their population estimators to the model that FWS had used to justify delisting.²⁰² Citing FWS documents that asserted that failing to include this requirement would result in a "biologically and legally indefensible" delisting rule, the district court concluded that FWS's decision was based not on scientific data but on the states' political pressure.²⁰³

Second, the court found that the two studies FWS relied upon to determine that the GYE DPS would remain genetically self-sufficient did not support its conclusions. Those studies, in the court's view, concluded that the existing population size of the GYE DPS was sufficient "[f]or short-term fitness" but that "that the long-term health of the [GYE DPS] depend[ed] on the introduction of new genetic material."²⁰⁴ The court therefore found it "illogical" for FWS to rely on those studies to conclude that genetic health was not a threat to the population in the foreseeable future.²⁰⁵ The court vacated the rule and remanded the rule to FWS to address the three identified issues.²⁰⁶ FWS issued a notice in July 2019 that ESA protections had been reinstated for the GYE population.²⁰⁷

FWS appealed two aspects of the district court's remand order.²⁰⁸ First, it challenged the requirement to reconsider the GYE population's long-term genetic health.²⁰⁹ Second, it argued that the ESA did not require the court to order a full Section 4(a) review of the effect of delisting the DPS on the remnant population.²¹⁰ Other stakeholders, including states and private hunting

¹⁹⁶ *Ibid.* at pp. 30539-30540.

¹⁹⁷ *Ibid.* at p. 30545.

¹⁹⁸ *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999 (D. Mont. 2018).

¹⁹⁹ *Crow Indian Tribe*, 343 F. Supp. 3d at 1003-1004.

²⁰⁰ *Crow Indian Tribe*, 343 F. Supp. 3d at 1003-1004.

²⁰¹ *Crow Indian Tribe*, 343 F. Supp. 3d at 1004 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

²⁰² *Crow Indian Tribe*, 343 F. Supp. 3d at 1004.

²⁰³ *Crow Indian Tribe*, 343 F. Supp. 3d at 1016-1017.

²⁰⁴ *Crow Indian Tribe*, 343 F. Supp. 3d at 1016-1017.

²⁰⁵ *Crow Indian Tribe*, 343 F. Supp. 3d at 1016-1017.

²⁰⁶ *Crow Indian Tribe*, 343 F. Supp. 3d at 1021.

²⁰⁷ FWS, "Endangered and Threatened Wildlife and Plants; Reinstatement of ESA Listing for the Grizzly Bear in the Greater Yellowstone Ecosystem in Compliance with Court Order," 84 *Federal Register* 37144, July 31, 2019.

²⁰⁸ *Crow Indian Tribe v. United States*, 965 F.3d 662, 675 (9th Cir. 2020).

²⁰⁹ *Crow Indian Tribe*, 965 F.3d at 675.

²¹⁰ *Crow Indian Tribe*, 965 F.3d at 675.

and farming organizations, joined as intervenors to challenge the court's determination that future population estimators must be calibrated to the one used to delist the DPS.²¹¹

The Ninth Circuit generally affirmed the district court's order. The appeals court agreed that the underlying studies "express[ed] concerns about the long-term genetic health of the Yellowstone grizzly" and that FWS had not ensured adequate concrete and enforceable regulatory mechanisms to address these concerns.²¹² The appeals court further agreed with the district court's determination that FWS had failed to rely solely on the best scientific and commercial data when it did not require calibration of future population estimators.²¹³

The Ninth Circuit's analysis of the remaining issue—the effect of delisting the GYE DPS on the remnant grizzly bear population—considered in part an earlier decision of the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit).²¹⁴ In 2017, the D.C. Circuit concluded that before it could designate and delist a DPS of gray wolves, FWS must conduct a "comprehensive review" of the effect of the delisting on the remnant members of the species.²¹⁵ Ultimately, the Ninth Circuit distinguished the grizzly bear delisting from the gray wolf case because the remaining grizzly bear population would remain listed. In the case of the gray wolf, FWS had created and delisted a gray wolf DPS and then attempted to delist what remained of the gray wolf population by concluding that the remnant population (i.e., the portion of the wolf population not included in the DPS) did not qualify as a "species" under the act and therefore should not be listed.²¹⁶

Despite finding the gray wolf case distinguishable, the appeals court held that FWS did need to consider whether the remaining grizzly bear populations would continue to satisfy the criteria for listing under the ESA.²¹⁷ Without that analysis, the court held, FWS could not delist the GYE DPS.²¹⁸ The court noted, however, that the district court was wrong to require a full Section 4(a) (i.e., listing) analysis of the remnant population's eligibility for listing.²¹⁹ Instead, the Ninth Circuit held that FWS need only assess "whether there is a sufficiently distinct and protectable remnant population, so that the delisting of the DPS will not further threaten the existence of the remnant."²²⁰ The Ninth Circuit directed the district court to adjust its remand order to narrow its scope consistent with the appeals court's opinion.²²¹

Recent Grizzly Bear Status Assessments and Findings

In March 2021, FWS released a five-year status review for the grizzly bear in the lower 48 states pursuant to a settlement agreement entered into with the Center for Biological Diversity in December 2019.²²² A five-year status review assesses a listed species to determine whether its

²¹¹ *Crow Indian Tribe*, 965 F.3d at 675.

²¹² *Crow Indian Tribe*, 965 F.3d at 679-80.

²¹³ *Crow Indian Tribe*, 965 F.3d at 680-81.

²¹⁴ *Crow Indian Tribe*, 965 F.3d at 673.

²¹⁵ *Humane Soc'y v. Zinke*, 865 F.3d 585, 600-602 (D.C. Cir. 2017).

²¹⁶ *Crow Indian Tribe*, 965 F.3d at 677.

²¹⁷ *Crow Indian Tribe*, 965 F.3d at 677.

²¹⁸ *Crow Indian Tribe*, 965 F.3d at 677-78.

²¹⁹ *Crow Indian Tribe*, 965 F.3d at 678.

²²⁰ *Crow Indian Tribe*, 965 F.3d at 678.

²²¹ *Crow Indian Tribe*, 965 F.3d at 681.

²²² FWS, *Grizzly Bear in the Lower-48 States*. The Center for Biological Diversity had sued to compel FWS to conduct a five-year status review of the grizzly bear in the lower 48 states, as required by the ESA. Stipulated Settlement (continued...)

status has changed and whether it should be classified differently under the ESA or delisted.²²³ The 2021 five-year review noted several improvements in grizzly bear populations since they were listed in 1975 and concluded that the grizzly bear in the lower 48 states was not currently in danger of extinction throughout all of its range but could be in danger of extinction within the foreseeable future throughout a significant portion of its range.²²⁴ This conclusion led FWS to state that the grizzly bear in the lower 48 states met the definition of a threatened species under the ESA and should retain its status as a threatened species.²²⁵

On February 6, 2023, FWS published preliminary findings on three petitions—one asking FWS to delist the grizzly bear in the lower 48 states and one each asking FWS to delist the NCDE and GYE populations.²²⁶ FWS denied the petition to delist the grizzly bear in the lower 48 states, concluding that the petition had not presented substantial scientific or commercial data indicating that delisting was warranted.²²⁷ FWS found, however, that the petitions for the two individual populations had presented sufficient information to indicate that delisting may be warranted.²²⁸ Accordingly, FWS announced it was initiating a status review of the NCDE and GYE populations to determine whether delisting is warranted.²²⁹

Considerations for Congress

The listing of grizzly bears—as a whole or in distinct populations—under the ESA remains the subject of congressional inquiry. The 118th Congress held oversight hearings addressing the listing of grizzly bears and introduced several bills that would direct the Secretary of the Interior to delist grizzly bears (either the entire population in the lower 48 states or specific population segments).²³⁰ Most of the legislative debate in the 118th Congress is on the listing status of the GYE and NCDE populations of grizzly bears and whether these populations or the overall population of grizzly bears in the lower 48 states should be listed under the ESA.

Some Members and stakeholders argue that grizzly bears should be delisted due to population increases since their listing.²³¹ These stakeholders contend that grizzly bear populations have

Agreement, *Ctr. for Biological Diversity v. Bernhardt*, No. 9:19-cv-00109 (D. Mont. Dec. 6, 2019). In the settlement agreement, FWS agreed to post a status review of all grizzly bear populations by March 31, 2021. *Ibid.*

²²³ Note that all proposed changes to the status of a species listed under the act have to go through the listing process to become final.

²²⁴ FWS, *Grizzly Bear in the Lower-48 States*.

²²⁵ *Ibid.* For more detailed information on the five-year status review and most recent species status assessment, see report section on “Science of the Conservation and Recovery of Grizzly Bears.”

²²⁶ DOI, FWS, “Endangered and Threatened Wildlife and Plants; 90-Day Findings for Three Petitions to Delist the Grizzly Bear in the Lower-48 States,” 88 *Federal Register* 7658, Feb. 6, 2023 (hereinafter cited as 88 *Federal Register* 7658).

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ In the 118th Congress, for example, H.R. 4997 and S. 2571 would remove grizzly bears (including experimental populations in Idaho and Montana) from being listed under the ESA; H.R. 1419 would direct the Department of Interior to issue a final rule to remove the Northern Continental Divide Ecosystem (NCDE) population of grizzly bears from being listed under the ESA; H.R. 1364 would direct DOI to reissue a rule to delist the GYE population of grizzly bears and issue a final rule to remove the NCDE population of grizzly bears from being listed under the ESA; and H.R. 1245 and S. 445 would direct DOI to reissue a rule to delist the GYE population of grizzly bears.

²³¹ For example, see Representative Matt Rosendale, “Rep. Rosendale Releases Statement on Recovering Grizzly Bear Population in Montana,” Press Release, February 24, 2024, <https://rosendale.house.gov/news/documentsingle.aspx?DocumentID=797>.

increased beyond recovery plan goals, have moved out of their designated recovery areas, and are threatening livestock and humans.²³² Some individuals cite human-bear conflicts as a key concern and argue that delisting grizzly bears would allow states greater responsibility for managing populations, which may allow managers to better protect humans and livestock from aggressive bears.²³³ Further, some stakeholders in favor of delisting grizzly bears contend that state management of grizzly bears would be more effective than federal management.²³⁴

Members and stakeholders in favor of continuing to list grizzly bears under the ESA contend that ESA protections will help prevent the extinction of grizzly bears and support their recovery.²³⁵ In response to arguments to delist the entire grizzly bear population, some stakeholders assert that the entire grizzly bear population in the lower 48 states is far from recovered and should not be delisted.²³⁶ They note the low and extant populations of grizzly bears in the CYE and BE as justification for keeping bears listed under the ESA.²³⁷ Some also assert that the ESA provides a framework for conservation and recovery of species that individual states might not follow if they retained sole responsibility for managing bears.²³⁸ Some stakeholders also suggest that states may approve activities that are detrimental to grizzly bear populations; for example, some point to proposed trophy hunting seasons for grizzly bears in Idaho and Wyoming as inconsistent with conservation.²³⁹ In response to previous efforts to delist grizzly bears, some tribal stakeholders passed legal resolutions opposing the delisting of grizzly bears, citing cultural and religious beliefs that value grizzly bears.²⁴⁰

State Versus Federal Management of Grizzly Bears

Delisting the grizzly bear, or any other species listed under the ESA, generally leads to a shift in management responsibilities from the federal government to state governments. For the first five years after a species is delisted, the ESA requires FWS and NMFS, in cooperation with the states in which the species is found, to monitor the species' status.²⁴¹ The federal government retains responsibility for managing species on federal lands when they are delisted, whereas the state

²³² For example, see testimony of Brian Nesvik, Director of the Wyoming Game and Fish Department, in U.S. Congress, House Committee on Natural Resources, Water, Wildlife, and Fisheries Subcommittee, *Legislative Hearing on: H.R. 764, the "Trust the Science Act"; H.R. 886, "Save Our Seas 2.0 Amendments Act"; H.R. 1245, "Grizzly Bear State Management Act"; and H.R. 1419, "Comprehensive Grizzly Bear Management Act,"* hearings, 118th Cong., 1st Sess., March 23, 2023, H.Hrg. 118-10 (hereinafter, hearing cited as H.Hrg. 118-10).

²³³ Testimony of Representative Matt Rosendale in H.Hrg. 118-10.

²³⁴ If grizzly bears were delisted from the ESA, states would be responsible for managing populations within their boundaries.

²³⁵ For example, see Alliance for the Wild Rockies, "Alliance for the Wild Rockies Stops Cabinet-Yaak Grizzly Bear Habitat Destruction," press release, August 20, 2023, <https://allianceforthewildrockies.org/alliance-for-the-wild-rockies-stops-cabinet-yaak-grizzly-bear-habitat-destruction/>.

²³⁶ Earthjustice, "Grizzly Bears Still Need Protections," press release, January 18, 2024, <https://earthjustice.org/experts/perry-wheeler/grizzly-bears-still-need-protections#:~:text=While%20their%20numbers%20have%20improved,the%20species%20is%20fully%20recovered.>

²³⁷ Bonnie Rice, "Anti-Wildlife Governors Are Going After Grizzly Bears," Sierra Club, February 10, 2023, <https://www.sierraclub.org/articles/2023/02/anti-wildlife-governors-are-going-after-grizzly-bears>.

²³⁸ For example, see Center for Biological Diversity, "State Efforts to Remove Federal Grizzly Protections Move Forward," press release, February 3, 2023, <https://biologicaldiversity.org/w/news/press-releases/state-efforts-to-remove-federal-grizzly-protections-move-forward-2023-02-03/>.

²³⁹ Testimony of Representative Jared Huffman in H.Hrg. 118-10.

²⁴⁰ For some examples of resolutions, see Letter from R. Bear Stands Last, Co-founder, GOAL Tribal Coalition, to Sally Jewell, Secretary of the Interior, U.S. Department of the Interior, January 16, 2015, <https://www.doi.gov/sites/doi.gov/files/migrated/foia/os/upload/15-00269cu.pdf>.

²⁴¹ 16 U.S.C. §1533(g).

manages species on nonfederal lands. For example, if grizzly bears were delisted, NPS and FS would continue to manage grizzly bears in national parks and national forests, respectively.²⁴² Tribal entities would continue to manage grizzly bears on tribal lands.²⁴³

Congress may consider various perspectives on state versus federal management of grizzly bear populations when debating the status of grizzly bears under the ESA. Some stakeholders opposed to delisting grizzly bears argue that states will not adequately manage and protect the populations.²⁴⁴ They assert that existing state management plans do not reach the threshold of having adequate regulatory protections to merit delisting and that “anti-predator hysteria” will prevent the conservation of grizzly bears in some states.²⁴⁵ Specifically, some stakeholders claim that states such as Wyoming, Idaho, and Montana may reactivate bounty and sport hunting programs to kill grizzly bears and could weaken protections for grizzly bears that may prevent their recovery.²⁴⁶ For example, under state law in Wyoming and Idaho, grizzly bears are designated as trophy game, which is subject to hunting with a license.²⁴⁷ Some stakeholders assert that trophy hunts of grizzly bears are morally objectionable and that grizzly bears should not be killed for “sport and bragging rights.”²⁴⁸ Some other stakeholders note that state laws permitting hunters to use snares, bait, hounds, and bounty payments to hunt grizzlies are detrimental to bears.²⁴⁹ This sentiment is shared by numerous tribal entities that have expressed their views by signing the Treaty of the Grizzly, which opposes trophy hunting, denounces grizzly bear habitat alteration, and calls for consultation with tribal representatives on listing decisions related to grizzly bears under the ESA.²⁵⁰ More than 170 tribal nations have signed the Treaty of the Grizzly.

²⁴² For example, the National Park Service states that grizzly bear management in Grand Teton and Yellowstone National Parks would not change significantly if the GYE grizzly bear population were to be delisted. For more information, see National Park Service, Yellowstone, *Bear Management*, <https://www.nps.gov/yell/learn/management/bear.htm>.

²⁴³ 18 U.S.C. §1862 (recognizing tribal authority to manage wildlife on tribal land), §1865 (making it a crime to hunt, trap, fish, or remove game from tribal lands without tribal permission); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 344 (1983) (calling tribal authority to regulate the use of its resources by tribal members and nonmembers “unquestioned”).

²⁴⁴ For example, see Letter from Raul Grijalva, Ranking Member, House Committee on Natural Resources, et al. to The Honorable Martha Williams, Director of the U.S. Fish and Wildlife Service, April 24, 2023, <https://democrats-naturalresources.house.gov/imo/media/doc/2023-04-24%20Wolves%20and%20Grizzly%20Bears%20Letter%20to%20FWS.pdf>.

²⁴⁵ For example, see Chris Servheen et al., “Prominent Scientists Push Back Against Delisting Grizzly Bears: Op-Ed, When It Comes to Assessing Biological Recovery of Grizzlies, Who Is Better Informed—People Who Study Wildlife for a Living or Governors and Legislators Who Dislike Grizzlies and Wolves?” *Mountain Journal*, January 13, 2022, <https://mountainjournal.org/prominent-scientists-say-removing-grizzly-bears-from-federal-protection-in-west-is-bad-idea> (hereinafter cited as Servheen et al., “Prominent Scientists Push Back”).

²⁴⁶ For example, see Laura Birkes, “Montana Cannot Be Trusted with Grizzly Bear and Wolf Management,” *Mongabay*, May 1, 2023, <https://news.mongabay.com/2023/05/montana-cannot-be-trusted-with-grizzly-bear-wolf-management-commentary/>; Laura Sheehan, “U.S. Fish and Wildlife Service Announces Status Review of Grizzly Bears,” *Defenders of Wildlife*, February 3, 2023, <https://defenders.org/newsroom/us-fish-and-wildlife-service-announces-status-review-of-grizzly-bears>.

²⁴⁷ IDAHO CODE §36-202(h) and WYO. STAT. ANN. §23-1-101(a)(xii)(A).

²⁴⁸ Robert Keiter, “Grizzlies, Wolves, and Law in the Greater Yellowstone Ecosystem: Wildlife Management Amidst Jurisdictional Complexity and Tension,” *Wyoming Law Review*, vol. 22, no. 2 (2022), <https://scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1465&context=wlr>.

²⁴⁹ For example, see Servheen et al., “Prominent Scientists Push Back.” Note that the State of Montana is in the process of considering regulations that would prohibit the intentional baiting of grizzly bears if they were delisted.

²⁵⁰ For more information, see Global Indigenous Council, “The Grizzly Treaty,” <https://www.globalindigenouscouncil.com/grizzly-treaty>.

Some stakeholders who support delisting grizzly bears contend that states have adequate measures to manage and conserve bears if they were delisted.²⁵¹ For example, a Wyoming Wildlife Taskforce report recommends that the governor take steps to bring the GYE population of grizzly bears under state management in Wyoming.²⁵² According to the governor’s office, Wyoming has a state management plan for grizzly bears in place and will amend it by changing annual management targets and mortality thresholds to ensure the plan meets ESA standards and the population remains above federal thresholds.²⁵³ Some stakeholders also assert that states are better equipped to manage populations than the federal government and have greater understanding of local conditions to tailor population-specific management plans.²⁵⁴ Some states with grizzly bears are taking steps to develop management strategies and build coordination. The states of Montana, Wyoming, and Idaho prepared a memorandum of agreement (Tri-State MOA) to coordinate their management of the GYE grizzly bear population if it were delisted.²⁵⁵ The Tri-State MOA addresses discretionary mortality and conservation of grizzly bears in the GYE population. It also contains management objectives and monitoring and adaptive management provisions, and it aims to correspond to FWS recovery criteria if the species were delisted. This agreement aims to complement state management plans created by Idaho, Montana, and Wyoming.²⁵⁶

Some state laws provide conditions for hunting grizzly bears that aim to limit hunting if it is detrimental to grizzly populations. For example, Montana state law directs a Commission on Grizzly Bears to “establish hunting season quotas for grizzly bears that will prevent the population of grizzly bears from decreasing below sustainable levels.”²⁵⁷

Livestock Protection and Human-Bear Conflicts

Some grizzly bears have been known to attack and harass livestock and threaten and kill humans under certain circumstances.²⁵⁸ As grizzly bear populations increase and expand into developed areas, human-bear conflicts (which include livestock depredation) are expected to increase, according to stakeholders.²⁵⁹ The ESA provides a defense against civil and criminal penalties for individuals who take listed species—including grizzly bears—if individuals adequately

²⁵¹ For example, see Gordon, Petition.

²⁵² The task force comprises members selected by the Governor of Wyoming. The task force has a position paper supporting state management of grizzly bears and a final report with similar sentiments. See Wyoming Wildlife Taskforce at <https://sites.google.com/wyo.gov/wyomingwildlifetaskforce/home>.

²⁵³ Wyoming Game and Fish Department, “Wyoming Seeks State Management of Grizzly Bears,” press release, September 16, 2021, <https://wgfd.wyo.gov/News/Wyoming-Seeks-State-Management-of-Grizzly-Bears>.

²⁵⁴ Testimony of Representative Harriet Hageman in H.Hrg. 118-10.

²⁵⁵ Wyoming Game and Fish Commission et al., *Tri-State Memorandum of Agreement Regarding the Management, Genetic Health, and Allocation of Discretionary Mortality of Grizzly Bears in the Greater Yellowstone Ecosystem Among Wyoming Game and Fish Commission, Wyoming Game and Fish Department, Montana Fish and Wildlife Commission, Montana Fish, Wildlife and Parks, Idaho Fish and Game Commission, and Idaho Department of Fish and Game*, 2024, https://fwp.mt.gov/binaries/content/assets/fwp/commission/2024/jun/wildlife/moa-actual_tri-state-grizzly-bear_jan-2024-wgfc_ifgc.pdf (hereinafter cited as Wyoming Game and Fish Commission et al., *Tri-State Memorandum of Agreement*).

²⁵⁶ *Ibid.*

²⁵⁷ Mont. Code Ann. §87-5-302 (2023).

²⁵⁸ For example, see National Park Service, “Visitor Injured in Incident with Bear,” press release, May 19, 2024, <https://www.nps.gov/grte/learn/news/visitor-injured-in-incident-with-bear.htm>.

²⁵⁹ Smith L. Wells et al., “Grizzly Bear Depredation on Grazing Allotments in the Yellowstone Ecosystem,” *Journal of Wildlife Management*, vol. 83, no. 3 (December 2018), <https://wildlife.onlinelibrary.wiley.com/doi/10.1002/jwmg.21618>.

demonstrate that the taking was in self-defense or to protect a family member or other individual.²⁶⁰ This defense is not available, however, for taking endangered species that threaten or kill livestock. Under a special 4(d) rule for grizzly bears, grizzly bears can be removed if they are threatening livestock and can be killed, under certain conditions, if they are committing significant depredation of livestock.²⁶¹ Lethally taking a grizzly bear that is preying on livestock is allowed if (1) it is not possible to relieve the threat through live capture and release; (2) the taking is done in a humane manner and authorized by federal, state, and tribal authorities; and (3) the taking is reported within five days.²⁶²

Some stakeholders who favor delisting grizzly bears contend that livestock losses due to grizzly bears are significant and create a sense of fear among ranchers for the safety of their family and livestock.²⁶³ They argue that lifting federal protections and returning management to states would better address human safety and grizzly bear depredation of livestock.²⁶⁴ They support this position by asserting that state managers have a better understanding of local ranching practices and grizzly bear behavior and that state managers can balance the needs of ranchers and bears better than federal managers.²⁶⁵ These stakeholders also note that states have several existing laws that address the conservation of grizzly bears.²⁶⁶

Some stakeholders who are against delisting grizzly bears argue that state laws and regulations that authorize the take of grizzly bears that harm livestock or threaten humans would not adequately protect grizzly bear populations if they were delisted.²⁶⁷ These stakeholders claim that under state laws, grizzly bears would be taken at levels that would reduce their population size.²⁶⁸ For example, under Montana state law, state policy is to manage grizzly bears to minimize conflicts with humans and livestock and to “use proactive management to manage grizzly bear distribution and prevent conflicts, including non-lethal and preventative measures, as well as, trapping and lethal measures.”²⁶⁹ This policy, in part, has prompted some stakeholders to assert that Montana law would allow for nearly unregulated killing of grizzly bears that threaten livestock (with no definition of what is considered threatening).²⁷⁰ Montana law also allows a

²⁶⁰ 16 U.S.C. §1540(b)(3).

²⁶¹ 40 *Federal Register* 31734, pp. 31734-31736; 50 C.F.R. §17.40(b).

²⁶² 50 C.F.R. §17.40(b)(i)(C). The U.S. Department of Agriculture, Animal and Plant Health Inspection Service, collaborates with FWS and state wildlife agencies to assist livestock owners that experience livestock depredation due to grizzly bears and other species. Federal wildlife specialists use nonlethal methods and, when necessary, lethal removal to prevent grizzly bears from attacking cattle and sheep under this program. For more information, see Joe Szuszwalak, FWS, “USFWS and USD Providing Additional Support to Montana Livestock Producers,” press release, June 3, 2020, <https://www.fws.gov/press-release/2020-06/collaboration-support-livestock-producers-after-increased-grizzly-bear>.

²⁶³ Testimony of Karli Johnson in H.Hrg. 118-10.

²⁶⁴ U.S. Representative Matt Rosendale, “Rosendale Legislation to Delist Montana Grizzly Bear Population Receives Committee Hearing,” press release, March 23, 2023, <https://rosendale.house.gov/news/documentsingle.aspx?DocumentID=543>.

²⁶⁵ For example, in reference to the GYE grizzly bear population, see Gordon, Petition.

²⁶⁶ Wyoming Game and Fish Commission et al., *Tri-State Memorandum of Agreement*. (A summary is found in the Tri-State MOA.)

²⁶⁷ For example, see Servheen et al., “Prominent Scientists Push Back.”

²⁶⁸ Testimony of Christopher Servheen in H.Hrg. 118-10.

²⁶⁹ MONT. CODE ANN. §87-5-301, as amended by 2023 Mont. S.B. 295.

²⁷⁰ Center for Biological Diversity, “State Efforts to Remove Federal Grizzly Protections Move Forward,” press release, February 3, 2023, <https://biologicaldiversity.org/w/news/press-releases/state-efforts-to-remove-federal-grizzly-protections-move-forward-2023-02-03/>.

person to kill a grizzly bear without a permit if the bear is attacking or killing livestock.²⁷¹ Because the ESA preempts state law, management of the grizzly bear is governed by federal, not state, law. Some actions permitted by Montana law, such as trapping, would currently violate the ESA, but if grizzly bears were delisted from the ESA and were threatening livestock, an owner could complain to the state and have the bear removed or taken.²⁷² If delisted, grizzlies could be taken under the Montana state law only if an annual quota for taking grizzly bears had not been surpassed.²⁷³

Ranchers can receive compensation from the federal government and some states for livestock lost to grizzly bears. For example, some states and the federal Livestock Indemnity Program provide compensation to ranchers who lose livestock to bear attacks under certain circumstances.²⁷⁴ FWS also coordinates with state agencies to address human-grizzly conflicts. FWS has a Grizzly Bear Recovery Program with several conflict specialists to assist states, tribes, and local communities in relocating grizzly bears; implement grizzly bear conflict management and mitigation; and conduct outreach and education activities.²⁷⁵

FWS efforts to alleviate conflicts with grizzly bears have been contentious. In 2019, some stakeholders sued FWS, as well as FS, for authorizing the lethal take of up to 72 grizzly bears in the GYE over a 10-year period in anticipation of conflicts with ranchers with federal grazing permits.²⁷⁶ FWS authorized the take in the context of FS's proposal to authorize livestock grazing for 10 years on the Upper Green River Area Rangeland in Wyoming.²⁷⁷ Although the district court upheld the agencies' actions, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) reversed in part.²⁷⁸ In relevant part, the Tenth Circuit concluded that FWS's biological opinion violated the ESA by failing to consider limiting lethal take on female bears in light of the existing "mortality sink" (i.e., mortality exceeding or nearly exceeding survival) for female grizzly bears in the area affected by the grazing permits.²⁷⁹ The court remanded the biological opinion and FS's decision to issue the grazing permits to the agencies without vacating either action.²⁸⁰

Science of the Conservation and Recovery of Grizzly Bears

In the debate over whether to delist grizzly bears, Congress may consider perspectives and scientific findings on the status and viability of grizzly bear populations. Some stakeholders assert that the entire grizzly bear population should be delisted because population recovery goals have been met and, in some cases, surpassed.²⁸¹ Some other stakeholders favor delisting certain distinct

²⁷¹ MONT. CODE ANN. §87-5-301, as amended by 2023 Mont. S.B. 295.

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ For more information on the Livestock Indemnity Program, see U.S. Department of Agriculture, "Livestock Indemnity Program (LIP)," <https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/livestock-indemnity/index>.

²⁷⁵ For more information, see FWS, "Grizzly Bear Recovery Program," <https://www.fws.gov/office/grizzly-bear-recovery-program>.

²⁷⁶ *Ctr. for Biological Diversity v. Haaland*, 603 F. Supp. 2d 1094, 1098-99 (D. Wyo. 2022).

²⁷⁷ *Ibid.* at p. 1103.

²⁷⁸ *W. Watersheds Project v. Haaland*, 69 F.4th 689 (10th Cir. 2023).

²⁷⁹ *W. Watersheds Project*, 69 F.4th at 698.

²⁸⁰ *W. Watersheds Project*, 69 F.4th at 698.

²⁸¹ U.S. Senator for Idaho James E. Risch, "Risch, Crapo Reintroduce Bill to Delist Greater Yellowstone Grizzly," press release, February 16, 2023, <https://www.risch.senate.gov/public/index.cfm/2023/2/risch-crapo-reintroduce-bill-to-delist-greater-yellowstone-grizzly>.

populations of grizzly bears;²⁸² they assert that the GYE and NCDE populations have surpassed recovery goals for population size and should be delisted as DPSs.²⁸³ This perspective is illustrated in petitions to FWS to designate a DPS for the GYE and the NCDE, which are under review.²⁸⁴

Other stakeholders state that grizzly bears should remain listed based, in part, on recent status reports from FWS that recommend a threatened listing and on potential long-term threats to grizzly bear populations, such as climate change and development.²⁸⁵ Some conservationists also argue that certain populations of grizzly bears are essentially extirpated and should recover (e.g., through the possible introduction of an experimental population) before the species is delisted.²⁸⁶ In addition, some stakeholders question the accuracy of population counts for grizzly bears that are reported to surpass recovery benchmarks. They argue that counting grizzly bears is challenging and results vary significantly, thus implying that population counts might not be accurate.²⁸⁷

Congress may consider several scientific findings when evaluating the varying perspectives on the status of grizzly bear populations. In 2021, FWS issued a five-year status review evaluating grizzly bears from 2011 to 2021. FWS also conducted a species status assessment (SSA) for grizzly bears in 2022.²⁸⁸

The 2021 five-year review evaluated the status of the grizzly bear population and its population viability according to three conservation biology principles: redundancy, resiliency, and representation.²⁸⁹ FWS concluded that the entire grizzly bear population in the lower 48 states should remain a threatened species under the ESA.²⁹⁰ This finding was based on several factors that threaten grizzly bears and activities implemented to conserve grizzly bears. For example, the five-year review evaluated the current resiliency of separate populations of grizzly bears to evaluate the condition of the entire population. The assessment concluded that the GYE and NCDE populations have high resiliency to natural and human-caused perturbations; it also stated that the SE population has moderate resiliency and the CYE population has low resiliency. The BE and NCE populations are functionally extirpated, according to the review, and therefore have

²⁸² See “Recent Grizzly Bear Status Assessments and Findings.”

²⁸³ Gordon, Petition.

²⁸⁴ 88 *Federal Register* 7658.

²⁸⁵ For example, see Perry Wheeler, “Grizzly Bears Still Need Protections,” Earthjustice, January 18, 2024, <https://earthjustice.org/experts/perry-wheeler/grizzly-bears-still-need-protections>.

²⁸⁶ Clark Corbin, “Idaho Sen. Jim Risch Introduces Bill to Fully Delist Grizzly Bears in Lower 48,” *Idaho Capitol Sun*, August 14, 2023, <https://idahocapitalsun.com/2023/08/14/idaho-sen-jim-risch-introduces-bill-to-fully-delist-grizzly-bears-in-lower-48/>.

²⁸⁷ David Mattson, “More Confusion About Yellowstone National Park’s Grizzly Bear Population,” *The Daily Montanan*, May 29, 2023, <https://dailymontanan.com/2023/05/29/more-confusion-about-yellowstone-national-parks-grizzly-bear-population/>.

²⁸⁸ FWS, *Grizzly Bear in the Lower-48 States*, and FWS, *Species Status Assessment*, *supra* note 15. There was no review in 2016.

²⁸⁹ According to FWS, *redundancy* is “the ability for the species to withstand catastrophic events, for which adaptation is unlikely, and is associated with the number and distribution of populations”; *resiliency* “is the ability for populations to persist in the face of stochastic events, or for populations to recover from years with low reproduction or reduced survival, and is associated with population size, growth rate, and the quality and quantity of habitats”; and *representation* “is the ability of a species to adapt to changes in the environment and is associated with its diversity, whether ecological, genetic, behavioral, or morphological.” FWS, *Species Status Assessment Framework: An Integrated Analytical Framework for Conservation*, version 3.4, August 2016, <https://www.fws.gov/sites/default/files/documents/species-status-assessment-framework-2016-08-10.pdf>.

²⁹⁰ FWS, *Grizzly Bear in the Lower-48 States*. According to FWS, this conclusion was based on an analysis of the best scientific information available and was an assessment of the viability of the population.

no resiliency.²⁹¹ The report concluded that the high resiliency of some individual populations does not make the overall population currently in danger of extinction. However, within the foreseeable future, the report noted that the overall population would be less likely to “withstand plausible stochastic events, catastrophic events, or retain sufficient adaptive capacity to withstand environmental change 30 to 45 years into the future,” among other things, and should be listed as threatened.²⁹²

The 2022 SSA evaluated grizzly populations with data up to December 2020 and reported similar results.²⁹³ The 2022 SSA, however, did not make listing recommendations for the entire grizzly bear population or individual populations. The 2022 SSA also evaluated the grizzly bear population with respect to its recovery criteria. For grizzly bears, certain criteria are measured for the recovery of each population:

- Minimum population size measured by unduplicated females and cubs
- Distribution of reproductive females across a recovery zone and not concentrated in one area
- Annual human-caused mortality limits that would allow the population to achieve and sustain recovery
- Habitat-based recovery criteria²⁹⁴

The 2022 SSA reported that the GYE and the NCDE grizzly bear populations met all of the recovery criteria. The other four populations did not meet all of the recovery criteria, according to the report.²⁹⁵

Some stakeholders raise the question of how grizzly bear populations are adapting to changes in their environment and if they have the ability to adapt to long-term environmental changes in the future.²⁹⁶ Some studies provide results that may, in part, answer this question.²⁹⁷ For example, one study reported that certain grizzly bear populations are adapting to changes in their ecosystem.²⁹⁸ The study reported that body fat levels in grizzly bears in the GYE did not significantly change over 20 years even though competition for food and resources increased (e.g., grizzly bear density increased in the region).²⁹⁹ This study also notes that even though grizzly bear populations are resilient to short-term environmental and ecosystem changes, they might be affected by long-term changes such as climate change, drought, and changes in forage species such as whitebark pine.³⁰⁰

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Species status assessments are done annually for grizzly bears, and the information from these assessments is used for the five-year status reviews.

²⁹⁴ FWS, *Species Status Assessment*.

²⁹⁵ Ibid.

²⁹⁶ U.S. Geological Survey, “New Publication Synthesizes Climate Effects on Bears and their Interactions with Humans,” press release, April 11, 2024, <https://www.usgs.gov/programs/climate-adaptation-science-centers/news/new-publication-synthesizes-climate-effects-bears>.

²⁹⁷ Andrea Corradini et al., “Evidence for Density-Dependent Effects on Body Composition of a Large Omnivore in a Changing Greater Yellowstone Ecosystem,” *Journal of Global Change Biology*, vol. 29, no. 16 (June 1, 2023), pp. 4496-4510, <https://doi.org/10.1111/gcb.16759>.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

Members of Congress and stakeholders have also taken positions on the proposed rule to establish a nonessential experimental population of grizzly bears in the NCE in Washington state.³⁰¹ The intent of the experimental population is to “support reintroduction and recovery of grizzly bears within the NCE and provide the prohibitions and exceptions under the Act necessary and appropriate to conserve the species.”³⁰² Some stakeholders argue that introducing grizzly bears in the NCE will increase human-wildlife conflicts, livestock depredation, and property damage.³⁰³ In the 118th Congress, H.R. 5927 would withdraw the proposed rule to create the experimental population of grizzly bears in the NCE and would withdraw a draft EIS addressing the experimental population.

Legislation to Delist the Grizzly Bear from the ESA

Congress is considering bills in the 118th Congress that would direct the Secretary of the Interior to delist the grizzly bear without going through the delisting process under the ESA. For example, H.R. 1419, H.R. 1245, and S. 445 would direct the Secretary of the Interior to issue a final rule to delist the NCDE grizzly bear population and reissue a final rule to delist the GYE population.³⁰⁴ H.R. 4997 and S. 2571 would direct the Secretary of the Interior to remove grizzly bears and associated experimental populations from the threatened and endangered lists under the ESA. H.R. 1364 would direct the Secretary of the Interior to remove grizzly bears in the GYE and NCDE from the list of threatened and endangered species. All of the bills would preclude judicial review of the listing rules. In considering these and other measures addressing grizzly bears, Congress may evaluate arguments for and against using legislation to make listing decisions under the ESA and precluding judicial review of these actions.

Some stakeholders supporting these bills argue that grizzly bear populations have recovered and contend that the ESA makes it difficult to delist species.³⁰⁵ Members of Congress have introduced legislation over time to delist grizzly bears, though none of the bills have been enacted.³⁰⁶ Some stakeholders opposed to these bills argue that if Congress passed a law delisting grizzly bear populations, it would bypass the process for delisting under the ESA that takes into account the best available science and scientific analysis.³⁰⁷ They also argue that it would set a precedent for

³⁰¹ 88 *Federal Register* 67193.

³⁰² *Ibid.*

³⁰³ For example, see Representative Dan Newhouse, “Challenging the Biden Administration’s Ill-Conceived Grizzly Bear Relocation Proposal,” press release, March 28, 2024, <https://newhouse.house.gov/media/weekly-columns-and-oped/challenging-biden-administrations-ill-conceived-grizzly-bear>.

³⁰⁴ 82 *Federal Register* 30502 (for the GYE grizzly population).

³⁰⁵ For example, see U.S. Representative Matt Rosendale, “Rosendale Legislation to Delist Montana Grizzly Bear Population Receives Committee Hearing,” press release, March 23, 2023; Senator James E. Risch, “Risch Leads Bicameral Legislation to Fully Delist Grizzly Bears in Lower 48 States,” press release, July 27, 2023, <https://www.risch.senate.gov/public/index.cfm/pressreleases?ID=27A8E7BC-0198-4360-8175-6DBEF0B940E2>.

³⁰⁶ For example, in the 118th Congress, the House of Representatives and the Senate passed joint resolutions to overturn ESA listings for the lesser prairie chicken and the northern long-eared bat (S.J.Res. 9 and S.J.Res. 24, respectively). The President vetoed both resolutions on September 26, 2023, and stated that S.J.Res. 9 and S.J.Res. 24 “would overturn a science-based rulemaking that follows the requirements of the law, and thereby undermines the ESA.” White House, “Message to the Senate on the President’s Veto of S.J.Res. 9,” press release, September 26, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/26/message-to-the-senate-on-the-presidents-veto-of-s-j-res-9/>; White House, “Message to the Senate on the President’s Veto of S.J.Res. 24,” press release, September 26, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/26/message-to-the-senate-on-the-presidents-veto-of-s-j-res-24/>.

³⁰⁷ Testimony of Stephen Guertin, Deputy Director for FWS, in H.Hrg. 118-10.

addressing other listed species through legislation rather than the listing process under the ESA.³⁰⁸

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³⁰⁸ U.S. Congress, House Committee on Natural Resources, *Full Committee Markup*, 118th Cong., April 27, 2023; White House, "Message to the Senate on the President's Veto of S.J.Res. 9," press release, September 26, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/26/message-to-the-senate-on-the-presidents-veto-of-s-j-res-9/>; White House, "Message to the Senate on the President's Veto of S.J.Res. 24," press release, September 26, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/26/message-to-the-senate-on-the-presidents-veto-of-s-j-res-24/>.