



**ADMINISTRATIVE REMEDIES SOUGHT:**

In accordance with procedures set forth in Section 4 of the ESA and 50 C.F.R. 424, Petitioner requests that the U. S. Fish and Wildlife Service (USFWS):

- **Delist Grizzly Bear** (*Ursus arctos horribilis*) in the Conterminous “Lower 48” United States from the ESA List of Endangered and Threatened Wildlife, including where listed as an experimental population, because this listed entity does not meet the ESA statutory definition of “species.”

## I. INTRODUCTION

This petition does not question whether grizzly bears are worthy of protection and conservation. For decades, Idaho, our sister states, tribes, local governments, and particularly our rural communities, have invested considerable resources in this enterprise, and have shouldered much of the burden of rebuilding grizzly bear populations. This burden involves more restrictions in outdoor livelihoods, rural living, and recreation; risk of injury that comes from living with bears; and considerable investment of time and resources in a wide array of conservation measures, including management of conflicts between bears and people.

Idaho's contributions in the Greater Yellowstone Area and northern Panhandle have played an important role in one of the most successful conservation efforts of our time. Grizzly bears in Idaho, Montana, Wyoming, and Washington had dwindled to a few hundred bears in 1975, but now number over 2,000. It is vital to the future success of such conservation efforts that the ESA works as it was intended, and that federal protections are lifted for healthy populations. Delisting healthy populations demonstrates that sustained investments in conservation are worth the effort for our rural communities, and delisting allows federal resources to focus on species more in need of protection.

This petition is not about when Idaho should “take over” management of grizzly bears from USFWS. If Idaho, other states, and tribes stepped back from the grizzly bear management they have performed for decades, USFWS has no ready replacement to assume these responsibilities. When conflicts occur, state, tribal, or local authorities are the primary—and often the only—responders on the scene. USFWS does not have the resources to ensure that people properly use bear-proof food/garbage containers or “bear aware” methods for herding and confining domestic animals. USFWS does not have the resources to coordinate activities like gathering up townsite apples and other attractants, or to take many of the other measures that help prevent bears from setting up shop where they might hurt or kill people and domestic animals.

The goal of ESA conservation is “to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary” (16 U.S. Code § 1532). When conservation efforts accomplish this point, but the formal step of delisting does not occur, or worse yet, appears unachievable, we risk conservation tragedy through loss of community support. This risk is even larger when it involves species such as grizzly bears, whose successful conservation requires ongoing intensive management.

The framework that applied to grizzly bear listing under the ESA in 1975 no longer exists. The 1993 Recovery Plan for “lower-48” grizzly bear identified a phased delisting strategy (*i.e.*, delisting recovery areas identified in the 1993 Plan as each achieved recovery criteria and then delisting the remainder of the listed entity). Recent court decisions, however, have rejected this framework.

Interpreting ESA delisting requirements has come to resemble a Charlie Brown cartoon with Lucy holding the football. But for those who live with grizzly bears as neighbors, it is no laughing matter. Successful conservation should be rewarded with increased management flexibility, as envisioned by the ESA and the 1993 Recovery Plan; successful conservation



should not result in ever-increasing management restrictions. When ESA protections continue and expand in scope when they are not biologically necessary, states and local communities are justified in asking whether they should leave tackling conservation challenges to the armchair quarterbacks, and refocus their energies on more productive endeavors.

**A combination of court decisions and administrative determinations have tied delisting procedures in knots.** Recent court decisions impose additional delisting requirements based on judicial concern about the “remnant” listed entity left when a robust population is delisted as a distinct population segment (DPS) from within a larger listed entity. Instead of continuing to pull on a hopeless tangle of requirements, it is reasonable to address the primary cause of judicial concern at its source – the overly broad 1975 listed entity that was not based on taxonomy or biology from the beginning, and that is not an entity on which current ESA jurisdiction is based.

This petition does not challenge the ESA’s authority to protect interbreeding population segments of grizzly bears that are discrete and significant to the taxonomic subspecies, and that meet the definition of threatened or endangered species. This petition does, however, challenge *de facto* ESA listing of an entity that does not meet the ESA definition of a protectable “species,” when such a listing appears to stand in the way of the ESA’s operating as intended and risks eroding continued species conservation.

## **II. THE RECENT SHIFT IN THE LONGSTANDING GRIZZLY BEAR DELISTING FRAMEWORK**

In 1978 Congress amended the definition of “species” such that ESA protections could only apply to an entity that is a taxonomic species, taxonomic subspecies, or a “distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S. Code §1532(16). In 1996, USFWS adopted a policy to interpret “distinct population segment” as a population that is both discrete and significant **to the taxon** to which it belongs (USFWS 1996, 61 Fed. Reg. 4,722) (emphasis added).

The 1975 grizzly bear listing preceded the enactment of “DPS” in the statutory definition. It crudely listed grizzly bears in the 48 conterminous States of the entire United States, with the knowledge that grizzly bears did not historically occupy the eastern U.S. (USFWS 1975, 40 Fed. Reg. 31,734).<sup>1</sup> When grizzly bear listing occurred in 1975, the focus was on putting the brakes on population declines in the United States, and not on careful delineation of key population boundaries. In hindsight, too little attention was paid to how the delisting process would work after conservation succeeded. This lack of detail now puts continued conservation success at risk.

In 1993 USFWS issued a revised Recovery Plan for grizzly bear (USFWS 1993). The 1993 Recovery Plan established a framework for recovery of the “lower-48” listing based on five grizzly bear “populations” “remaining” in parts of Idaho, Montana, Washington, and Wyoming, and a possible sixth population (USFWS 1993, p. ii). The executive summary of the 1993 Plan’s “Recovery Objective” is simple: “Delisting of each of the remaining [grizzly] populations *by population* as they achieve recovery targets.” *Id.* (emphasis added). Recovery criteria indicated

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<sup>1</sup> Grizzly bear were among the animals “discovered” by the Lewis and Clark expedition (1803-1806), as prior European settlement and exploration of the United States had not encountered them.

that “the species throughout the lower 48 states can be delisted when the populations in all established recovery zones have been delisted.” *Id.*

The 1993 Recovery Plan preceded USFWS’ 1996 DPS Policy. For over twenty-five years, those undertaking grizzly bear conservation, including Idaho, proceeded with the understanding that the phased delisting framework of the 1993 Recovery Plan was procedurally consistent with the ESA. Litigation challenging the 1993 Recovery Plan led to a 1997 settlement regarding the development of habitat-based recovery criteria, but did *not* revise the 1993 Recovery Plan framework of partial delisting by individual recovery area. *See* (USFWS 1999a/1999b, 64 Fed. Reg. 38,464-6).

For decades, this anticipated framework of phased delisting by individual recovery area made the vastly overbroad 1975 “lower-48 states” grizzly bear listing of little legal or administrative consequence. DPS designation for delisting was not an issue in the district court ruling on the 2007 rule delisting the Greater Yellowstone DPS, and the Plaintiff organization did not challenge that from a procedural standpoint (U.S. District Court, Montana. 2009).

The Ninth Circuit Court of Appeals’ 2020 decision on the 2017 delisting of the Greater Yellowstone Grizzly bear DPS represented a major shift from the longstanding partial delisting framework of the 1993 Recovery Plan (Ninth Circuit Court of Appeals 2020). The Ninth Circuit followed the reasoning of a 2017 decision of the D.C. Circuit Court of Appeals that reviewed delisting a DPS from within the lower-48 gray wolf delisting.<sup>2</sup> These appellate decisions find it improper to delist a DPS from within an existing listed entity unless USFWS analysis ensures the “remnant” listing remains protectable as a species under the ESA (*see* D.C. Circuit Court of Appeals 2017).

There appear to be two ways to address judicial concern related to “legal orphaning” of the area that remains listed after a DPS is delisted from within a larger listed entity: (1) evaluating the listed remnant at the back end of the delisting process to ensure the remnant is protectable and viable/recoverable under the ESA; or (2) evaluating the historically listed entity to ensure it identifies a “species” protectable under the ESA in the first place.

Our sister states have petitioned for delisting of grizzly bear DPSs based on the approach of evaluating the DPS delisting’s effect on the listed remnant. On January 10, 2022, Wyoming petitioned for delisting of the robust and secure Greater Yellowstone Ecosystem DPS. Wyoming based its petition on compliance with the Ninth Circuit’s limited remand of the 2017 delisting of the Greater Yellowstone DPS.

Wyoming’s petition describes how Idaho, Montana, and Wyoming have committed to translocate bears for genetic health, and to recalibrate population metrics based on changes to our population estimation model to address two aspects of the remand. Wyoming’s petition also identifies information that enables USFWS to address the third and final element of the remand

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<sup>2</sup>In another example of how ESA delisting goalposts keep moving, the D.C. Circuit issued this decision a month after USFWS issued the rule delisting the Greater Yellowstone grizzly bear DPS in 2017.



related to analysis of the effects of DPS delisting on the remnant of the lower-48 listed entity (Wyoming 2022).<sup>3</sup>

On December 17, 2021, Montana petitioned for delisting of the robust and secure population in the Northern Continental Divide area (Montana 2021).

However, there is no demonstrated success in delisting robust and secure populations using the remnant analysis approach now required by two U.S. Circuit Courts of Appeal. Indeed, a combination of district court decisions create a seemingly impenetrable tangle to delisting, at odds with the ESA's stated objective to end federal protections when they are no longer necessary.

Most recently, a February 10, 2022 decision by the U.S. District Court for the Northern District of California added to the tangle of procedural requirements for analyzing remnants of listed entities at the back end of a DPS delisting. For example, this decision found USFWS' delisting of the "lower 48" listed entity for gray wolves inadequate because USFWS did not analyze the status of lone dispersers and other wolves outside of core populations under statutory listing criteria—referring to individual gray wolves reported in states such as Iowa, Nebraska and Massachusetts. (U.S. District Court, N. District of California, 2022). This court also found that USFWS did not provide "objective guideposts or factors" for determining "significance" relative to the "range" of the lower-48 listed entity based on resiliency, representation, and redundancy (*id.*).

This amount of procedural entanglement should concern anyone who wants the ESA to work as it was intended, whether future determinations involve initial listing for federal protection, uplisting or downlisting species, or delisting species when federal protection is no longer necessary. Indeed, this procedural tangle achieves *the opposite* of the ESA's purpose. It keeps robust populations under federal ESA protection unnecessarily, at the expense of agency resources that could benefit other species.

Ultimately, the long-acknowledged error and overbreadth of "lower 48" listings of the 1970s are an obvious root cause of appellate and district court judicial concern in reviewing later actions to delist populations in only a portion of the original listing.

Thirty of the "lower 48" states in the 1975 listing are outside of grizzlies' historic range entirely. With changes in land use since 1850, fourteen other states have insufficient habitat to support self-sustaining populations of grizzly bears. The 1975 listing is even more absurd when viewed in the context of the grizzly bear subspecies taxon under the 1996 DPS Policy. The transboundary populations in Idaho, Montana, and Washington are biologically and ecologically indistinct from grizzly bears in British Columbia, forming the southern extensions of metapopulations crossing western Canada to Alaska and numbering around 60,000 animals.

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<sup>3</sup> Notably, the Ninth Circuit's remand of the previous 2007 rule delisting the Greater Yellowstone DPS identified a single, and different issue – the failure of the delisting rule to assess a potential threat to bear diet from a decline in whitebark pine trees (that was just coming to light as USFWS was finalizing the 2007 rule). The interagency team of federal and state scientists addressed this issue through detailed analysis presented in support of the 2017 delisting rule (IGBST 2013).

In the absence of a demonstrated ability to address the results of the “lower-48” listing errors *after* delisting populations as they achieve recovery criteria, as originally envisioned under the 1993 Recovery Plan, it is appropriate to revisit the original listed entity at the front end of the process, because it does not meet the ESA statutory definition of “species.”

Idaho recognizes that the February 2022 Northern California District Court decision ruled that USFWS could not rely on a listed entity’s not meeting the statutory definition of “species” as an independent basis for delisting. However, this decision is a clear legal error, and it is not binding on Idaho. Although this decision characterized examination of whether a listed entity qualifies as “species” as a “statutory dodge,” such examination is in reality a matter of ensuring faithful execution of the statute and answering a threshold question in the proper exercise of ESA jurisdiction.

With various judicial decisions resulting in a fundamental shift in the delisting framework presented in the 1993 Recovery Plan, it is important, and legally proper, to review the 1975 listed entity from a fundamental jurisdictional standpoint. Idaho’s petitioned delisting action is consistent with the statutory definition, 1996 DPS Policy requirements, and ESA implementing regulations for petitions to delist (50 C.F.R. 424.11(e)(3)).

### III. ESA STATUTORY DEFINITION OF “SPECIES”

Under the ESA, the identification of “species” is a threshold legal issue, determinative of whether there is potential federal jurisdiction over a group of animals. Such identification is supposed to precede the analysis of whether the “species” is endangered or threatened (Ninth Circuit Court of Appeals, 2009, 2017).

The ESA precludes USFWS from recognizing something other than a “species” as threatened or endangered. This is important relative to the ESA’s conservation purpose to prioritize federal resources toward the conservation of biological resources at risk of extinction. The ESA is not intended to be a general biodiversity statute, or to provide perpetual protection without regard to the risks of extinction (USFWS 1996, 61 Fed. Reg. 4,724). The statutory definition is also important from a policy perspective, because ESA listing preempts state and tribal sovereign authorities over resident wildlife species within their respective jurisdictions.

The ESA definition of “species” includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife that interbreeds when mature. 16 U.S.C. §1532(16). The only three choices for ESA listing as a threatened or endangered species related to grizzly bear under the current ESA are thus: (1) taxonomic species; (2) taxonomic subspecies; and (3) distinct population segments that interbreed when mature. There has been no serious scientifically based contention that the taxonomic bear species (*Ursus arctos*, brown bear) or taxonomic grizzly bear subspecies (*U. arctos horribilis*) warrant ESA listing as a threatened or endangered species.

USFWS interprets “distinct population segment” based on its 1996 Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the ESA (USFWS 1996). The

1996 DPS Policy provided additional agency interpretation of the term “DPS” because the respective Secretary must “determine whether any species is an endangered species or a threatened species” (section 4(a)(1)) (*id.*).

The 1996 DPS Policy also recognized Congress’ instruction to exercise the authority to designate DPSs “sparingly and only when the biological evidence indicates that such action is warranted.” (Senate Report 151, 96th Congress, 1st Session). The policy clearly indicates the purpose of the DPS Policy is to “better judge and concentrate their efforts toward the conservation of biological resources at risk of extinction,” and refers to “the ability to address local issues (without the need to list, recover, and consult rangewide)” resulting in a more effective conservation program (USFWS 1996, 61 Fed. Reg. 4,725). While recent courts have quoted this language in regards to assessing identification of a DPS from within a historic listed entity, it applies to examination of whether a listed entity is a species in the first place.

The 1996 DPS Policy discusses Senate Report No. 96-151 (May 15, 1979), in which the Senate Committee rejected calls to remove authority to designate DPSs because that authority could lead to the listing of “squirrels in a specific city park” even though an abundance of squirrels lived in “other parks in the same city, or elsewhere” (Report at 6-7). The Committee equated protecting squirrels in a city park with an abuse of the DPS concept, not a proper application of it. *Id.* at 7. Congress did not intend for USFWS to protect haphazard groupings of animals as threatened or endangered. *Id.*

“The Services consider the Act to be directed at maintenance of species and populations as elements of natural diversity. Consequently, the principal significance to be considered in a potential DPS will be the significance to the taxon to which it belongs . . . the Act is not intended to establish a comprehensive biodiversity conservation program, and it would be improper for the Services to recognize a potential DPS as significant and afford it the Act’s substantive protections solely or primarily on these grounds...” (USFWS 1996 61 Fed. Reg. 4,724) (emphasis added).

Under the 1996 DPS Policy, USFWS considers three elements to determine whether the population segment is a valid DPS:

1. Discreteness of the population segment in relation to the remainder of the taxon to which it belongs;
2. The significance of the population segment to the taxon to which it belongs; and
3. The population segment’s conservation status in relation to the Act’s standards for listing.

(USFWS 1996, 61 Fed. Reg. at 4725) (emphasis added).

USFWS may consider a population segment of a vertebrate species “discrete” if it satisfies either one of the following conditions:



1. It is markedly separated from other populations **of the same taxon** as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.
2. It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

(USFWS 1996, 61 Fed. Reg. at 4724-25) (emphasis added).

For the significance element,

[i]f a population segment is considered discrete under one or more of the above considerations, its biological and ecological significance will then be considered in light of Congressional guidance (see Senate Report 151, 96th Congress, 1st Session) that the authority to list DPSs be used ‘ sparingly’ while encouraging the conservation of genetic diversity. In carrying out this examination, the Service will consider available scientific evidence of **the discrete population segment’s importance to the taxon to which it belongs.** This consideration may include, but is not limited to, the following:

1. Persistence of the discrete population segment in an ecological setting unusual or unique **for the taxon.**
2. Evidence that loss of the discrete population segment would result in a significant gap in the range **of a taxon.**
3. Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
4. Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

(USFWS 1996, 61 Fed. Reg. at 4725) (emphasis added).

“If a population segment is discrete and significant (*i.e.*, it is a distinct population segment) its evaluation for endangered or threatened status will be based on the [ESA’s] definitions of those terms and a review of the factors enumerated in section 4(a). It may be appropriate to assign different classifications to different DPS’s of the same vertebrate taxon” (*id.*).

Idaho recognizes that USFWS completed a status review of the lower-48 listed entity in 2021 as a result of a litigation settlement, and that USFWS concluded that listing of this entity was still warranted (USFWS 2021). However, the status review failed to comply with USFWS’ requirement to consider appropriate application of the 1996 DPS Policy (“the appropriate application of the policy will also be considered in the 5-year reviews of the status of listed species required by section 4(c)(2) of the Act”) (USFWS 1996). The status review and related

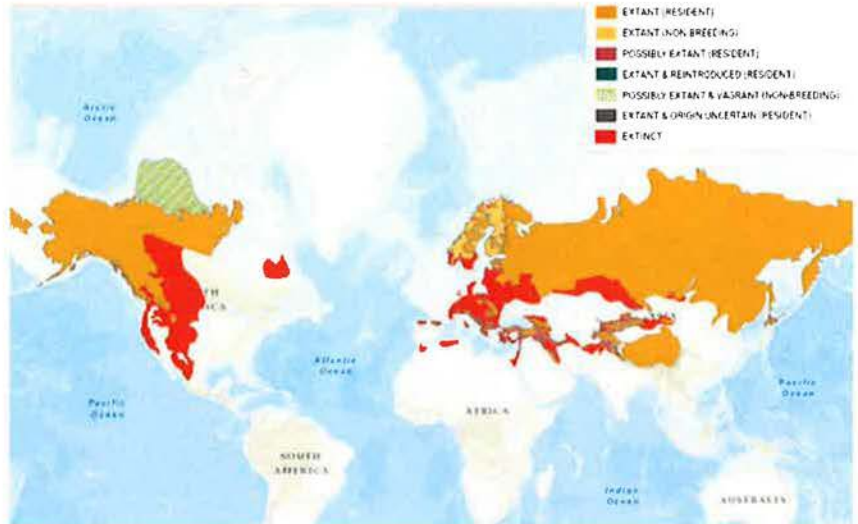
species status assessment thus did not analyze the issue at the core of this petition, whether the “lower-48” listed entity qualifies as a “species” under the ESA statutory definition. The 2021 status assessment and “5-year” status review did not apply the 1996 policy to evaluate the lower 48-listed entity relative to the taxonomic grizzly bear subspecies.<sup>4</sup>

Idaho’s review indicates that the “lower-48” grizzly bear listed entity does not identify a taxonomic species, taxonomic subspecies, or a distinct population segment, and thus does not qualify as a “species” under the ESA.

#### IV. ESA STATUTORY DEFINITIONS AS APPLIED TO GRIZZLY BEARS

**Taxonomic Species:** The Brown Bear species (*Ursus arctos*) is the most widely distributed bear species (*ursid*) in the world, occupying over 9.2 million square miles (Fig.1) (IUCN Red List 2017).

There has been no serious biologically-based contention that this taxonomic species is in danger of extinction or likely to become so throughout all or a significant portion of its current range, such that the entire species warrants listing under the ESA.



**Fig. 1. Current and Historic Range of Brown Bear.** (IUCN Red list 2017)

**Taxonomic Subspecies:** The grizzly bear subspecies (*Ursus arctos horribilis*) of brown bear numbers over 60,000 individuals, estimated around 30,000 in Alaska, 13,000 in Yukon/Northwest Territories/Nunavut, 900 in Alberta, 15,000 in British Columbia, 1,000 in the Greater Yellowstone Area, and 1,000 elsewhere in Montana/Idaho/Washington (USFWS 2021, App. E, as updated for Alberta (fRi Research 2021); Bjornlie 2021). The subspecies occupies over 1.7 million square miles, more than 60% of the subspecies’ historic range.<sup>5</sup>

The historic range<sup>6</sup> of grizzly bear in North America generally excluded areas east of the Great Plains. Historic range also excluded the Great Basin and high desert areas between the Coast Range and Rocky Mountains (Fig. 2) (USFWS 2021, citing Haroldson *et al.* 2020).

<sup>4</sup>Idaho identified the USFWS’ lack of compliance with the 1996 DPS policy in our comments on USFWS’ draft documents, but USFWS’ 2021 final review and species status assessment did not fix this deficiency.

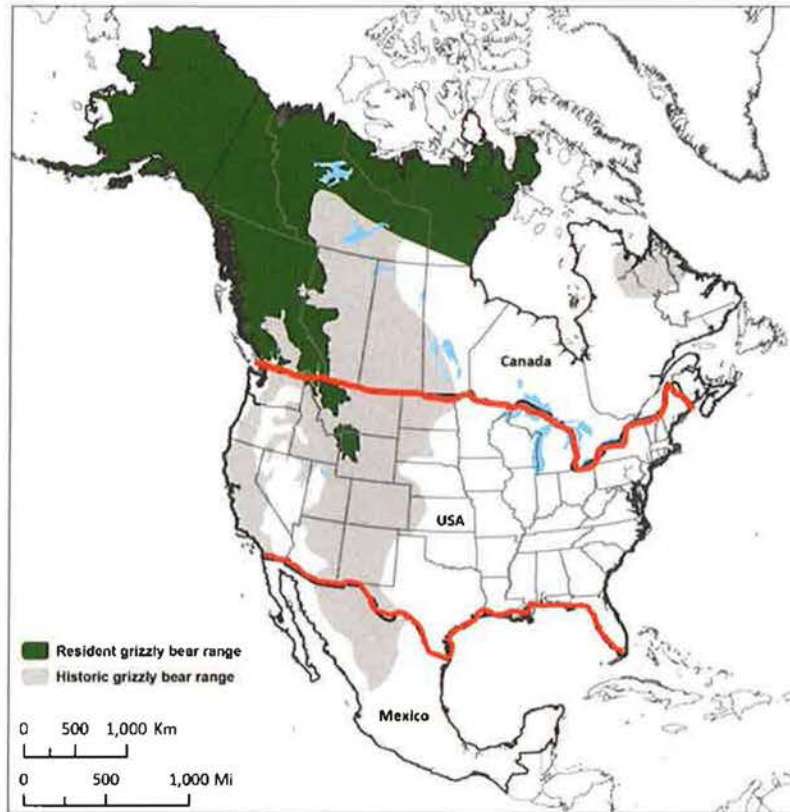
<sup>5</sup> Grizzly bears occupy all of their historic range in Alaska, approximately 60% of their historic range in Canada (with some expansion northward outside historic range), and approximately 6% of their range in the “lower 48” states (Haroldson 2020).

<sup>6</sup> This petition assumes that USFWS considers grizzly bear “historic range” to be its range around 1850, preceding the time of major distribution changes related to high levels of human-caused mortality and



There has been no serious biologically based contention that the grizzly bear taxonomic subspecies is in danger of extinction or likely to become so throughout all or a significant portion of its current range, such that the entire subspecies warrants listing.

The grizzly bear subspecies has an expansive current range (Haroldson 2020). It is a habitat generalist with an omnivorous diet of considerable plasticity (USFWS 2021, IGBST 2013) and continues to enjoy robust, viable population levels despite the loss of a substantial amount of suitable habitat in the western conterminous United States and the portions of south central Canada during settlement in the 1800 and 1900s.



**Fig. 2. Current and Historic Range of Grizzly Bear subspecies** (modified from Haroldson 2020, cited by USFWS 2021). (Brown bears on Kodiak Island, Alaska are considered a separate subspecies (*Ursus arctos middendorffi*).

### **Distinct Population Segment**

The 1975 listing of grizzly bears in the entire conterminous (“lower 48”) states (USFWS 1975) preceded the 1978 ESA amendments that limited protectable entities to taxonomic species and subspecies, and “distinct population segment of any species of vertebrate fish or wildlife [that] interbreeds when mature.”

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habitat loss with pioneer settlement west of the Mississippi. *See* (USFWS 2018, 83 Fed. Reg. 18,741).



To be a DPS, a population must interbreed when mature, and be discrete and significant, as described in the 1996 DPS Policy.

USFWS has identified a minimum population size of 500 grizzly bears for short-term genetic fitness, with a minimum population size of 800 grizzly bears to obtain a “High” category for self-sustainability (USFWS 2021).

*The Overbroad “Lower 48” 1975 Listed Entity does not identify a grizzly bear population.*

In conducting various regulatory reviews and assessments of grizzly bears, USFWS uses the term “listed entity” to refer to the lower-48 listing (*e.g.*, USFWS 2018, 83 Fed. Reg. 18,737). This properly reflects that USFWS has not formally designated the “lower 48” as a DPS. The listing does not conform to the current ESA. The 1975 listing of grizzly bears in the entire lower 48 states is not a DPS because it does not identify a grizzly bear population at all (in 1975 or currently). The 1975 listed entity is a geographic area unrelated to biological delineation of a “distinct population segment” as defined by the ESA.

USFWS has defined “population” under the ESA to mean “a group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement that interbreed[s] when mature.” 50 C.F.R. 17.3. By definition, one individual animal, or zero animals, is not a population (*see* Tenth Circuit Court of Appeals, 2000).

USFWS has long acknowledged that the 1975 listing is erroneous, as evident in the structure of the 1993 Recovery Plan and other administrative documents. USFWS’ most recent “5-year” status review and related species status assessment again acknowledged the major error in the listed entity relative to grizzly bear historic range (USFWS 2021). Yet the 2021 five-year review did not comply with the 1996 DPS Policy and consider appropriate application of the DPS Policy in assessing status of the listed entity. Instead, USFWS unaccountably persisted in assessing the status of the clearly erroneous “lower 48” entity based on recovery areas in the 1993 Recovery Plan, in a vacuum disconnected from the taxonomic subspecies.

Most of the “lower-48” listed entity consists of areas outside the subspecies’ historical range and areas from which grizzly bears are extirpated and now lack suitable habitat to support self-sustaining grizzly bear populations (*e.g.*, USFWS 2021, Appendix A). USFWS has recognized that *thirty* of the lower-48 states are entirely outside grizzly bear historic range (USFWS 2021, p. 36). Records show that grizzly bears historically existed in only 18 of the 48 conterminous states (*i.e.*, Washington, Oregon, California, Idaho, Montana, Wyoming, Nevada, Colorado, Utah, New Mexico, Arizona, North Dakota, South Dakota, Minnesota, Nebraska, Kansas, Oklahoma, and Texas) (USFWS 2021, p. 4).

In the 18 western states containing grizzly bear historic range, grizzly bears were historically absent from large expanses of desert habitats that would have separated grizzly bears in the coastal mountain ranges (Sierra Nevada and Cascade ranges) from those in the Rocky Mountains. These included the high deserts of Washington and Oregon; and the deserts comprising most of Nevada and portions of Utah, Arizona, and California (USFWS 2021, *citing* Haroldson *et al.* 2020).

The “lower-48” listed entity does not identify a grizzly bear population; roughly three quarters of the listing does not contain grizzly bears, and roughly half of the listing is outside grizzly bear historic range entirely.

*The “lower 48” listed entity does not identify a population that interbreeds when mature.*

Extirpated grizzly bear historical range in the heavily human-settled transboundary Okanagan valley area of Washington (and a contiguous part of Canada), lying between coastal ranges and the Rocky Mountains ranges, now lacks sufficient suitable habitat for self-sustaining populations of grizzly bears (see, e.g., USFWS 2021, p. 322). Even should grizzly bear restoration occur in extremely limited areas of suitable habitat that may be present elsewhere in the coastal/Cascade ranges of the conterminous United States, these grizzly bears would be reproductively isolated from grizzly bears in the Northern Rocky Mountains and Greater Yellowstone.<sup>7</sup> Grizzly bears in the Northern Rocky Mountains and grizzly bears hypothetically restored to the coastal/cascade range of the conterminous United States therefore would not collectively form a DPS that interbreeds when mature.

Grizzly bears are also extirpated from the Great Plains (east of the NCDE and Greater Yellowstone) and areas south of the Greater Yellowstone Area, including all of their historic range in North and South Dakota, Nebraska, Kansas, and Oklahoma. (USFWS 2021). This historic range now lacks sufficient suitable habitat for self-sustaining populations of grizzly bears due to extensive human settlement and agricultural land use, and there has been no serious proposal to restore grizzly bears to these areas (see USFWS 2021 App. A). Grizzly bears hypothetically restored to areas south of Yellowstone would be reproductively isolated and therefore would not collectively form a DPS which interbreeds when mature with other areas of the conterminous United States.

*Application of population “discreteness” under the current ESA framework illustrates why the “lower-48” listed entity is not a DPS.*

Two district court decisions from nearly ten years ago rejected USFWS’ attempt to divide the 1978 gray wolf “lower 48” listed entity into multiple DPSs for purposes of applying different status classifications under the ESA. The U.S. District Court of Oregon found USFWS’ DPS approach unlawful because it did not draw the DPS boundary around distinct populations in the Western Great Lakes and Northern Rockies, and instead created larger DPSs encompassing the wolves’ entire historical range, creating “dramatic variation” in conservation status that did not comport with the definition of a DPS (U.S. District Court, Oregon, 2005). The U.S. District Court of

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<sup>7</sup> USFWS does not identify existing populations in the lower-48, including those in eastern Washington, as sources of potential natural recolonization of the North Cascades; it only identifies three British Columbia subpopulations on the coastal (west) side of Canada’s portion of the Okanagan valley. (USFWS 2021, pp. 180-181). USFWS has repeatedly described “the United States’ portion of the NCE” as contiguous with habitat north of the international border in British Columbia in Canada, but isolated from other grizzly bear populations in both the United States and Canada. This description is scientifically supported (USFWS 1999) (USFWS/NPS 2015) (USFWS/NPS 2017, draft EIS, 1, 6, 36, 88).



Vermont rejected USFWS' attempt to "delist an area that it previously determined warrants an endangered listing because it 'lumps together' a core population with a low to non-existent population outside of the core area" (U.S. District Court, Vermont 2005).

From a biological and conservation perspective, it is clear that the "lower-48" listed entity does not constitute a population or an interbreeding population, and is thus not a DPS qualifying as a "species" under the ESA. No further analysis is necessary to merit delisting. Implementing regulations specifically authorize a listing's failure to meet the statutory definition of "species" as a basis for a delisting petition (50 CFR 424.11(e)(3)). However, it may be helpful to contrast how the DPS definition might apply to grizzly bears that occupy four of the conterminous United States to further illustrate why the lower-48 listed entity is not itself a DPS.

Under the 1996 DPS Policy, a population is discrete if it is either: (1) markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors; or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act (USFWS).

Ultimately, there are more than 2,000 grizzly bears that inhabit parts of four states within the conterminous United States. Current range south of the international border consists of: (1) more than 1,000 grizzly bears in Montana, Idaho and Washington forming southern extensions of grizzly bear populations in Canada's Rocky Mountains; and (2) a population over 1,000 grizzly bears in the Greater Yellowstone Area of Wyoming, Montana, and Idaho which has been generally isolated from other grizzly bear populations since the 1930s.



**Fig. 3. Current range of grizzly bears south of Canada** (data sources via [ecos.fws.gov](http://ecos.fws.gov) 2022).

#### *Discreteness by "Marked Separation"*

Grizzly bears within their current range in the lower-48 states as a whole are not markedly separate from grizzly bears in Canada. Current grizzly bear range straddles the Canada – U.S. border in three states: Idaho, Montana, and Washington. There is no marked separation between the grizzly bears in the Northern Rocky Mountains of the United States and the Southern Rocky Mountains of Canada, and bears move back and forth across the border (USFWS 1993, USFWS 2021). There are no physiological, ecological or behavioral characteristics markedly separating grizzly bears in



the lower-48 from other grizzly bears of the subspecies taxon in Canada and Alaska (USFWS 2021, Haroldson 2020, Waits 1998).<sup>8</sup>

In contrast to the “lower-48” listed entity as a whole, one individual population within the lower-48 listed entity is “markedly separate” from other grizzly bears. That is the Greater Yellowstone population, which UFSWS identified as a DPS based on “marked separation” in conjunction with delisting rules issued in 2007 and 2017 (USFWS 2007a, 2017).

*Discreteness Delimited by International Boundary*

As to discreteness of a population based on international boundaries, most of the international border between Canada and the “lower 48” United States crosses no population of grizzly bears to delimit. There is no distinction between the areas of the United States and Canada that lie east of the Red River, which are outside of historic range on both sides of the border. Similarly, the extirpated range of the well-settled and agriculturally developed areas of Saskatchewan and Manitoba are on the same footing as the extirpated range of eastern Montana and North Dakota. These areas now lack sufficient suitable habitat for sustaining grizzly bear populations.

The only geographic area with grizzly bears that might be delimited by the international Canada-U.S. boundary involves three states and two Canada provinces: Washington, Idaho, and Montana, and British Columbia and Alberta. Current grizzly bear range in the conterminous United States along the border is limited to the border ranging from the Selkirk Mountains of Washington-Idaho to the eastern front of the Rocky Mountains of Montana.

Grizzly bears in the “North” Cascades of Washington are considered extirpated (USFWS 2021). As discussed above, grizzly bears at the southern extension of the coastal/cascade ranges of Canada are physically separated from grizzly bears at the southern extensions of Canada’s Rocky Mountains and would not interbreed, even if restoration in the Cascade range occurred in the United States. Compliance with the 1996 DPS Policy would accordingly entail separate assessments of DPS delimitation by international boundary for these two portions of grizzly bear range.

USFWS has specifically recognized that the U.S. portions of the Selkirks and Cabinet-Yaak contain insufficient geographic area for viable grizzly bear populations independent from Canada (USFWS 1993, pp. 83, 101). Notably, roughly 50% of the Selkirk Recovery Area identified in the 1993 Recovery Plan is in British Columbia. USFWS extended the recovery area into Canada to achieve a size necessary to support a recovery objective of a mere 90 bears (USFWS 1993, p. 101), making a *de facto* local override of delimitation of a DPS based on the international boundary.

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<sup>8</sup> Even if some groups of grizzly bears showed such characteristics, there are not “adaptions...that could be significant to the conservation of the taxon as a whole” that would support a determination of “significance” for purposes of defining a DPS (*see* Ninth Circuit Court of Appeals 2017). Grizzly bears are highly adaptable, wide-ranging habitat generalists with omnivorous diets of considerable plasticity (*e.g.*, USFWS 2021, Haroldson 2020, IGBST 2013).

## V. FLAWS IN PRIOR USFWS ANALYSES

In considering this petition, Idaho has reexamined multiple USFWS status reviews and court decisions regarding status of the “lower-48” listing and individual “ecosystems.”

While USFWS has correctly applied the 1996 DPS Policy to assess the Greater Yellowstone Ecosystem (USFWS 2007a, USFWS 2017), it has not correctly applied the ESA statutory definition of “species” and DPS Policy in other status reviews and species status assessments.

As discussed above, USFWS’ 2021 status review and related species status assessment did not apply the 1996 DPS Policy. USFWS’ prior “5-year” review, completed in 2011, recognized that the 1975 listing’s inclusion of all or parts of 33 eastern, midwestern, and southern states was in error. However, the review incongruously determined that the “lower-48” delisting qualified as a DPS delimited by an international border. Notably, the 2011 review also failed to analyze whether the “lower-48” listed entity identified a grizzly bear population that interbreeds when mature (USFWS 2011).

In hindsight, USFWS has also not correctly applied the ESA statutory definition of “species” in its prior assessments of the independent status of the Cabinet-Yaak, Selkirk and North Cascades “ecosystems.” As a consequence of USFWS’ incorrect application of the 1996 DPS Policy, several court decisions analyzed only the propriety of USFWS’ “five-factor” analyses, with little if any examination of the threshold question of whether the entity qualifies as an ESA “species” in the first place. (U.S. Dist. Court, D.C. 1995)(U.S. Dist. Court, D.C. 1998) (U.S. Dist. Court Montana, 2017).

For example, USFWS findings in 1991 regarding a petition to uplist the North Cascades Area (preceding the 1996 DPS Policy) rejected the classification of this population as a separate subspecies of brown bear and made no detailed examination of this qualification as a DPS (USFWS 1991). Similarly, the USFWS made findings regarding petitioned uplisting of the Cabinet-Yaak and Selkirk petitions in 1992, 1993, and 1996 (preceding the 1996 DPS Policy) and made no detailed examination of whether these areas qualified as DPSs. A prevailing theme of these analyses was the “small size” of “populations,” which is not the criteria for qualifying a group of bears as a population or as DPS without examining the relationship of the group to the remainder of the subspecies taxon.

When USFWS made findings on these populations in 1999 following litigation, and discussed the 1996 DPS Policy, it unaccountably blurred threshold analyses of “population,” “discreteness,” and “significance” (USFWS 1999c). USFWS’ 1999 analysis of “significance” considered the “lower-48” listed entity as the equivalent of the subspecies taxon, which produces incorrect conclusions as to “unique ecological setting for the taxon,” “significant gap in the range of the taxon,” etc. (USFWS 1999c, 64 Fed. Reg. 26,727). As noted previously in this petition, USFWS has delineated the Selkirk Recovery Area to be roughly 50% within Canada, making it expressly not delimited at the international border.

USFWS’ 5-year review for the lower-48 listed entity in 2011 made recommendations about uplisting of the Cabinet-Yaak, Selkirk, and North Cascades ecosystems, again without examining

their status independently in accordance with the ESA statutory definition and the 1996 DPS Policy relative to interbreeding, discreteness and significance relative the subspecies grizzly bear taxon. Thus, flaws in application of the DPS Policy have persisted across multiple reviews in turn producing flawed results.

### CONCLUSION

Idaho has reviewed the grizzly bear delisting petitions of our sister states. The Greater Yellowstone and Northern Continental Divide Areas both meet USFWS recovery criteria, consistent with the delisting framework envisioned in the 1993 Recovery Plan. Based on the 2020 Ninth Circuit Court of Appeals' limited remand of the 2017 Greater Yellowstone Ecosystem DPS rule, the path to delisting the GYE should be clear with the recent tri-state actions to formalize additional commitments related to population metrics and genetic health.

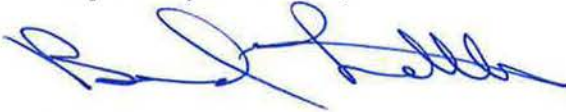
However, a combination of judicial interpretations and USFWS administrative actions appear to block the 1993 Recovery Plan's delisting framework on which we have long relied. We do not see a way to navigate around the known flaws in the 1975 "lower-48" grizzly bear listing, and these flaws appear at the root of judicial concerns with delisting or revisions involving listed entities preceding USFWS' 1996 DPS Policy.

It is essential for continued conservation of grizzly bears that delisting occur when we achieve ESA's purpose, recovery of threatened and endangered *species*. It should not take two decades – and counting – to delist grizzly bears inhabiting the Greater Yellowstone Ecosystem after achieving USFWS' recovery criteria.

Yet, we find our rural communities and important conservation efforts held hostage by procedural gridlock concerning the ESA-listed status of grizzly bears in 44 states where people do not have to live with grizzly bears as neighbors, including 30 states that *never* had grizzly bear populations.

Absent viable delisting alternatives, the only way to cut through the hopeless tangle caused by the errors of the 1975 "lower 48" grizzly bear listing is to confront those errors head-on. Idaho therefore petitions for delisting of the "lower-48" listed entity because it is not a "species" under the ESA.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Brad Little', written over a horizontal line.

Brad Little  
Governor



**NOTICE UNDER 50 C.F.R. § 424.14(b)**

The Ninth Circuit Court of Appeals has determined that the notice requirement in 50 CFR 424.14(b) is inconsistent with ESA's statutory scheme. *Friends of Animals v. Haaland*, 997 F.3d 1010, 1018 (9th Cir. 2021).

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