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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SAVE THE YELLOWSTONE GRIZZLY, Plaintiff vs. UNITED STATES FISH AND WILDLIFE SERVICE—MARTHA WILLIAMS, Director; JIM FREDERICKS, Director of Idaho Department of Fish & Game; MATT PIERON, Regional Supervisor of Idaho Department of Fish & Game; CURTIS HENDRICKS, Regional Wildlife Manager of Idaho Department of Fish & Game. Defendants	Case No.: **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

I. INTRODUCTION

1. Plaintiff, SAVE THE YELLOWSTONE GRIZZLY ("STYG") seeks declaratory and injunctive relief against Defendants UNITED STATES FISH AND WILDLIFE SERVICE,

("USFWS"); MARTHA WILLIAMS, Director of USFWS (collectively "Federal Defendants"); JIM FREDERICKS, Director of Idaho Department of Fish & Game ("IDFG"); MATT PERON, Regional Supervisor of IDFG; and CURTIS HENDRICKS, Regional Wildlife Manager of IDFG (collectively "Idaho Defendants") pursuant to the citizen suit provision of the Endangered Species Act ("ESA") 16 U.S.C. § 1531-44, as well as the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, asking the Court to declare unlawful and enjoin Defendants further violations of the "take" prohibition of ESA Section 9 and related authorities.

2. In November of 2022, the Idaho Defendants killed three federally protected grizzly bears in Idaho in violation of the ESA. Specifically, a female grizzly and her two cubs were shot and killed by the IDFG.

3. In violation of the ESA and its own regulations and guidance, Federal Defendants illegally authorized the "take" of Grizzly 1089 ("Grizzly 1089") and her cub ("Cub 1").

4. The following day, Idaho Defendants killed Grizzly 1089's second cub ("Cub 2") near Tetonia, Idaho without proper authorization from USFWS, in violation of the ESA.

5. To protect grizzly bears from further unauthorized killings at the hands of wildlife officials, STYG seeks a declaratory judgment that Defendants' actions violated the ESA and an injunction barring Defendants from authorizing and committing further illegal and unauthorized "takes" which are likely to occur in the absence of judicial relief.

6. STYG seeks a declaration that Federal Defendants' authorization for the November 9, 2022 killing of Grizzly 1089 and Cub 1 constitutes an illegal take pursuant to the ESA, and seeks to enjoin Federal Defendant, its employees and contractors, from taking, or authorizing the taking of grizzly bears when such actions are not necessary for defense of self or others and less than lethal alternative means of investigation and management are available.

7. STYG seeks a declaration that Idaho Defendants Jim Fredericks, Matt Pieron, and Curtis Hendricks, officers with the IDFG, acting in their official capacities, violated federal law when they illegally shot and killed Grizzly 1089's second cub ("Cub 2") near Tetonia, Idaho on November 10, 2022, without authorization from the USFWS in violation of Section 9 of the Endangered Species Act ("ESA") as applied to threatened species under Section 4 of the ESA.

8. Accordingly, and in order to prevent further likely violations of the ESA, "take" of protected grizzly bears, and harm to Plaintiff's interests, declaratory and/or injunctive relief is necessary. STYG also seeks an award of costs, attorney fees, and other expenses pursuant to 16 U.S.C § 1540(g)(4).

II. JURISDICTION AND VENUE

9. The Court has jurisdiction pursuant to 16 U.S.C. § 1540(g)(1) because this action arises under the Endangered Species Act and seeks enforcement of the provisions of that Act. The Court also has authority to issue declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02, the Declaratory Judgment Act.

10. Venue is proper in this District pursuant to 16 U.S.C. § 1540(g)(3) because the ESA violations alleged in this Complaint occurred in this District.

11. As required by the ESA, 16 U.S.C. § 1540(g)(2)(A)(1), Plaintiff provided sixty days' written notice of their intent to file this suit for the illegal take of Grizzly 1089, Cub 1, and Cub 2.

III. PARTIES

12. Plaintiff SAVE THE YELLOWSTONE GRIZZLY ("STYG") is a tax-exempt non-profit organization dedicated to protecting the Yellowstone grizzly bear and its habitat. STYG's mission is to preclude the trophy hunting of grizzly bears and ensure connectivity with the Northern Continental Divide, Selkirk, Cabinet, and Yaak Valley grizzlies for long-term genetic sustainability. STYG promotes the long-term genetic sustainability of the species by protecting the safety and welfare of all grizzlies south of Canada. Members of STYG include preeminent scientists in the field of grizzly bear conservation as well as notable naturalists, environmentalists, and authors on the subject of grizzly bears and their habitat. STYG brings this action on its own behalf and on behalf of its adversely affected members.

13. Plaintiff and its members have long-standing interests in the conservation and recovery of grizzly bears in Idaho because they highly value grizzly bears and because the grizzly bear is essential to the health and functioning of the ecosystem in which they live. Plaintiff has a long history of working to protect and recover grizzly bears through a variety of actions, including public education and outreach, writing, scientific research and analysis, and advocacy aimed at achieving healthy ecosystem function in the region.

14. Plaintiff's members use Idaho's grizzly bear habitat for traditional activities and recreation, including hiking, camping, backpacking, wildlife viewing, and aesthetic enjoyment. Through such pursuits, Plaintiff's members seek to observe, photograph, study, and write about grizzly bears in their native habitat. Plaintiffs gain aesthetic, recreational, scientific, inspirational, spiritual, and other benefits from these activities.

15. The killing of grizzly bears, including the lethal removal of bears by agents and employees of state and federal wildlife agencies, prevents isolated populations of grizzly bears from establishing connectivity and genetic exchange and reasonably certain future killing of grizzly bears has caused and will in the future cause harm to Plaintiffs' members' interests in the well-being of individual grizzly bears. Such actions will also reduce opportunities for Plaintiff's members to experience grizzly bears in their wild habitat in Idaho by causing reasonably certain mortality of the species. The legal violations alleged in this complaint therefore cause direct injury to the aesthetic, conservation, educational, inspirational, personal, scientific, spiritual, religious, and wildlife preservation interests of Plaintiff and its members.

16. Plaintiff's aesthetic, conservation, educational, inspirational, personal, scientific, spiritual, religious, and wildlife preservation interests have been, are being, and, unless the relief prayed for in this Complaint is granted, will continue to be adversely and irreparably injured by Defendants' failure to comply with the ESA and the APA. These are actual, concrete, particularized injuries directly traceable to Defendants' decisions and conduct that would be redressed by the requested relief.

17. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS") is an agency or instrumentality of the United States, within the Department of Interior, who along with other federal agencies are responsible for administering the ESA, including coordinating with and authorizing state wildlife management agencies to lethally remove or relocate grizzly bears.

18. Defendant MARTHA WILLIAMS is sued in her official capacity as the Director of the USFWS.

19. Defendant JIM FREDERICKS is sued individually in his official capacity as Deputy Director (currently Director) of Idaho Department of Fish and Game.

20. Defendant MATT PIERON is sued individually in his official capacity as Regional Supervisor—Upper Snake Region, of Idaho Department of Fish and Game.

21. Defendant CURTIS HENDRICKS is sued individually in his official capacity as Regional Wildlife Manager of Idaho Department of Fish and Game.

22. Plaintiff is not seeking monetary damages from the Defendants; nor is the Plaintiff seeking any retrospective relief against these Defendants or any agency of the State of Idaho. Plaintiff solely seeks forward-looking declaratory, injunctive, and ancillary relief pursuant to the ESA, the Declaratory Judgment Act, and other provisions of federal law.

IV. LEGAL BACKGROUND

23. Congress passed the ESA, 16 U.S.C. §§ 1531 *et seq.*, in 1973 to affirm our nation's commitment to the conservation and continued survival of endangered species and their habitat. The ESA requires the use of all methods and procedures necessary to recover threatened and endangered species so that the Act's protections are no longer necessary. 16 U.S.C. § 1532(3).

24. The ESA "seeks to protect species of animals against threats to their continuing existence caused by man." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 558 (1992).

25. The ESA is considered "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 152, 180 (1978).

26. A species may be listed under the ESA as either "endangered" or "threatened." 16 U.S.C. § 1533.

27. The listing of a species as endangered under the ESA triggers robust prohibitions under Section 9, 16 U.S.C. § 1538, including the prohibition on the "take" of a member of the species, which is defined 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); *see also* 50 C.F.R. § 17.3 (defining harm as "an act which actually kills or injures wildlife").

28. A species listed as "threatened," is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

29. The Yellowstone grizzly bear is a sub-population of grizzly bear that is currently listed as a "threatened species" under the ESA.

30. Section 4(d) of the ESA includes the requirement that the U.S. Fish and Wildlife Service ("USFWS") promulgate regulations prohibiting the take of threatened, as well as endangered, species. 16 U.S.C. § 1533(d).

31. Under the ESA "it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States." 16 U.S.C. §1538(a)(1)(B).

32. The ESA defines a "person" as "an individual . . . or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State . . . or any other entity subject to the jurisdiction of the United States." 16 U.S.C. § 1532(13).

33. In 1975, USFWS exercised its Section 4(d) responsibility and extended the prohibition on "take" in Section 9 to include all threatened species. 50 C.F.R. § 17.31(a) (2018); Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,111,44,425 (Sept. 26, 1975). This rule created the default situation, known as the "blanket 4(d) rule, under

which species listed as threatened would receive all of the "anti-take" protections provided to endangered species, unless USFWS promulgated a species-specific rule changing those protections.

34. In 1975, shortly after the grizzly bear was listed as a threatened species, the USFWS promulgated a special species-specific rule applying all of the ESA's prohibitions to the threatened grizzly bear with three narrow exceptions: (1) self-defense or defense of others; (2) removal of nuisance bears; and (3) certain non-lethal scientific research activities. 50 C.F.R. § 17.40(b)(1)(i) (2014).

35. The USFWS is tasked with administering the ESA, which includes promulgating regulations to further its administration.

36. 50 C.F.R. § 17.40 (b)(1)(i) permits the take of grizzly bears only under very specific, clearly enumerated circumstances. This provision states that "no person shall take any grizzly bear" unless (in the case of the removal of nuisance bears) the bear constitutes "a demonstrable but non immediate threat to human safety or [is] committing significant depredations to lawfully present livestock, crops, or beehives."

37. Even when these specific circumstances exist, a grizzly bear may only be taken if: (1) [i]t has not been reasonably possible to eliminate such threat or depredation by live-capturing and releasing unharmed in a remote area the grizzly bear involved; and (2) [t]he taking is done in a humane manner by authorized Federal, State, or Tribal authorities, and ***in accordance with current interagency guidelines*** covering the taking of such nuisance bears . . . ." (emphasis added).

38. Even when a grizzly exhibits nuisance behaviors contemplated in 50 C.F.R. § 17.40 (b)(1)(i), a take is not permitted until the agency takes the required steps outlined in

subsection (1) by first attempting to live-capture and relocate the bear and under subsection (2) the take must be carried out in accordance Interagency Guidelines for Grizzly Bear Control Action as articulated in the 1986 Interagency Grizzly Bear Guidelines. Retrieved March 20, 2022 at https://fwp.mt.gov/binaries/content/assets/fwp/conservation/wildlife-reports/bears/07202020_grizzly-bear-conflict-response-protocol.pdf.

39. According to these guidelines, an adult female grizzly with cubs is not supposed to be subject to removal until her third "strike" involving livestock depredation or incidence of obtaining unnatural or human food or her second incidence involving a human safety threat.

40. The guidelines for orphaned cubs call for even less intrusive measures, with "release on site" and "relocation" being the recommended actions no matter the number of conflicts in all conflict types except for human injury and/or death.

Table 1. Guidelines for Grizzly Bear Control Action (from Interagency Grizzly Bear Guidelines (1986).

Conflict Type		**Livestock Depredation or Use of Unnatural/Human Foods**			**Human Safety Threat**		**Human Injury/Death**
History (no. of "strikes")		**1**	**2**	**3**	**1**	**2**	**1**
Female	Sub-Adult	REL	REL	REM	REL	REM	REM
Female	Adult	REL	REL	REM	REL	REM	REM
Female	Ad w/ Young	REL	REL	REM	REL	REM	REM
Female	Old Adult	REL	REM	N/A	REM	N/A	REM
Male	Sub-Adult	REL	REM	N/A	REM	N/A	REM
Male	Adult	REL	REM	N/A	REM	N/A	REM
Male	Old Adult	REM	REM	N/A	REM	N/A	REM
Male / Female	Orphaned Cub	RLS/REL	RLS/REL	RLS/REL	RLS/REL	RLS/REL	REM

REL = Relocate; REM = Removal (Euthanasia); RLS = Release on site

V. STATEMENT OF FACTS

41. Grizzly bears historically numbered more than 50,000 and inhabited much of the western United States. U.S. Fish and Wildlife Service, *Grizzly Bear Recovery Plan*, 9 (1993).

42. As European settlement increasingly spread across the American West, grizzlies were "shot, poisoned, and trapped wherever they were found." U.S. Fish and Wildlife Service, *Species Profile for Grizzly Bear*, https://ecos.fws.gov/ecp/species/7642.

43. The grizzly bear population was reduced by more than 98% between 1850 and 1950 as human-caused mortality and habitat destruction decimated the species. U.S. Fish and Wildlife Service, U.S. Department of the Interior, *1990 Draft Grizzly Bear Recovery Plan*, 23.

44. Grizzly bears were reduced to a few isolated remnants of their former habitat, including the Greater Yellowstone Ecosystem ("GYE"). Grizzly Bear Recovery Program, *Grizzly Bears, https://www.cfc.umt.edu/grizzlybearrecovery/grizzly-bears/default.php*.

45. By 1975, the year the grizzly bear was federally protected under the ESA, fewer than 1,000 individual grizzly bears remained. U.S. Fish and Wildlife Service, *Grizzly Bear Recovery Plan*, 9 (1993).

46. The GYE grizzly bear population is currently isolated from all other grizzly bear populations, with no known genetic interchange occurring. U.S. Fish & Wildlife Service Grizzly Bear Recovery Program, *2020 Annual Report*, 4.

47. The USFWS approved the first Recovery Plan for the grizzly bear in 1982 and published an amended 1993 Recovery Plan, which remains in effect today.

48. An Interagency Grizzly Bear Committee ("IGBC") was formed in 1983 to establish guidelines on grizzly bear management throughout the grizzly's range. In 1986, the IGBC published Interagency Grizzly Bear Guidelines ("Guidelines"), which apply to federally

owned lands in the five grizzly bear ecosystems in Idaho, Montana, Washington, and Wyoming. 51 Fed. Reg. 42863 (Nov. 26, 1986).

49. The Guidelines are considered such an essential element to the protection of grizzly bears on federal lands that the Recovery Plan, as amended in 1993, lists implementing the Guidelines as a "Priority One" recovery measure, which the Plan defines as an action "necessary to prevent extinction" of the grizzly bear. Recovery Plan at 131-134.

50. Grizzly bears must be determined to be a nuisance by specific criteria before they can be controlled. Guidelines 53.

51. The USFWS recognizes the threat posed by inbreeding and states that the Yellowstone grizzly population is "lower than recommended for evolutionary success . . ." 72 Fed. Reg. 14895 (March 29, 2007).

52. The takings giving rise to these claims were not authorized either under the blanket provisions of 50 C.F.R. § 17.40 (b)(i) or its exceptions (1) and (2).

History of Grizzly 1089 and Cubs 1 and 2

53. Neither Grizzly 1089 nor either of her cubs demonstrated any threat to human safety at any time or committed a single known depredation upon livestock, crops, or beehives.

54. The record supports that the bears only ever browsed on natural food sources. According to then IDFG's Upper Snake Region bear biologist Jeremy Nicholson, Grizzly 1089 and her cubs had been "finding some Hawthorne and alfalfa to munch on. We haven't received any complaints about her getting into anything yet."

55. The bears were foraging in proximity to human residences without a single reported conflict.

56. According to a press release issued by the Montana Department of Fish, Wildlife and Parks on October 25, 2022, these same bears had previously been relocated to and released in an area south of West Yellowstone, Montana from an area near Gardiner, Montana.

57. Despite their capture and relocation, the bears did not have a history of any conflicts with humans but were relocated based on the fact that they had been observed foraging in proximity to areas also inhabited by humans.

58. According to the press release, "[t]he bears were in good health, and there was no evidence they had gained access to unsecured garbage."

59. After being released south of West Yellowstone on October 17, 2022 Grizzly 1089 and her cubs travelled south and were observed by agents of IDFG on October 28 near the community of Tetonia, Idaho.

60. In early November of 2022 a sow grizzly bear ("Grizzly 1089") and her two cubs of the year ("Cub 1" and "Cub 2") were observed foraging on fruit trees near Tetonia Idaho.

61. On November 8, 2022 USFWS officials reviewed GPS locations from Grizzly 1089's collar and determined "that while there were some locations in fields and close to houses, the majority of locations were associated with riparian corridors."

62. On November 7, 2022 Defendant Matt Pieron, IDFG Regional Supervisor for the Snake River Region, requested USFWS authorization to lethally remove Grizzly 1089 and her cubs.

63. USFWS Grizzly Bear Recovery Program Conflict Coordinator Benjamin Jimenez initially granted authorization on November 8 for the removal of Grizzly 1089 and her two cubs on behalf of USFWS, despite expressing reservations about doing so.

64. Jimenez communicated to Defendant Pieron that "USFWS was not in favor of removing the cubs, [and] that USFWS did not agree the cubs represented a risk to human safety. . . ."

65. However, in spite of these reservations, Jimenez said "USFWS would authorize IDFG to remove [all three of] the bears" **if** relocation sites could not be found, IDFG exhausted all options, and it "honestly believed the bears represented a significant threat to human safety."

Taking of Grizzly 1089 and Cub 1 on November 9, 2022 Near Tetonia, Idaho

66. On the evening of November 9, 2022 IDFG employee Matt Pieron notified USFWS that IDFG had "removed" Grizzly 1089 and Cub 1.

67. Internally, it appears that USFWS was concerned with the characterization of this "authorization." In a series of text messages sent between 4:14 and 4:22 pm on November 10, 2022, USFWS' Acting State Supervisor of the Idaho Fish and Wildlife Office wrote:

> we're noodling with a press release ID Dept of Fish and Game wants to put out that we don't agree with . . . . The initial draft first sentence apparently read 'On Nov 9th and 10th, Idaho Fish and Game ***in consultation*** . . . .' I told IDFG that we didn't feel that was accurate from our perspective given that ***the authorization was not there for them to remove bears on the 10th***. (emphasis added) They changed to just say 'on Nov 9th . . .' in the version you're reviewing. I still feel like it can be implied USFWS gave authorization for bear taken [sic] on the 10th.

68. Grizzly 1089 was a sow with two cubs of the year ("COYs") that had "never been in conflict or acted aggressively towards humans."

69. According to USFWS Grizzly Bear Recovery Coordinator Hilary Cooley, the USFWS did not agree that Grizzly 1089 and her cubs posed a human safety threat, yet authorized the taking regardless.

70. In an email dated November 30, 2022 to USFWS employees, Cooley wrote, "These bears were not in conflict," and "We disagreed with the human safety threat, but ultimately authorized them to take the bears if they exhausted all other options and still believed the threat to be imminent."

71. However, in the same communication, Cooley made it clear that USFWS, upon learning that there may have been a relocation site available for Cub 2, revoked any authority it had granted for the taking of Cub 2. In Cooley's words, "[w]e communicated to IDFG that because we now have an alternative, IDFG was no longer authorized to remove the bears and asked them to live-capture the remaining cub."

Taking of Grizzly Bear Cub 2 on November 10, 2022 Near Tetonia, Idaho

72. On November 9, after learning that Grizzly 1089 and Cub 1 had been lethally removed and that IDFG was planning on killing Cub 2, USFWS communicated to IDFG that USFWS believed the "cub did not pose an immediate or demonstrable threat to human safety" and that USFWS was "no longer authorizing the [lethal] removal of the cub given a potential relocation option."

73. This was a clear an unequivocal revocation of any legal authority that may have been previously granted to lethally remove Cub 2.

74. Despite the lack of authorization, agents acting in their official capacity with IDFG, including Idaho Defendants, made the decision to lethally remove Cub 2 and an unknown agent of IDFG killed Cub 2 on November 10, 2022.

75. According to an email exchange between Hilary Cooley and USFWS Regional Director for the Mountain-Prairie Region Matt Hogan, sent immediately after they had learned of

Cub 2's death, it was unprecedented for a state agency to lethally remove a grizzly bear without authority from USFWS:

5:37 pm Hogan: "Has a state ever removed a bear without approval?"

Cooley: "Not that I'm aware of[.]"

FIRST CLAIM FOR RELIEF: FEDERAL DEFENDANTS VIOLATED ESA'S PROHIBITION ON TAKE OF THREATENED SPECIES

76. Plaintiff re-alleges and reasserts all previous paragraphs as if set forth in full herein.

77. Section 9 of the ESA prohibits any person from taking an endangered species. 16 U.S.C. § 1538(a)(1)(B).

78. The term " 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." § 1532(19).

79. " 'Take' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." *Strahan v. Coxe*, 127 F.3d 155, 162 (1st Cir. 1997).

80. The USFWS has extended the prohibition on take to grizzly bears as a threatened species. 50 C.F.R. § 17.40(b)(1)(i)(A).

81. Under the ESA, the definition of a "person" is any "officer, employee, agent, department, or instrumentality of the Federal Government, or any State, municipality or political subdivision of a State." 16 U.S.C. § 1532(13).

82. In addition to its prohibition on a person taking a listed species, the ESA, makes it unlawful for any person "to attempt to commit, solicit another to commit, or cause to be committed, any offense defined" in the ESA. § 1538(g).

83. Accordingly, officials and agencies that authorize, allow, permit, or license activities that are reasonably certain to continue to result in the take of threatened species are in violation of the ESA.

84. Federal Defendants authorizing IDFG to lethally remove Grizzly 1089 and Cub 1 on November 9, 2022 is in direction violation of ESA's prohibition on the "taking" of grizzly bears pursuant to 50 C.F.R. 17.40(b)(1)(i)(A).

85. While this provision of the C.F.R. provides exceptions in cases of self-defense and for the removal of "nuisance bears," neither of these exceptions applied to Grizzly 1089 or Cub 1.

86. Grizzly 1089 and Club 1 did not meet the definition of nuisance bears as defined in 50 C.F.R. 17.40(b)(i)(C).

87. The record does not support that Grizzly 1089 and her cubs actions that were threatening to human safety, nor does it support that the bears committed any depredations.

88. Even so, had the agencies determined that these threats existed, 50 C.F.R. 17.40(b)(i) subsections (C)(1)&(2) require that attempts first be made to capture and release the involved bears and that this decision making is in line with the guidance spelled out in the 1986 Interagency Grizzly Bear Guidelines ("Guidelines) be followed. Neither occurred here.

89. The Guidelines clearly state that an adult female grizzly with cubs is not to be lethally removed until her third "strike" involving livestock depredation or the obtaining of human or unnatural foods or her second "strike" involving a threat to human safety.

90. The Guidelines for orphaned cubs are even more forgiving and provide for the cubs to be either "release[d] on site" or "relocate[ed]" irrespective of the number of conflicts, so long as the conflicts don't involve human injury and/or death.

https://fwp.mt.gov/binaries/content/assets/fwp/conservation/wildlife-reports/bears/07202020_grizzly-bear-conflict-response-protocol.pdf.

91. None of the bears met these qualifications and the USFWS authorization clearly violates the ESA, USFWS regulations, and interagency guidelines.

92. In the absence of relief from the Court, future illegal takings are likely to occur as a result of agency actions.

93. Barring judicial relief in the present action, Plaintiffs would have no redress, as the only possibility of judicial action would be after grizzly bears had already been killed.

94. Plaintiff is entitled to relief, including but not limited to declaratory and injunctive relief.

SECOND CLAIM FOR RELIEF: IDAHO DEFENDANTS VIOLATED ESA'S PROHIBITION ON TAKE OF THREATENED SPECIES

95. Plaintiff re-alleges and reasserts all previous paragraphs as if set forth in full herein.

96. Section 9 of the ESA prohibits any person from taking an endangered species. 16 U.S.C. § 1538(a)(1)(B).

97. By regulation, the USFWS has extended the prohibition on take to grizzly bears as a threatened species. 50 C.F.R. § 17.40(b)(1)(i)(A).

98. In addition to its prohibition on a person directly taking a listed species, the ESA prohibits a third party from authorizing or allowing a person to conduct an activity that results in the take of a listed species. According to the 1st Circuit Court of Appeals in *Strahan v. Coxe*, a "governmental third party pursuant to whose authority an actor directly exacts a taking of an

endangered species may be deemed to have violated provisions of the ESA." 127 F.3d 155, 163 (1st Cir. 1997).

99. The unauthorized lethal removal of Cub 2 on November 10, 2022 by the above-named employees of IDFG was illegal as it violated the ESA's prohibition on the "taking" of grizzly bears pursuant to 50 C.F.R. 17.40(b)(A).

100. While this provision of the C.F.R. provides exceptions in cases of self-defense and for the removal of "nuisance bears," neither of these exceptions applies to Cub 2. 50 C.F.R. 17.40(b)(i)(C).

101. Grizzly Cub 2 never demonstrated such a threat or committed any depredations.

102. Even if Cub 2 had demonstrated such a threat, subsections (C)(1)&(2) require that attempts first be made to capture and release the involved bears and that guidance spelled out in the 1986 Interagency Grizzly Bear Guidelines be followed. Neither occurred here.

103. The Guidelines specifically state that an orphaned cub, as was Cub 2 after the lethal removal of 1089, is to be either "release[d] on site" or "relocate[ed]" irrespective of the number of conflicts other than human injury and/or death. https://fwp.mt.gov/binaries/content/assets/fwp/conservation/wildlife-reports/bears/07202020_grizzly-bear-conflict-response-protocol.pdf.

104. Defendants Pieron, Hendricks and Fredericks' lethal removal of Cub 2 constitutes a take and directly violates of ESA.

105. In the absence of relief from the Court, future illegal takings are likely to occur as a result of agency actions.

106. Despite internal communications showing that personnel with the USFWS believed the Idaho Defendants had engaged in a take of Cub 2, the USFWS did not initiate any

enforcement action under the ESA. This will further embolden IDFG and its agents to continue to act unilaterally and disregard the ESA and its prohibitions.

107. Barring judicial relief in the present action, Plaintiffs would have no redress, as the only possibility of judicial action would be after grizzly bears had already been killed.

108. Therefore, Plaintiff is entitled to relief, including but not limited to declaratory and injunctive relief.

PRAYER FOR RELIEF

Plaintiff respectfully requests that the Court grant the following relief:

(a) Declare and adjudge that Defendants acted illegally by killing the grizzly bear cub in violation of the ESA's prohibition on take of a threatened species, 16 U.S.C. § 1538(a)(1)(B);

(b) Enjoin Defendants from engaging in lethal action against non-conflict grizzly bears that do not pose a threat to human safety without first taking non-lethal measures, such as tranquilizing, relocating, and using bear deterrent;

(c) Enjoin Defendants from taking grizzly bears without clear and explicit authority for doing so from the USFWS; and

(d) Award Plaintiff its reasonable fees, costs, and expenses associated with this litigation under 16 U.S.C. § 1540 (g)(4).

Filed this 14th day of August, 2023.

/s/Deborah A. Ferguson
Deborah A. Ferguson
FERGUSON DURHAM, PLLC

Attorneys for Petitioners