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Western Environmental Law Center

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SENT VIA E-MAIL AND U.S. POSTAL (Delivery Confirmation)

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Re: Sixty-day notice of intent to sue for violating the Endangered Species Act.

Dear Sirs and Madam:

Western Watersheds Project and WildEarth Guardians, represented by the Western Environmental Law Center (“WELC”), hereby provide this sixty-day notice of intent to sue for violations of section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. §1536.

The U.S. Forest Service (“Forest Service”) and the U.S. Fish and Wildlife Service (“Fish and Wildlife Service”) are required to reinitiate and complete consultation on the Forest Service’s final policy on the use of bait for hunting on National Forest lands. *See* 60 Fed. Reg. 14720-02 (March 20, 1995); Forest Service Manual (“FSM”) § 2643.12 (Use of Bait for Resident Game Hunting on National Forest lands) (hereinafter “national baiting policy”).

Separately, the Forest Service is also required to initiate and complete consultation on its issuance of food storage orders in the Idaho Panhandle, Caribou-Targhee, Bridger-Teton, and Shoshone National Forests that exempt “baiting” on National Forest System lands from the prohibitions included in the orders.

Western Watersheds Project and WildEarth Guardians have significant, concrete interest in ensuring the long-term survival and recovery of black bears and grizzly bears in the Northern Rockies and specifically in Idaho and Wyoming where “baiting” for black bears on National Forest lands is still allowed. These conservation groups also have a strong interest in ensuring federal agency compliance with federal law and ensuring that the Forest Service and Fish and Wildlife Service utilize the best available science and comply with the ESA when allowing certain activities to occur on our National Forest System lands.

Baiting on National Forest lands in Idaho and Wyoming

The use of “baits” to hunt – most commonly for black bears – is a controversial practice that involves dumping large amounts (sometimes hundreds of pounds) of decaying food, sugar-based foods, or animal parts/carcasses in piles on the ground or enclosed in a barrel (with holes to allow the odor to escape) as a means to attract black bears which can then be shot and killed at close range. Over time, bears become attracted to the bait station and eventually associate it with easy and abundant food making them an easy target for hunters. Photos of these “baiting” sites are routinely posted on-line and include the following:



A significant number of “how to” bait black bear videos are also available for review (and downloading) online. *See e.g.*,
<https://www.youtube.com/watch?v=9vaiG32REp4>
https://www.youtube.com/watch?v=bODwFaWLw_M
<https://www.youtube.com/watch?v=RJzqwHmV0>

https://www.youtube.com/watch?v=H66_Wz49Yuk

In Montana, the use of bait as a hunting method is not allowed. Montana considers baiting inconsistent with “fair chase” hunting practices, which is a tenet of the North American Model of Wildlife Conservation. Montana also explains that it is committed to being a “bear-friendly” state, which means “allowing every bear to retain its wild and free nature” and a commitment from the state to take and implement proactive steps to prevent bears from finding and being accustomed to human food sources. *See*

<http://fwp.mt.gov/fishAndWildlife/livingWithWildlife/beBearAware/>. As explained by the Montana Department of Fish, Wildlife and Parks, “[o]nce a bear is food-trained, it is often impossible to untrain them. That is why biologists so often say that ***a fed bear is a dead bear.***” *Id.* (emphasis added).

Most other western states also prohibit the use of baits in hunting, including for black bears, for the same reasons articulated by Montana. The two exceptions are the states of Idaho and Wyoming.

In Idaho, baiting is allowed for black bear hunting throughout most of the state (and game management units) with only a few exceptions, and subject to a few minor restrictions regarding the types of bait used.¹ Baiting is not allowed in game management unit 1 (the area north of the Clark Fork River), a portion of game management unit 61, and game management units 62A, 62, 75, 78, and 77, presumably to protect threatened grizzly bears. However, black bear baiting is allowed in most game management units and National Forest lands in Idaho, including in many areas of Idaho where “grizzly bears may be encountered.” *See* <https://idfg.idaho.gov/sites/default/files/seasons-rules-big-game-black-bear-2017-2018.pdf>. These include game management units 2, 3, 4, 4A, 5, 6, 7, 9 – just south of the Clark Fork River, and units 10, 12, 16, 16A, 17, 19, and 20 in the Selway-Bitterroot region, and portions units of 61, 60, 64, 65, 67, 66, 66A, 67, 69, and 76 in the Greater Yellowstone region. These are all areas where – as Idaho recognizes – grizzlies may occur and be encountered by baiters. *See id.* Baiting also occurs in designated wilderness areas in Idaho by commercial outfitters. *See e.g.*, <http://yorkoutfitters.com/spring-and-fall-bear-hunting/>; <http://selwayridgerunners.com/bear-hunts-in-the-selway-river-wilderness/>; <http://www.idahohunts.net/bearhunts.html>; <https://gothunts.com/hunting/black-bear/idaho-black-bear-hunts/>. This includes but is not limited to the Frank Church

¹ Idaho recently considered allowing baiting for gray wolf hunting as well. This was not approved but Idaho’s current gray wolf regulations allow for wolves to be “incidentally” shot if found at a black bear baiting station.

River-of-no Return Wilderness and the Selway-Bitterroot Wilderness, where grizzly bears may be encountered. *See id.*

Since 2006, approximately 25,700 black bears have been taken by hunters in Idaho. Of these bears, approximately 10,050 were taken at a black bear baiting site representing close to 40% of the total black bear hunter takes over the past decade. In the past five years, baiting has made up around 47% of the black bear hunter takes in Idaho, which may represent the increased use or effectiveness of baiting. Data for 2016 on Idaho's website reveal that approximately 1,234 black bears were killed over bait in a single year.

<https://idfg.idaho.gov/ifwis/huntplanner/stats/?season=general&game=bear&yr=2016>.

Wyoming also allows black bear baiting throughout most of the state and in areas occupied by grizzly bears, including portions of the grizzly demographic monitoring area or "DMA" defined by the Fish and Wildlife Service (baiting is not allowed inside the primary conservation area for grizzlies). This includes portions of hunt areas 13, 14, 15, 16, 17, 18, 19, 23, 24, 27, 28, and 29.

In 2017, hunters killed a total of 467 black bears in Wyoming (the state does not parse out the methods used to kill these bears). It is estimated that approximately 24% of the bears taken during the fall hunting season in Wyoming are taken over bait and 80% of the bears taken during the spring season are taken over bait. This is likely due to the bears' hunger when emerging from hibernation. Numbers on how many grizzlies have been killed at bait sites in Wyoming over the past decade are unavailable. As discussed below, however, over the years a number of grizzly bears have been shot and killed at black bear baiting sites in Wyoming.

Notably, a substantial amount of "baiting" for black bears in Idaho and Wyoming occurs on National Forest lands. This includes large portions of the Idaho Panhandle and Caribou Targhee National Forests in Idaho and large portions of the Shoshone and Bridger-Teton National Forests in Wyoming.

States, including Idaho and Wyoming, traditionally manage wildlife and hunting practices within their state boundaries. However, hunting on our National Forest lands is subject to federal authority and control. The Forest Service, for instance, has the express authority to establish when and where hunting maybe permitted on National Forest System lands. *See* 43 U.S.C. § 1732(b); 36 C.F.R. § 261.70(a)(4); 36 C.F.R. § 261.50(a). It is also the Forest Service's obligation and duty to manage federal lands and resources in accordance with federal law. *See* Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, *Environmental Law* 47, No. 4 (2017) (discussing federal authority and responsibility

to manage wildlife on federal lands); *see also* *Hunt v. United States*, 278 U.S. 96, 100 (1928) (recognizing Forest Service authority under the Organic Act to kill deer over-browsing on National Forest lands, notwithstanding the fact that such action was contrary to state game laws); *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (when “Congress so acts, the federal legislation necessarily overrides conflicting state laws”). The “power of the United States to . . . protect its lands and property does not admit of doubt.” *Hunt*, 278 U.S. at 100.

The National Forest Management Act (“NFMA”) requires the Forest Service to manage wildlife and provide “for a diversity of plant and animal communities” on National Forest lands. 16 U.S.C. § 1604(i); *see also* 36 C.F.R. § 219.19 (NFMA’s 1982 implementing regulations discussing duty to manage viable populations of wildlife); 36 C.F.R. § 219 (2012 planning rule discussing wildlife obligations). The Forest Service is to treat the wildlife resource as a “controlling, co-equal factor in forest management.” Charles Wilkinson and Michael Anderson, *Land and Resource Planning in the National Forests* 296 (1987).

As such, the Forest Service has the authority and responsibility to manage wildlife on National Forest lands under NFMA, its implementing regulations, and the applicable Land and Resource Management Plans (“forest plans”) for each National Forest. The Forest Service has discretionary authority to manage hunting practices like black bear baiting on National Forest lands and the authority to regulate any practices it allows. The Forest Service also has the responsibility to protect forest resources from harmful practices like black bear baiting.

In the past, the Forest Service typically regulated the practice of baiting on National Forest lands by requiring all hunters and commercial guides using bait – typically for black bears – to obtain “special use” authorization to prevent conflicts with other uses and protect forest resources. The Forest Service also used its authority under 36 C.F.R § 261 to close certain areas to baiting.

In 1992, the practice of black bear baiting became an issue on National Forest lands in Wyoming when the Forest Service abandoned its practice of requiring special use authorization and handed over regulation to the states. This decision prompted litigation from conservationists that eventually led to the Forest Service’s decision to undertake a National Environmental Policy Act (“NEPA”) analysis and consult under Section 7 of the ESA to analyze the impacts of baiting on National Forest lands in Wyoming alone.

Subsequently, in 1993, the Forest Service announced plans to adopt a “national policy” on the baiting on all National Forest lands. The Forest Service also

announced it would prohibit baiting on National Forest lands in Wyoming pending issuance of this new national policy.

In April, 1994, the Forest Service released for public comment a notice of a proposed national policy on the use of baiting on National Forest lands. 59 Fed. Reg. 17,758-02 (April 14, 1994). The Forest Service explained that this national baiting policy was needed in order to clarify the agency's role in relation to the roles of states and to provide a "consistent approach to the regulation of baiting" on National Forest lands. *Id.* at 17,758.

After considering public comment, on March 20, 1995, the Forest Service adopted a national baiting policy. 60 Fed. Reg. 14,720-02 (March 20, 1995). The Forest Service also prepared an Environmental Assessment ("EA") under NEPA to analyze the effects of the new national baiting policy and prepared a biological evaluation pursuant to section 7 of the ESA to analyze the impacts of this decision on endangered and threatened species.

The Forest Service's national baiting policy (and related food storage orders)

The Forest Service's 1995 national baiting policy, which was published in the Forest Service's Manual ("FSM") 2643.12 (use of bait for resident game hunting on National Forest lands), represented a significant shift in how the Forest Service managed baiting on National Forest System lands.

Specifically, the Forest Service's national baiting policy: (a) generally eliminated the use and issuance of special use permits for those seeking to use bait while hunting on National Forest lands; (b) lifted the ban on baiting on National Forest lands in the State of Wyoming; and (c) effectively handed over authority to allow or prohibit baiting on National Forest lands to the states (subject to retaining some authority to close areas to baiting subject to certain findings being made and conditions found).

Pursuant to the national baiting policy, the use of bait in hunting is considered a "hunting practice" and, as such, subject to state hunting regulations. 60 Fed. Reg at 14,723; FSM 2643.12. Under the new policy, no specific decision to authorize baiting on National Forest System lands is required. Rather, the practice will be directed by states. If State hunting regulations prohibit baiting, then the practice is prohibited on National Forest lands. *Id.* Conversely, where States "permit the use of bait for attracting resident game, this activity is allowed on National Forest lands, subject to state hunting laws and regulations," unless the

Forest Service makes a specific and formal determination – on a site-specific basis – that there is a need to prohibit or restrict the practice. *Id.*

Under the national baiting policy, the Forest Service retains the right to close a particular area to baiting (or otherwise restrict or limit) baiting on National Forest lands but only if the authorized officer determines: (1) state regulations allowing baiting are not adequate to protect the forest’s resources; (2) the effects of baiting are not consistent with the forest plan; or (3) the state regulations allowing baiting conflict with federal law, including the ESA. *Id.*²

In other words, the national baiting policy adopts a “hands-off” and “open unless closed” policy. How, when, and where baiting on National Forest System lands can occur is now largely left to the individual states. If states like Montana, for instance, elect to prohibit the use of all forms of “bait” while hunting – which they have – then it would not be allowed on National Forest lands in Montana. If states like Idaho and Wyoming, however, allow the use of baiting, then baiting on National Forest lands would be allowed to occur. As such, baiting will be allowed – as authorized by the individual states – unless and until an authorized officer from the Forest Service makes a formal, site-specific decision that there is a need to prohibit or restrict the activity.

As noted earlier, when the Forest Service adopted the national baiting policy in 1995, it prepared an EA and issued a decision notice and related “finding of no significant impact.” Pursuant to section 7 of the ESA, the Forest Service also prepared a biological evaluation to assess how the national baiting policy may affect grizzly bears, gray wolves, and bald eagles. This process concluded with a “not likely to adversely affect” determination for these three species and a concurrence from the Fish and Wildlife Service on this determination.

Since the Forest Service’s 1995 adoption of the national baiting policy, it has also issued food storage orders on a number of National Forests in Idaho and Wyoming. As explained by the Forest Service, these food storage orders are designed to protect bears and people, i.e., to “help keep you and other forest visitors

² Pursuant to the national baiting policy, an attempt to close an area to baiting requires that the authorized Forest Service officer immediately inform state wildlife officials about a proposed closure or restriction and then attempt to resolve any conflicts through consultation and coordination with State officials. *See* 60 Fed. Reg at 14,723; FSM 2643.12. Only if the State and Forest Service officials are unable to resolve the matter, is the Forest Service authorized to close an area to baiting. *Id.* And, if the hunting season is already underway and it “would be impracticable” to issue an order closure, then other measures besides closure have to be explored. *Id.*

safe by avoiding encounters with bears and preventing bears from being attracted to campgrounds, trailheads, picnic sites and other areas frequented by people.” https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_063303.pdf. The orders are specifically intended to minimize the adverse interactions between bears and humans and, as such, typically include requirements that: (1) all food and refuse be acceptably stored during daytime and nighttime hours in camping areas (both in the front and back country); (2) all harvested animal carcasses be acceptably stored; and (3) that all camping or sleeping areas be a certain distance from animal carcasses. Paradoxically, however, these food storage orders in Wyoming and Idaho expressly exempt black bear baiting from the food restrictions and prohibitions.

For example, on June 14, 2016, the Forest Supervisors for the Bridger-Teton and Shoshone National Forests in Wyoming issued a food storage order to minimize human-bear conflicts but this very order expressly exempts all “[p]ersons in the act of placing black bear baits for the lawful purpose of hunting black bears under state law and regulation.” Bridger-Teton National Forest Order 04-030330; Shoshone National Forest Order 16-001. Similar food storage orders were also issued by the Idaho Panhandle and Caribou-Targhee National Forests in Idaho. *See* Idaho Panhandle Order F-11-002 (exempting persons with a permit to conduct activity); Caribou-Targhee Order 04-15-0063 (exempting persons in the act of placing black bear baits).

The Forest Service’s and Fish and Wildlife’s Service’s Violation of Section 7 of the ESA

The Forest Service’s national baiting policy and subsequent issuance of food storage orders for National Forests in Idaho and Wyoming that exempt baiting from restriction (discussed above) have violated and continue to violate section 7 of the ESA.

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 153, 179 (1978). The ESA was enacted to forestall the extinction of species and allow a species to recover to the point where it may be de-listed. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004); *see* 16 U.S.C. § 1532(3) (defining “conservation” as all methods that can be employed to “the point at which measures provided pursuant to [the ESA] are no longer necessary”). Survival and conservation (recovery) of listed species are the “two different (though complimentary) goals of the ESA.” *Id.*

Integral to achieving the ESA's goals is Section 7's consultation provision. Section 7 is described as the "heart of the ESA," *Western Watersheds Project v. Kraayenbrink*, 632 F. 3d 472, 495 (9th Cir. 2011), because it requires federal agencies, including the Forest Service to ensure that any action it authorizes, funds, or carries out does not jeopardize the continued existence of a listed species. 16 U.S.C. § 1536(a)(2). Congress intended the term "agency action" to have broad meaning. *Karuk Tribe of Cal. v. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc). "The relevant question is whether the agency could influence a private activity to benefit a listed species, not whether it must do so." *Id.* at 1025. Even non-action has been held to contravene an agency's duty to conserve under Section 7 of the ESA. *See, e.g., Ctr. for Biological Diversity v. Vilsack*, 2017 WL 3131970 at *22 (D. Nev. 2017) (holding that failure to take affirmative action to conserve the flycatcher violated the ESA).

Section 7's consultation duties are triggered by agency actions that "may affect" a listed species. *Id.* at 1027 (citing 50 C.F.R. § 402.14(b)(1)). "May affect" is a low standard: "Any possible effect, whether beneficial, benign, adverse, or of an undetermined character" triggers the consultation requirement. *Id.* (citation omitted). For all actions that "may affect" a listed species, the agency must determine whether its action is likely or not likely to adversely affect the listed species. 50 C.F.R. § 402.14(a)-(b). A "not likely to adversely affect" determination leads to informal consultation where the Service concurs with that determination in writing. *Id.* § 402.13. If there is no concurrence or if the action is "likely to adversely affect" a listed species, then formal consultation is required. *Id.* at §§ 402.02, 402.14(a). The end product of formal consultation is a biological opinion from the Service on whether the action will jeopardize the survival of the species and, if so, what reasonable and prudent alternatives are available to avoid such a result. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(g)(4).

The ESA's implementing regulations also place an additional, on-going duty on the Forest Service and the Fish and Wildlife Service to reinitiate consultation under certain circumstances.

Reinitiation of consultation under section 7 of the ESA is required and shall be requested by the acting agency or the Fish and Wildlife Service "where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (a) If the amount or extent of taking specified in the incidental take statement is exceeded; (b) If new information reveals effects of the action that may affected listed species or critical habitat in a manner or to an extent not previously considered; (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) If a new species is listed or critical

habitat id designated that may be affected by the identified action.” 50 C.F.R. § 402.16.

Here, the Forest Service and/or the Fish and Wildlife Service have violated and continue to violate section 7 of the ESA by: (1) failing to reinitiate and complete consultation on its 1995 national baiting policy – action over which the Forest Service still retains discretion and control – in light of new information on the increased distribution of grizzly bears in Idaho and Wyoming and the adverse effects of bear baiting on grizzly bears since the national baiting policy was adopted; and (2) failing to initiate and complete consultation on its issuance of Food Storage Orders in the Idaho Panhandle, Caribou-Targhee, Shoshone, and Bridger-Teton National Forests in Idaho and Wyoming.

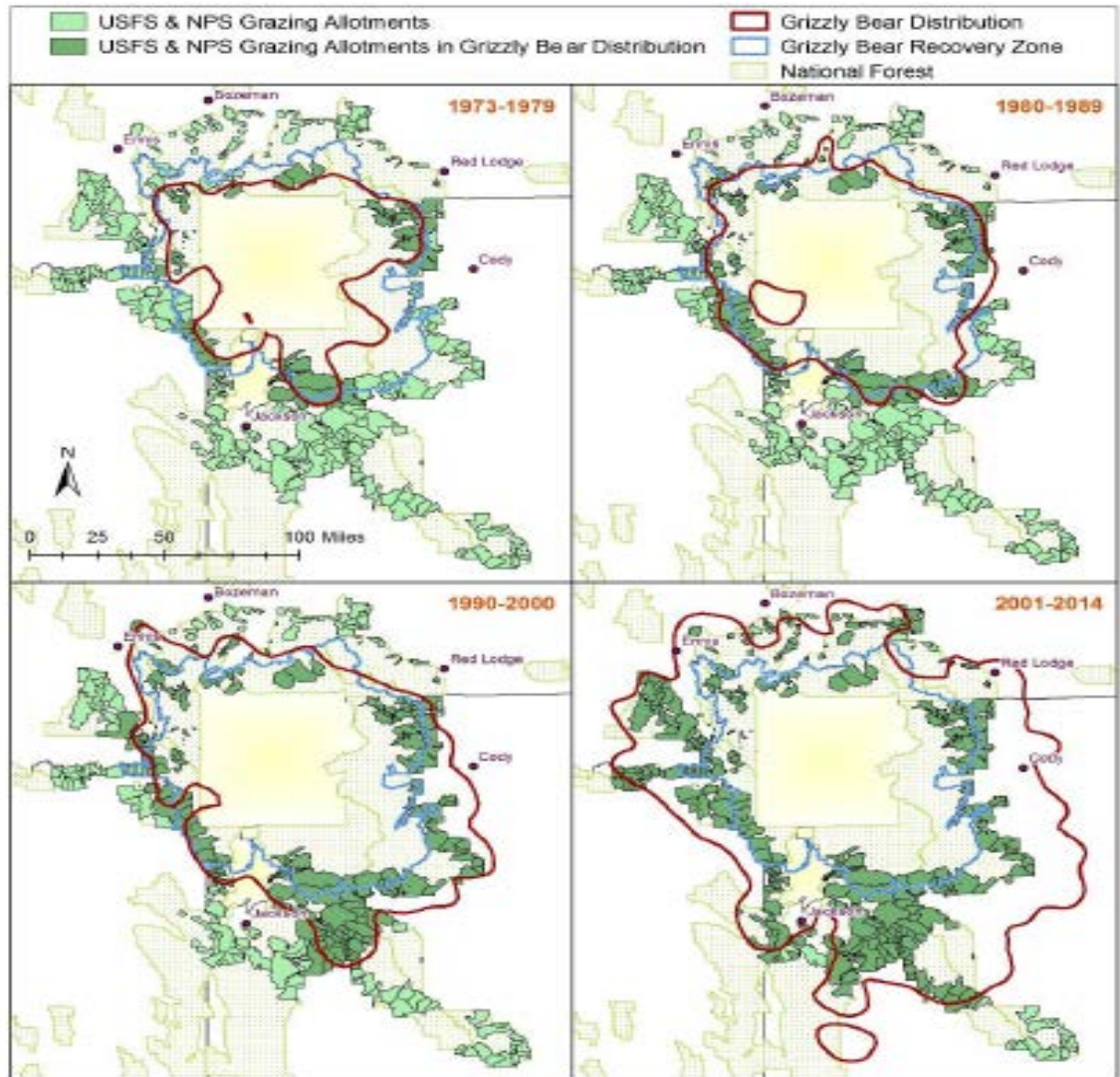
(1) The need to reinitiate consultation on the national baiting policy

As noted, in 1995 the Forest Service prepared a biological evaluation to assess the impacts of its national baiting policy on listed species, including threatened grizzly bears. This resulted in a finding of “not likely to adversely affect” grizzly bears (as well as gray wolves and bald eagles, which were also listed at the time). The Fish and Wildlife Service concurred with this “not likely to adversely affect” finding.

This 1995 finding (and the Fish and Wildlife Service’s concurrence with it) was premised on the assumption that baiting for black bears is generally prohibited in nearly all occupied grizzly habitat. 1995 EA at 5 (Appendix A, Comment Summary). The Forest Service assumed that “[t]he vast majority of occupied grizzly bear habitat is closed to baiting in Wyoming . . . and Idaho.” *Id.* at 16. Accordingly, in 1995, the Forest Service assumed, and the Fish and Wildlife Service agreed, that the national baiting policy adequately “provides for the protection of all threatened and endangered species,” including grizzly bears, and that the killing of grizzly bears at black bear baiting sites on National Forest lands was unlikely and only a “remote possibility.” *Id.*

We now know that this 1995 finding is outdated, contradicted by the best available science, and needs to be revisited through reinitiation of consultation for three reasons.

First, new information demonstrates that grizzly bear distribution has expanded and is now much greater in Idaho and Wyoming than originally assumed in 1995. This is true in both the Greater Yellowstone Ecosystem (see map below) and northern Idaho (the Cabinet-Yaak and Selkirk Ecosystems):



Wells (2017) (excerpt attached); *see also* Fish and Wildlife Service report on grizzly destruction in the Cabinet-Yaak region, <https://www.fws.gov/mountain-prairie/es/species/mammals/grizzly/cabinet-yaak-grizzly-bear-recovery-area-2017.pdf>.

From 2004 to 2010, for example, grizzly bear distribution in the Greater Yellowstone Ecosystem (which includes portions of Idaho and Wyoming) increased 38 percent. Bjornlie (2014) (attached). Distribution increased by an additional 11 percent from 2014-2016. Wells (2017) (attached); *see also* Kasworm (2018) (attached).

Second, and related to the increase in distribution, there is new information demonstrating that grizzly bear deaths due to baiting on National Forest Service

lands in Idaho and Wyoming is on the rise and far greater than anticipated in 1995. As examples:

- May 5, 1996 – killing of grizzly bear at black bear baiting site on National Forest lands near Dubois, Wyoming.
- May 8, 2000 – killing of male grizzly bear while hunting over bait in Wyoming (outside the recovery zone).
- May 26, 2003 – killing of male grizzly bear at black bear baiting site near Owl Creek in Wyoming’s Shoshone National Forest.
- May 10, 2004 – killing of a male grizzly bear near Sweeney Creek in Wyoming at a black bear baiting site.
- May 4, 2006 – killing of a male grizzly bear near the South Fork of Owl Creek in Wyoming at a black bear baiting site.
- September, 2007 – killing of male grizzly bear in Idaho’s North Fork Clearwater drainage at a black bear baiting site (by a Tennessee hunter on an outfitting trip in the Selway-Bitterroot Wilderness). This was the first grizzly bear verified in the area since 1946.
- 2010 (approximately) – killing of grizzly bear over bait in Idaho by a hunter on a guided trip. Idaho Fish and Game fined the shooter and confiscated the dead grizzly bear.
- September, 2015 – killing of radio-collared and recently reintroduced grizzly bear from the Cabinet-Yaak subpopulation over a black bear baiting site near Wallace, Idaho. The grizzly was dispersing from the region and in search of food.³
- September, 2018 – a grizzly bear from the Cabinet Mountains crossed the Clark Fork in Idaho and was reported at a black bear baiting site. The grizzly was removed by Fish and Wildlife Service officials but returned to the same baiting site in Idaho a few weeks later.

³ According to the Fish and Wildlife Service, because the grizzly bear numbers in the Cabinet-Yaak ecosystem are so small – approximately 20-40 bears total – the human-caused mortality goal is “zero” for this population.

Notably, this list is under-inclusive. It includes only reported incidents of grizzly bears killed when visiting baiting stations that mention “bait.” As such, it does not include: (a) unreported incidents; or (b) incidents of grizzly bear take from black bear hunters generally (that may involve but do not specifically mention use of bait). The list also does not include grizzly bears killed or removed from the wild in Idaho and Wyoming because they become attracted to or dependent on human foods (two grizzlies were lethally removed from eastern Idaho in September, 2018 for this reason).

Third, in addition to greater grizzly bear distribution in Idaho and Wyoming and more grizzly bear take than anticipated in 1995, there is also new emerging science on the adverse impacts of black bear baiting since 1995.

In 1995 members of the public raised a number of concerns about the Forest Service’s national baiting policy. In particular, members of the public noted that allowing baiting on National Forest lands (as controlled by state hunting regulations, not the Forest Service) creates problems for black bears and other species – including grizzly bears – by conditioning them to rely on and search for unnatural, human food sources. This, in turn, can cause problems at campsites and increase other human conflicts. A number of comments noted that a significant number of grizzly bear management killings “involved food-conditioned or habituated grizzly bears.” EA at 16 (Appendix A).

In response, the Forest Service downplayed such adverse impacts, noting in 1995 that while baiting on National Forest lands “could increase animal habituation,” there is “no evidence that it creates the same kind of problems that areas where human foods are available for long periods of time experience.” EA at 24 (Appendix A). “Bear baits are temporary features that are removed . . . [so wildlife do not] become so conditioned to it that when it is gone, they can’t resort to natural foods. Bears are more likely to get conditioned to human foods around campgrounds where food is available for longer periods of time and the bears are not shot at in the process of getting it.” *Id.* at 18. No scientific papers or supporting data was provided by the Forest Service in support of this finding. And such a finding is not outdated.

Since 1995, a new body of scientific knowledge has developed about the potential adverse impacts associated with baiting on National Forest lands (including areas occupied by other wildlife, including grizzlies). These scientific papers reveal that the adverse impacts of black bear baiting on National Forest lands may be more serious and significant than previously thought. Baiting for black bears on National Forest lands may:

- concentrate wildlife, which can spread disease and result in intra- and inter-specific aggression;
- change movement and travel patterns and denning behavior;
- undermine habitat security;
- result in higher number of female bear mortalities;
- negatively affect non-target species,
- be potentially toxic (some of the waste candy used contains Theobromine which is toxic to bears and canids or become toxic with spoilage); and
- habituate bears to the foods and scents of humans, and ultimately create more human-bear conflicts.

See Dunkley (2003); Beckmann and Berger (2003); Inslerman (2006); Hilderbrand (2013); Kirby (2017); Krofel (2016); Mazur (2010); Masse (2014); Gunther (1998).⁴

“The practice of harvesting bears over bait may have significant ecological and demographic effects.” Hilderbrand (2013) at 94. “Disruption of animal movement patterns and spatial distribution, alternation of community structure with reduced diversity and abundance, the introduction and invasion of exotic plant species, and general degradation of habitat are all major negative effects that have been documented at different locations in North America.” Dunkley (2003) at 22. Baiting, in particular, can pull and attract bears (both black bears and grizzlies) away from their natural, more secure habitats, home ranges, and travel corridors and into less adequate and safe areas where they are more likely to get into trouble. *See* Inslerman (2006) at 27.

Baiting also habituates bears to human odors, activities, and food, which can negatively impact their survival, behavior, population density, and community structure. Inslerman (2006) at 28-29 (citing and discussing literature). “Habituated and food-conditioned black bears rarely revert to wild behavior; once persistent nuisance behavior is learned, animals usually have to be relocated long distances to remove areas or destroyed.” *Id.* (citation omitted). [W]ildness and behavior of black bears can be influenced significantly by baiting . . .” *Id.* ; *see also* Hilderbrand (2013) at 95 (noting that “baiting may alter the natural behavior of bears by conditioning

⁴ Copies of these studies are attached to this notice.

them to human foods” and that such conditioning is “inconsistent with National Park Service policy”); Dunkley (2003) at 27 (discussing problem conditioning bears to human foods).

“Human-bear conflicts are best resolved by insisting that unnatural food sources created by humans are not made available for black bears . . . There are thousands of documented cases of black bear interactions with people . . . [and] most interactions are usually associated with purposefully or inadvertently feeding bears.” Inslerman (2006) at 28 (citation omitted). A “fed bear is a dead bear,” because “so many fed bears become nuisance bears and their habituation to either bait or supplemental feed result in human-bear interaction problems.” *Id.* at 32; *see also* Hilderbrand (2013) at 95 (“food conditioning of bears should be avoided to benefit the survival of individual bears and to increase public safety”); Dunkley (2003) (discussing the human safety concerns created by baiting).

As recently explained by the Fish and Wildlife Service (in response to a two year-old male grizzly attracted to black bear baiting site in Idaho on two occasions in September, 2018), “[t]he practice of baiting is at contrast with the policy of minimizing attractants for bears.” http://igbconline.org/wp-content/uploads/2018/11/181108_Cabinet-Yaak-Selkirk-Grizzly-Bear-Update.pdf.(attached).

Notably, none of this scientific information was published and therefore was not considered in 1995, when the Forest Service adopted and completed informal consultation on its national baiting policy.

(2) *The need to initiate and complete consultation on its food storage orders*

The Forest Service has also violated and continues to violate Section 7 of the ESA by failing to initiate and complete consultation on its food storage orders for the Idaho Panhandle, Carbiou-Targhee, Shoshone and Bridger-Teton National Forests.

As noted, the Forest Service issued food storage orders on these National Forests that exempt the practice of black bear baiting from the prohibitions and restrictions. Yet, the Forest Service never initiated and completed consultation related to this decision. The Forest Service never consulted on and analyzed the effects of this action/decision on threatened grizzly bears. Nor did the Forest Service follow its own policy and consider whether black bear baiting was appropriate in areas of these National Forests that are or may be occupied by grizzlies. Nor did the

Forest Service comply with NEPA and analyze the direct, indirect, and cumulative impacts of these decisions.

Accordingly, by this sixty-day notice letter, Western Watersheds Project and WildEarth Guardians put the Forest Service and the Fish and Wildlife Service on notice of their respective liabilities for violating Section 7 of the ESA for: (1) failing to reinitiate and complete consultation on its 1995 national baiting policy; and (2) failing to initiate and complete consultation on its food storage orders which expressly exempt bear baiting from the food restrictions on the Shoshone, Bridger-Teton, Caribou-Targhee and Idaho Panhandle National Forests.

This notice is provided pursuant to, and in accordance with, Section 11 (g)(2) of the ESA, 16 U.S.C. § 1540(g)(2).

Sincerely,

/s/ Matthew Bishop
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