

1 Rebecca K. Smith
2 PUBLIC INTEREST DEFENSE CENTER, PC
3 P.O. Box 7584
4 Missoula, MT 59807
5 (406) 531-8133
6 publicdefense@gmail.com

7 Timothy M. Bechtold
8 BECHTOLD LAW FIRM, PLLC
9 P.O. Box 7051
10 Missoula, MT 59807
11 (406) 721-1435
12 tim@bechtoldlaw.net

13 Attorneys for Plaintiff

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1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF MONTANA**
3 **MISSOULA DIVISION**

4 ALLIANCE FOR THE WILD
5 ROCKIES

6 Plaintiff,

7 vs.

8 UNITED STATES DEPARTMENT
9 OF AGRICULTURE, UNITED
10 STATES ANIMAL AND PLANT
HEALTH INSPECTION SERVICE, an
11 agency of the U.S. Department of
Agriculture, UNITED STATES
12 FOREST SERVICE, an agency of the
13 U.S. Department of Agriculture,
14 LESLIE WELDON, in her official
capacity as Regional Forester of
15 Region One of the U.S. Forest Service,
16 UNITED STATES DEPARTMENT
OF INTERIOR, UNITED STATES
17 FISH AND WILDLIFE SERVICE, an
18 agency of the U.S. Department of
Interior, UNITED STATES
19 NATIONAL PARK SERVICE, an
20 agency of the U.S. Department of
Interior, and CHRISTIAN MACKAY,
21 in his official capacity as Executive
22 Director of the State of Montana
23 Department of Livestock.

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25 Defendants.
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CV-11-76-M-CCL

**PLAINTIFF'S FIRST AMENDED
COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

I. INTRODUCTION

1. This is a civil action for judicial review under the Administrative Procedure Act (APA) and Endangered Species Act (ESA). Plaintiff challenges the Gallatin National Forest Land and Resource Management Plan (Gallatin Forest Plan), the Biological Opinion/Incidental Take Statement for the Gallatin Forest Plan, the Interagency Bison Management Plan, the biological assessment and letter of concurrence for the Interagency Bison Management Plan, the interagency 2008 Adaptive Management Plan for bison, the interagency 2009 Operating Procedures for bison management, and the interagency recurring annual decisions to permit recurrent low-altitude helicopter flights, during spring and summer bear season, in occupied habitat for the Yellowstone grizzly bear, which is listed as a threatened species under the Endangered Species Act.
2. Plaintiff Alliance for the Wild Rockies attests that Defendants' decisions allowing, agreeing to, funding, and participating in recurrent, low-altitude helicopter use for wildlife-hazing operations on National Forest lands within occupied habitat for the threatened Yellowstone grizzly bear, as well as their failures to properly analyze the effects of those decisions, are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law, in particular the Endangered Species Act (ESA), 16

1 U.S.C. §§ 1531 *et seq.*, the National Environmental Policy Act (NEPA), 42
2 U.S.C. 4331 *et seq.*, the National Forest Management Act (NFMA), 16
3 U.S.C. § 1600 *et seq.*, and the Administrative Procedure Act (APA), 5
4 U.S.C. §§ 701 *et seq.*

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7 3. Plaintiff requests that the Court set aside or remand the challenged decisions
8 pursuant to 5 U.S.C. § 706(2)(A) and 16 U.S.C. § 1540(g), and that the
9 Court enjoin Defendants from allowing, agreeing to, funding, participating
10 in, and executing low-altitude, recurrent helicopter hazing operations in
11 occupied habitat for the threatened Yellowstone grizzly bear.
12
13 4. Plaintiff seeks a declaratory judgment, injunctive relief, the award of costs
14 and expenses of suit, including attorney and expert witness fees pursuant to
15 the ESA, 16 U.S.C. § 1540, and the Equal Access to Justice Act, 28 U.S.C.
16 § 2412, and such other relief as this Court deems just and proper.
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19 **II. JURISDICTION**

- 20
21 5. This action arises under the laws of the United States and involves the
22 United States as a Defendant. Therefore, this Court has subject matter
23 jurisdiction over the claims specified in this Complaint pursuant to 28
24 U.S.C. §§ 1331, 1346.
25
26 6. An actual controversy exists between Plaintiff and Defendants. Plaintiff's
27 members use and enjoy the area occupied by Yellowstone grizzly bears for
28

1 hiking, fishing, hunting, camping, photographing scenery and wildlife, and
2 engaging in other vocational, scientific, spiritual, and recreational activities.
3
4 Plaintiff's members intend to continue to use and enjoy the area frequently
5 and on an ongoing basis in the future. Plaintiff's members are deeply
6 concerned about the management of grizzly bears and Plaintiff is actively
7 engaged in grizzly bear conservation and policy issues and has been so
8 engaged for many years as one of its primary concerns. Plaintiff's members
9 intend to continue to look for grizzly bears and their signs in the Yellowstone
10 area frequently and on an ongoing basis into the future. Plaintiff also intends
11 to remain engaged in grizzly bear conservation policy and issues.
12
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- 15 7. The aesthetic, recreational, scientific, spiritual, and educational interests of
16 Plaintiff's members have been and will be adversely affected and
17 irreparably injured if Defendants continue to allow activities that disrupt
18 natural biological and ecological processes and harass and take threatened
19 Yellowstone grizzly bears, especially because Defendants have never
20 analyzed and publicly disclosed the impact of helicopter hazing on
21 Yellowstone grizzly bears. These are actual, concrete injuries caused by
22 Defendants' failure to comply with mandatory duties under ESA, NFMA,
23 NEPA, and the APA. The requested relief would redress these injuries and
24 this Court has the authority to grant Plaintiffs' requested relief under 28
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U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 & 706.

8. Regarding Plaintiff's APA claims, the challenged operating procedures, adaptive management plan, and annual/site-specific actions were never analyzed in a NEPA process, thus they are final decisions because there is no additional administrative remedy to exhaust. The challenged Gallatin Forest Plan and Interagency Bison Management Plan both went through administrative appeal processes and are therefore final decisions. Therefore the challenged decisions are final and this Court has jurisdiction over Plaintiff's APA claims. 5 U.S.C. §§ 702, 704, and 706.

9. Regarding Plaintiff's ESA claims, on May 11, 2011, Plaintiff sent a 60 day notice of intent to sue under the ESA to the applicable Secretary of both the U.S. Department of Agriculture and the U.S. Department of Interior, as required by statute, and also to Christian Mackay, Executive Officer of the Montana Department of Livestock. 16 U.S.C. 1540(g)(2)(A)(i). The statutorily-required 60 day notice period has now expired, and so this Court now has jurisdiction over Plaintiff's ESA claims.

III. VENUE

10. Venue in this case is proper under 28 U.S.C. § 1391(e), 16 U.S.C. § 1540(g)(3)(A), and LR 3.3(a)(1). The violations of law occurred and continue to occur in the U.S. District of Montana. Defendant Weldon is the

1 chief representative for Defendant U.S. Forest Service within the District of
2 Montana, and she resides within the Missoula Division of the United States
3 District Court for the District of Montana.
4

5 **IV. PARTIES**

6
7 11. Plaintiff ALLIANCE FOR THE WILD ROCKIES is a tax-exempt, non-
8 profit public interest organization dedicated to the protection and
9 preservation of the native biodiversity of the Northern Rockies Bioregion,
10 its native plant, fish, and animal life, and its naturally functioning
11 ecosystems. Its registered office is located in Helena, Montana. The
12 Alliance has over 2,000 individual and organization members, many of
13 which are located in Montana. Members of the Alliance work as fishing
14 guides, outfitters, and researchers, who observe, enjoy, and appreciate
15 Montana's native wildlife, water quality, and terrestrial habitat quality, and
16 expect to continue to do so in the future, including in the Yellowstone area.
17 Alliance's members' professional and recreational activities are directly
18 affected by Defendants' failure to perform their lawful duty to protect and
19 conserve threatened Yellowstone grizzly bears by approving, allowing,
20 funding, and participating in the challenged recurrent, low-altitude
21 helicopter hazing operations. Alliance for the Wild Rockies brings this
22 action on its own behalf and on behalf of its adversely affected members.
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- 1 12. Defendant UNITED STATES DEPARTMENT OF AGRICULTURE
2 (USDA) is a department of the executive branch of the federal government
3 charged with oversight of various federal agencies related to natural
4 resource and agricultural management, including USDA Animal and Plant
5 Inspection Service and USDA Forest Service. USDA is a signatory to the
6 Interagency Bison Management Plan.
7
- 8 13. Defendant UNITED STATES DEPARTMENT OF AGRICULTURE
9 ANIMAL AND PLANT HEALTH INSPECTION SERVICE (APHIS) is an
10 administrative agency within the USDA. APHIS is a signatory to the
11 Interagency Bison Management Plan and participates in and funds
12 helicopter hazing operations in the Yellowstone area.
13
- 14 14. Defendant UNITED STATES DEPARTMENT OF AGRICULTURE
15 FOREST SERVICE (Forest Service) is an administrative agency within the
16 USDA. The Forest Service is a signatory to the Interagency Bison
17 Management Plan, participates in helicopter hazing operations in the
18 Yellowstone area, allows helicopter hazing operations on National Forest
19 lands in the Yellowstone area, and is responsible for lawful management of
20 National Forest lands and the wildlife within them in the Yellowstone area.
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- 22 15. Defendant LESLIE WELDON is the Regional Forester for the Northern
23 Region of the Forest Service, which encompasses the Gallatin National
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1 Forest in the Yellowstone area, and in that official capacity is charged with
2 ultimate responsibility for ensuring that decisions made at each National
3 Forest in the Northern Region and within the District of Montana, including
4 the Gallatin National Forest, are consistent with applicable laws,
5 regulations, and official policies and procedures. Defendant Weldon is sued
6 in her official capacity.
7

8
9 16. Defendant UNITED STATES DEPARTMENT OF INTERIOR (USDI) is a
10 department of the executive branch of the federal government charged with
11 oversight of various federal agencies related to natural resource and public
12 land management, including USDI Fish and Wildlife Service and USDI
13 National Park Service. USDI is a signatory to the Interagency Bison
14 Management Plan.
15

16
17 17. Defendant UNITED STATES DEPARTMENT OF INTERIOR FISH AND
18 WILDLIFE SERVICE (Fish and Wildlife Service) is an administrative
19 agency within the USDI. The Fish and Wildlife Service provided a
20 Biological Opinion for the Gallatin National Forest Plan, signed a letter of
21 concurrence for the Interagency Bison Management Plan, approved and
22 allows helicopter hazing operations in the Yellowstone area, and is
23 responsible for lawful management of threatened and endangered species.
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27 18. Defendant UNITED STATES DEPARTMENT OF INTERIOR NATIONAL
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1 PARK SERVICE (Park Service) is an administrative agency within the
2 USDI. The Park Service is a signatory to the Interagency Bison
3 Management Plan, participates in helicopter hazing operations in the
4 Yellowstone area, allows helicopter hazing operations on National Park
5 lands in the Yellowstone area, and is responsible for lawful management of
6 National Park lands and the wildlife within them in the Yellowstone area.
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8
9 19. Defendant CHRISTIAN MACKAY is the Executive Officer of the State of
10 Montana Department of Livestock (MDOL). In that capacity he is
11 responsible for ensuring that MDOL actions comply with law. MDOL
12 participates in helicopter hazing operations in the Yellowstone area with
13 funding received from USDA. Defendant Mackay is sued in his official
14 capacity.
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18 V. FACTUAL ALLEGATIONS

19 Yellowstone grizzly bear

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21 20. The Yellowstone grizzly bear is a sub-population of grizzly bear that is
22 currently listed under the ESA.

23 21. Grizzly bears, icons of the American frontier, historically numbered
24 between 50,000-100,000 and ranged throughout the western United States.
25

26 22. With European settlement, grizzlies were “shot, poisoned, and trapped
27 wherever they were found.”
28

- 1 23. Human settlement and resource extraction pervaded the American West and
2 displaced bears across the landscape. In a historical blink of an eye – from
3 1850-1950 – humans reduced bear numbers and habitat by 98-99% and
4 restricted their range to a few remnant islands of wild country, including the
5 Greater Yellowstone Ecosystem.
6
- 7 24. When the grizzly bear was originally listed under the Endangered Species
8 Act (ESA) in 1975, perhaps 1,000 individuals remained.
9
- 10 25. The number of breeding Yellowstone grizzly bears has been estimated at
11 slightly over 100 individuals.
12
- 13 26. The best available science indicates that hundreds of breeding individuals
14 are necessary to prevent extinction from inbreeding.
15
- 16 27. The U.S. Fish and Wildlife Service recognizes the threat of inbreeding
17 depression and states that the population of the Yellowstone grizzly bear is
18 "lower than recommended for evolutionary success"
19
- 20 28. On March 29, 2007, the Yellowstone grizzly bear was delisted by the U.S.
21 Fish and Wildlife Service as a “distinct population segment” of grizzly bear.
22
- 23 29. On September 21, 2009, this Court overturned the Yellowstone grizzly bear
24 delisting rule for failing to comply with the provisions of the Endangered
25 Species Act. *Greater Yellowstone Coalition v. Servheen*, 672 F. Supp.2d
26 1105 (D. Mont. 2009).
27
28

1 30. The Yellowstone grizzly bear is thus still listed as threatened under the
2 Endangered Species Act. *See* 75 Fed. Reg. 14496 (March 26, 2010) (stating
3 that “all grizzly bears in the lower 48 States are again listed as threatened”).
4

5 Effects of helicopters on grizzly bears
6

7 31. The grizzly bear’s unique biology exacerbated the speed and depth of its
8 decline and slows recovery efforts. Grizzly bears mature late and, on
9 average in the Greater Yellowstone Ecosystem, produce small litters of two
10 bears. The bears have one of the slowest reproductive rates of all terrestrial
11 mammals, and it takes up to 10 years for a female to replace herself.
12

13 32. Young bears have overlapping home ranges with their mother’s, making
14 dispersal across the landscape a slow process. Adults, especially males,
15 require vast home ranges.
16

17 33. Yellowstone grizzlies depend on four primary food sources - ungulate meat,
18 whitebark pine seeds, cutthroat trout, and army cutworm moths - all of
19 which face continued, onerous threats.
20

21 34. When bears emerge from their dens in the spring, they are malnourished
22 from their long winter denning periods, which are essentially five to six
23 month long fasting periods. The bears heavily depend on their opportunity
24 to consume winter-killed ungulates to nourish themselves and their cubs
25 after den emergence. One study found that the most likely time for a grizzly
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1 bear to die of natural causes is during this spring period. Accordingly,
2 disruption of grizzly bears during spring feeding activities can have
3 significant detrimental effects on grizzly bears: the Grizzly Bear Recovery
4 Plan states, “Grizzly bears must avail themselves of foods rich in protein or
5 carbohydrates in excess of maintenance requirements in order to survive . . .
6 post-denning periods.”
7

8
9 35. Mechanized activities displace bears from their habitat, which stresses them
10 biologically and increases the risk of displacement onto private lands and
11 other non-preferred habitat where chances for mortality increase due to
12 increased risks of human-bear encounters. The Fish and Wildlife Service
13 states that “[f]emales with cubs displaced into marginal habitat may
14 experience physiological stresses related to decreased nutrient and energy
15 intake, resulting in lower cub survivorship.”
16
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19 36. One type of motorized use that negatively affects grizzly bears is low-
20 altitude helicopter over-flights. The Forest Service acknowledges that
21 “[g]rizzly bears have been noted to panic and flee areas from over-flights in
22 nearly all cases where they have been observed” (citing a National Park
23 Service literature review of five studies).
24
25

26 37. In a review of one study, the Park Service noted that “grizzly bears . . .
27 never became tolerant of aircraft, despite very frequent exposure.”
28

- 1 38. The Park Service has indicated that there is concern among wildlife
2 biologists that “disturbance from overflights could cause sensitive animals
3 to abandon their habitats.”
- 4
- 5 39. The Park Service warns that “the consequences of habitat abandonment can
6 be serious, particularly for species whose high-quality habitat is already
7 scarce.”
- 8
- 9 40. The Forest Service acknowledges that “[t]he available scientific literature
10 suggests that high frequency helicopter use, particularly at low altitudes, in
11 habitat occupied by grizzly bears can negatively affect the bears”
- 12
- 13 41. The Forest Service also acknowledges that the negative effects “may
14 include disturbance resulting in behavioral changes, such as fleeing from
15 the disturbance; physiological changes, such as increased heart rate;
16 displacement to lower quality habitat; and increased energetic demands.”
- 17
- 18 42. The Forest Service’s own guidance document on determining how
19 helicopters affect grizzly bears states:
20
21

22 Any human activities that would result in displacement
23 or disturbance to bears sufficient to produce any of the
24 results listed above [fleeing, physiological changes,
25 increased heart rate, displacement to lower quality
26 habitat, and increased energetic demands] should be
27 considered a negative effect for the purposes of effects
28 analysis in a Biological Assessment. Helicopter use
clearly has the potential to produce these negative
effects. Unless an extenuating circumstance exists,

1 therefore, the appropriate effects determination for low
2 altitude and high frequency *or* extended duration
3 helicopter use is “may affect, likely to adversely affect.”

4
5 43. Accordingly, multiple court decisions from this Court have
6 consistently set aside, as arbitrary, Forest Service authorizations of
7 recurring, low-altitude helicopter use in ESA-listed grizzly bear
8 habitat. *Alliance for the Wild Rockies v. U.S. Forest Service*, CV-07-
9 150-M-DWM, Order at 19-26 (D. Mont. July 30, 2008); *Alliance for*
10 *the Wild Rockies v. Tidwell*, CV-08-168-M-JCL-DWM, Findings and
11 Recommendations of United States Magistrate Judge at 16-23 (Dec.
12 23, 2009), *adopted in full by Alliance for the Wild Rockies v. Tidwell*,
13 CV-08-168-M-JCL-DWM, Order at 2 (March 30, 2010); *Alliance for*
14 *the Wild Rockies v. Bradford*, 720 F.Supp.2d 1193, 1213-1215 (D.
15 Mont. June 29, 2010). The Forest Service has chosen not to litigate
16 an appeal of any of these rulings.

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21 44. The Park Service admits that the helicopter over-flights conducted for
22 bison hazing are “sustained low level/slow speed flight.”

23
24 1987 Gallatin Forest Plan

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26 45. When the Yellowstone grizzly bear was temporarily delisted, the Forest
27 Service implemented a Forest Plan amendment in six National Forests,
28

1 including the Gallatin National Forest, to change grizzly bear habitat
2 management standards on those National Forests.
3

4 46. The Forest Plan amendment that changed the grizzly bear habitat
5 management standards on the Gallatin National Forest is no longer in effect;
6 instead the rules in effect prior to delisting are once again in effect. The
7 NEPA analysis from the amendment predicted this possibility and, prior to
8 the formal delisting, stated: “This forest plan amendment will be
9 implemented no sooner than five (5) working days after the Final Rule
10 delisting the Yellowstone grizzly population has been published in the
11 Federal Register. If the grizzly bear is not delisted, existing forest plan
12 direction for grizzly bears will remain in place. . . Should the delisting of the
13 grizzly bear be overturned, existing forest plan direction for grizzly bears
14 would remain in place.”
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19 47. Accordingly, the following provisions from the Gallatin Forest Plan
20 currently apply to Yellowstone grizzly bears on the Gallatin National
21 Forest:
22

23 A. “To assure the viability of the Yellowstone grizzly bear population
24 and its habitats, Forest activities must be at a level and conducted in a
25 manner to assure that [] *bears are not adversely impacted* directly,
26 indirectly, or cumulatively . . . and [] that *sufficient area is left*
27 *undisturbed from detrimental human activities to meet the biological*
28 *requirements of grizzly bears.*” (emphasis added).

1 B. “The Yellowstone Grizzly Bear Guidelines in Appendix G of the Plan
2 are intended to be an extension of the Forest-wide Standards, and are
3 intended to be applied in all management areas in occupied habitat,
4 whether referred to or not in the management standards.” In part, the
5 Yellowstone Grizzly Bear Guidelines state “*design and implement*
6 *project modifications which will provide compatibility (see Glossary)*
7 *between grizzly bears and other resource management activities*
8 *without jeopardizing the grizzly population. If a project cannot be*
9 *made compatible, and it will jeopardize the grizzly populations, it will*
10 *be necessary to eliminate the project if in MS-1 and/or modify the*
11 *project if in MS-2, primarily to reduce the potential for bear/human*
12 *conflict.” The guidelines further state: “Initiate formal consultation*
13 *procedures with the Service, as necessary, if the biological review*
14 *results in a ‘May Effect’ [sic] determination.” (emphases added).*

15 C. “All persons issued permits, contracts, leases or other forms of
16 authorization to conduct activities in occupied grizzly bear habitat are
17 to receive an appropriately addressed and signed copy of Enclosure
18 5.”

19 Enclosure 5 states:

20 Dear (Permittee, Contractor, Leasee. etc):

21 The area encompassed in your (permit/contract/lease) is within
22 occupied grizzly bear habitat. The grizzly bear is classified as
23 threatened under the Endangered Species Act. Human/bear
24 conflicts have been, and continue to be, the major factor
25 preventing recovery of grizzly bear populations. Therefore,
26 activities authorized by your (permit/contract/lease) *must be*
27 *conducted in a manner which will prevent or minimize the*
28 *opportunity for conflicts with the grizzly bear. Violations of*
(permit/contract/lease) clauses dealing with prevention of
human/bear conflicts, intentional or negligent acts which result
in the injury or death of a grizzly bear, or *other violations of the*
Endangered Species Act can result in the termination of your
(permit/contract/lease).

The Forest Service, as a Federal Agency, is mandated to
conduct its management activities in a manner to promote
recovery of all endangered and threatened species. We ask for

1 your help in bringing about the recovery of the grizzly bear.
2 Should you have any questions or concerns regarding grizzly
3 bear management and your activities, please contact (District
4 Ranger).

5 Forest Supervisor/District Ranger.

6 (emphases added).

7 D. Forest Plan goals include: "Provide habitat for viable populations of
8 all indigenous wildlife species Provide sufficient habitat for
9 recovered populations of threatened and endangered species (i.e.
10 grizzly bear . . .). . . Strive to prevent any human-caused grizzly bear
11 losses."

12 E. Forest Plan Desired Future Conditions include: "Management
13 practices provided in the Forest Plan are designed to favor the
14 recovery of the threatened grizzly bear and endangered bald eagle. It
15 may be necessary to restrict human activity within occupied grizzly
16 bear habitat to reduce human/grizzly bear confrontations."

17 48. The Gallatin Forest Plan does not disclose, address, or analyze the impacts
18 of recurrent, low-altitude helicopter operations on Yellowstone grizzly
19 bears.

20 2000 Interagency Bison Management Plan

21 49. The Yellowstone grizzly bear shares habitat on National Forest lands with
22 Yellowstone bison.

23 50. Yellowstone bison are managed, in part, according to a 2000 interagency
24 document called the Interagency Bison Management Plan, hereinafter
25 referred to as the "2000 management plan."
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1 51. The Interagency Bison Management Plan approved hazing of bison for the
2 purpose of attempting to prevent the transmission of the disease brucellosis
3 from wild bison to domestic cattle.
4

5 52. According to a 2008 U.S. Government Accountability Office report, “[n]o
6 known cases of brucellosis transmitted from bison to cattle have been
7 documented in the wild”
8

9 53. Moreover, the National Park Service has found that “there is essentially no
10 risk of brucellosis transmission from bison to cattle because cattle are not
11 present on Horse Butte or Zone 2 public lands south of the Madison Arm at
12 any time of year.”
13
14

15 54. Likewise, the August 2010 meeting notes for the 2000 management plan
16 partners states that “IBMP partners have acknowledged that the risk of
17 brucellosis transmission from bison to cattle on the Horse Butte peninsula is
18 substantially lower (approximately zero) compared to 2000 when the
19 Record of Decisions for the IBMP were signed.”
20
21

22 55. Some elk are infected with brucellosis in the Yellowstone area.

23 56. There have been transmissions or suspected transmissions of brucellosis
24 from elk to cattle in the wild in Montana within the past 10 years.
25

26 57. Despite the risk of transmission of brucellosis from elk to cattle, elk are not
27 hazed into Yellowstone National Park with helicopters.
28

1 58. As one of the partners to the interagency agreement, the Forest Service
2 signed and authorized implementation of the 2000 management plan on
3 National Forest lands.
4

5 59. Although the Gallatin Forest Plan was not formally amended with the 2000
6 management plan, the 2000 management plan did undergo NEPA analysis.
7

8 60. In part, the 2000 management plan EIS/ROD disclosed that the agencies
9 would execute hazing operations that would haze bison off of the Gallatin
10 National Forest and into Yellowstone National Park.
11

12 61. The 2000 management plan EIS/ROD and Biological Assessment
13 concluded that threatened Yellowstone grizzly bears would not be adversely
14 affected by this hazing activity because the bears would most likely be in
15 their dens during the hazing periods: “Bison management activities such as
16 hazing . . . would not have more than a negligible impact on grizzly bears.
17 Although there is the possibility of overlap in the fall and spring when bears
18 are not in dens, during the majority of bison management activities, bears
19 would be in their dens.”
20
21

22
23 62. The 2000 management plan EIS/ROD further elaborated by stating that
24 there was no evidence of Yellowstone grizzly bears being present on
25 National Forest lands on the west side of Yellowstone National Park (near
26 West Yellowstone, Montana) at the time then planned for bison hazing
27
28

1 operations: “At this time, no grizzly bears or their sign have been observed
2 prior to hazing operations at West Yellowstone (USFS, Inman, pers.
3 comm.).”
4

5 63. In the analysis of the existing situation, the 2000 management plan EIS
6 represented that there was an interagency policy that if grizzly bears were
7 present, the agencies would not engage in bison hazing operations:
8 “Currently, hazing operations would cease if there was evidence of grizzlies
9 being active in the area.”
10
11

12 64. The EIS stated that the impact of the chosen alternative on grizzly bears
13 would be the same as the existing situation.
14

15 65. In response to a public comment that “helicopters would adversely affect
16 denning bears and pregnant females and bears emerging from hibernation”
17 the agencies reiterated that bears would likely be in their dens and/or at
18 higher elevations during hazing operations: “[t]he actual practice of hazing
19 bison is unlikely to affect bears emerging from their dens....Grizzly bears
20 locate their dens at high elevations Winter range for bison, which
21 encompasses the capture facilities and areas where hazing would occur, is
22 present at lower elevations. Thus, the bears’ dens and the areas where
23 hazing would occur do not overlap. . . . personnel conducting hazing
24 activities move bison only within their winter range and not out in the more
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1 remote areas of the park where bears hibernate. Thus, hazing would not
2 affect bears within their dens.”
3

4 66. In response to a similar public comment, the agencies asserted that “grizzly
5 bear activity in the vicinity of the capture facilities is limited or nonexistent.
6 Most human activities associated with the capture facilities would occur
7 when grizzly bears are hibernating, although some operations may occur in
8 November and April, when bears are active. However, because little or no
9 grizzly activity occurs in these areas, impacts would be negligible.”
10
11

12 67. Based on the representations in the 2000 management plan EIS/ROD, the
13 signatory agencies concluded that the plan would not likely adversely affect
14 grizzly bears and the Fish and Wildlife Service concurred with that
15 conclusion.
16
17

18 68. The Fish and Wildlife Service’s conclusion is conditioned on a requirement
19 that the signatory agencies may need to reinitiate ESA consultation with the
20 Fish and Wildlife Service “if during implementation of the action, effects on
21 grizzly bears or other threatened or endangered species occur other than
22 those described in your March 15 [2000] biological assessment”
23
24

25 69. There are no formal documents that impose explicit restrictions on low-
26 altitude bison-hazing helicopter use during the spring and summer bear
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1 season (i.e. May, June, and July) in occupied habitat for the Yellowstone
2 grizzly bear.
3

4 70. The Park Service does implement seasonal land closures during spring and
5 summer bear season to protect grizzly bear habitat within Yellowstone
6 National Park, but the Park Service still allows low-altitude helicopter-
7 hazing operations within those closures.
8

9 71. In contrast to the finding in the 2000 management plan EIS/ROD that “no
10 grizzly bears or their sign have been observed prior to hazing operations at
11 West Yellowstone,” over the past several years there have been numerous
12 observations of significant amounts of grizzly bear activity prior to and
13 during hazing operations around West Yellowstone.
14

15 72. For example, this year the Forest Service issued a joint press release on May
16 13, 2011 stating that “Bears are out and active this time of year in the
17 Greater Yellowstone area, including the Gallatin National Forest This
18 time of year, bears have emerged from their dens and are feeding primarily
19 on ungulate carcasses and early spring green-up. . . . Numerous sightings of
20 bears feeding on carcasses have already occurred in the Cooke City area, *on*
21 *the Horse Butte Peninsula just north of West Yellowstone, Montana*, and
22 throughout Yellowstone National Park.” (emphasis added).
23
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1 73. Additionally, on May 12, 2011, the Forest Service posted a warning sign on
2 the Madison Arm road near West Yellowstone, Montana that stated that
3 there was a grizzly bear sow with an injured cub in the vicinity. On May 19,
4 2011, the Forest Service issued an official closure of the area to “ALL
5 HUMAN ENTRY” due to the significant presence of grizzly bears in the
6 area.
7

8
9 74. In direct violation of the agencies’ promise to the public in the 2000
10 management plan EIS that “[c]urrently, hazing operations would cease if
11 there was evidence of grizzlies being active in the area,” the agencies
12 commenced helicopter hazing operations in areas occupied by grizzly bears
13 in June of 2011 despite the undisputed evidence from their own press
14 release and posted public warning signs that grizzly bears were present in
15 the area.
16
17

18
19 75. Additionally, last year, on May 12, 2010, during helicopter hazing
20 operations near West Yellowstone, a videographer filmed an incident in
21 which a helicopter that was hazing bison in the area flew over a threatened
22 Yellowstone grizzly bear and caused the bear to flee.
23
24

25 76. Moreover, the Park Service has admitted that hazing helicopters have flown
26 over multiple grizzly bears within Yellowstone National Park. In the Park
27 Service’s 2010 “Bison Relocation Summary,” it admitted that “[d]uring
28

1 several hazing events in [Yellowstone National Park] the helicopter flew
2 over grizzly bears”

3
4 77. The Park Service further admitted in its 2010 report that “[a]lthough the
5 helicopter works well for hazing bison, it has a negative impact on visitor
6 experience and disturbance of other wildlife i.e. bears and wolves.”

7
8 78. Thus, the EIS/ROD for the 2000 management plan represented that all
9 hazing operations would end when bears were still at higher elevations or in
10 their dens and that there would therefore be “little or no grizzly activity” in
11 the area during hazing operations. Nowhere in the EIS/ROD did the
12 agencies address the possibility – that has now materialized – wherein
13 helicopter hazing of bison would routinely be carried out in summer (i.e.
14 late May, June, and even July) at a time that undisputedly overlaps with
15 spring and summer grizzly bear activity in lower elevations and has been
16 documented to cause bears to flee from their normal biological activities on
17 both National Forest and National Park lands.
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22 2008 Adaptive Management Plan

23 79. On December 17, 2008, the signatory agencies authorized what they called
24 “Adaptive Adjustments to the Interagency Bison Management Plan,” which
25 they subsequently refer to as the “2008 Adaptive Management Plan.”
26
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28

1 80. The 2008 adaptive management plan memorialized the agencies' decision
2 "to formally incorporate adaptive changes to the [2000 management plan]."
3

4 81. In relevant part, the 2008 management plan states the following:

5 Management Action 3.2.c-----Haze bison from the Hebgen basin
6 into [Yellowstone National Park] with a target date of May 15.

7 *Monitoring Metric:*
8

9 • Consistent with management action 1.1.a, assess the prevailing
10 environmental conditions and reach consensus by May 13 on a
11 step-wise, integrated plan for the end-of-winter return of bison
12 into [Yellowstone National Park] from Zone 2 (Lead =
MDOL/NPS).

13 • Annually document the timing of the end-of-winter return of
14 bison into [Yellowstone National Park], the number of bison
15 returned, prevailing environmental conditions, and success or
16 lack thereof of hazing bison and getting them to remain in the
park (Lead = MDOL/NPS)

17 82. The agencies' 2008 Adaptive Management Plan to allow annual hazing in
18 the Hebgen Basin starting May 15, with no definitive end period, was not
19 accompanied by a NEPA analysis or ESA consultation.
20

21 2009 Horse Butte Capture Facility Permit
22

23 83. On January 13, 2009, the Forest Service signed a Decision Memorandum
24 renewing a 10 year permit (initially authorized in 1998), hereinafter referred
25 to as the "permit," for the Montana Department of Livestock to operate a
26
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1 bison capture facility on Gallatin National Forest lands on the Horse Butte
2 peninsula near West Yellowstone, Montana.

3
4 84. The scope of the NEPA analysis for the permit covers bison hazing related
5 to the capture facility from November 1 to April 30 annually.

6
7 85. The NEPA analysis for the permit does not address any environmental
8 effects of bison hazing into Yellowstone National Park after April 30 and
9 before November 1 annually because such hazing is not associated with the
10 capture facility. The Decision Memorandum for the permit states: "Hazing
11 can occur with or without the presence of this capture facility and are not
12 part of this decision" and that "[h]elicopter use is not authorized in
13 association with the capture operation."
14

15
16 86. In the NEPA analysis for the permit, the Forest Service assessed the grizzly
17 bear only as a "sensitive species," not as a species listed under the ESA.
18

19 87. In the NEPA analysis for the permit, the Forest Service stated that there
20 would be a "no-fly zone" around several bald eagle nests between
21 November 1 to April 30.
22

23 88. The Forest Service speculated that this "no-fly zone" from November 1 to
24 April 30 annually around several bald eagle nests would adequately protect
25 the Yellowstone grizzly bear during the operation of the capture facility:
26 "There is a no fly zone in effect for Horse Butte (Attachment 1) which
27
28

1 restricts aerial operations around all three bald eagles nests on the Butte.

2 This no fly zone will also protect grizzly bear habitat in the non-denning
3 season.”
4

5 89. The Forest Service further promised in the NEPA analysis for the permit
6 that “[i]f grizzly bear(s) are active in the area, the permittee may be required
7 to cease operations.”
8

9 90. The fact that these helicopter-use restrictions apply only during November 1
10 to April 30 is clarified by the Montana Department of Livestock’s annual
11 operating plan from 2008-2009, which stated that “Helicopter use related to
12 the permitted bison capture facility on Horse Butte will not be conducted
13 between February 1 and April 30 on National Forest lands west of the
14 junction of Forest Road No. 610 and No. 6697, to the south boundary of the
15 North Arm pasture (see “helicopter no fly zone” on Attachment 1).”
16
17

18 91. The Montana Department of Livestock’s 2008-2009 operating plan further
19 stated that “If grizzly bear(s) are active in the area, the permittee may be
20 required to cease operations.”
21
22

23 92. Finally, the Montana Department of Livestock’s 2008-2009 operating plan
24 stated that “[h]azing and other requirements, as it [sic] is discussed herein, is
25 [sic] limited to **only** those operations and activities that are directly related
26 to the authorized facility. Other restrictions/mitigations regarding hazing
27
28

1 **not** in association with the facility are referenced in the Bison Operating
2 Procedures and agreed to by the Hebgen Lake Ranger District and the
3 DOL” (emphasis in original).

5 93. At the time of the permit approval, the Yellowstone grizzly bear was
6 delisted, thus the Forest Service did not conduct ESA consultation for the
7 grizzly bear even for the hazing between November 1 and April 30.

9 94. However, in the initial 1998 permit application, the Forest Service did
10 undergo ESA consultation for the grizzly bear and bald eagle for the time
11 period affected by the permit.

13 95. Based on the assumption that bears would still be in their dens in late April
14 when the capture facility ceased to operate, the ESA consultation conclusion
15 for the grizzly for the 1998 permit was “may affect, not likely to adversely
16 affect.” The NEPA analysis stated: “The capture facility would be
17 operational between November 1 and April 30 at a time when most bears
18 are denning. Since denning habitat is not present in the Horse Butte Area,
19 there will be no effect to grizzly bears during the denning period at either
20 Site A2 or at Site X. The No Action alternative would likely involve
21 monitoring, hazing and shooting activities in the Horse Butte area during
22 the denning period and would not effect [sic] denning grizzly bears. There
23 are no known cumulative effects on grizzly bear that would occur during the
24 25 26 27 28

1 denning period. This issue was eliminated from further consideration
2 because there would be no known effects to grizzly bear during this period.”
3

4 96. Regarding the bald eagles, however, the agencies agreed that helicopter
5 hazing would likely adversely affect bald eagles. Thus, the agencies issued
6 a biological opinion and incidental take statement with restrictions on
7 helicopter activity around eagle nests during the time period that the capture
8 facility was in operation.
9

10
11 97. These eagle nest buffer zones constitute the “no-fly zone” for helicopters
12 that is currently in effect from November 1 to April 30 on the Horse Butte
13 peninsula.
14

15 Funding for Helicopter Operations

16 98. The MDOL owns two helicopters.
17

18 99. The MDOL does not employ any MDOL pilots.

19 100. When the MDOL helicopter is used for bison helicopter hazing, the pilot is
20 a federal employee of the USDA.
21

22 101. If the MDOL contracts with a private helicopter company to do the
23 helicopter hazing, the helicopter operations are funded by the cooperative
24 agreement between the USDA and the MDOL.
25
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- 1 102. Under the cooperative agreement between the USDA and MDOL, the
2 USDA provides all of the funding, or at least the majority of the funding, for
3 the MDOL's participation in helicopter hazing operations of bison.
4
- 5 103. For example, last year, fiscal year 2010, under the cooperative agreement,
6 USDA provided \$525,000.00 to the MDOL to conduct bison management
7 activities. The total cost of the activities was \$525,000.00 and the MDOL's
8 contribution or "share" was \$0.00.
9
- 10 104. In fiscal year 2009, USDA gave MDOL \$660,000.00 for bison management
11 activities.
12
- 13 105. In the cooperative agreement between USDA and MDOL for bison
14 management activities, MDOL agreed to comply with NEPA and the ESA.
15
16

17 **VI. CLAIMS FOR RELIEF**

18 **FIRST CLAIM FOR RELIEF**

19
20 The annual low-altitude helicopter hazing operations in occupied Yellowstone
21 grizzly bear habitat in May, June, and July violate ESA Section 7.

- 22 106. All previous paragraphs are incorporated by reference.
23
- 24 107. In violation of the ESA, Defendants have failed to conduct any ESA Section
25 7 consultation for the annual site-specific decisions, 2009 operating
26 procedure decisions, and 2008 Adaptive Management Plan decisions to
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28

1 allow sustained low-altitude helicopter hazing flights over occupied
2 Yellowstone grizzly bear habitat.
3

4 108. In violation of the ESA, Defendants have failed to provide a Biological
5 Opinion and/or Incidental Take Statement for the adverse impact and take
6 of grizzly bears from repeated low-altitude helicopter flights during annual
7 bison helicopter hazing operations over occupied Yellowstone grizzly bear
8 habitat.
9

10
11 109. In violation of the ESA, Defendants have failed to comply with their
12 ongoing obligation to reinitiate ESA consultation for the 2000 management
13 plan and apply the best available science based on changed assumptions and
14 conditions since 2000. The Biological Assessment and Letter of
15 Concurrence for the 2000 management plan are not legally adequate
16 because they are based on outdated and false assumptions, and therefore
17 arbitrary and capricious and not based on the best available science. Under
18 existing conditions, the implementation of the 2000 management plan is
19 “likely to adversely affect” the Yellowstone grizzly bear.
20
21

22
23 110. In violation of the ESA, the Forest Service has failed to apply the best
24 available science and new information and reinitiate Section 7 ESA
25 consultation for the Gallatin Forest Plan on the issue of helicopter hazing
26 effects on threatened grizzly bears on National Forest lands. The existing
27
28

1 Biological Opinion and Incidental Take Statement for the Gallatin Forest
2 Plan is itself inadequate and itself requires that “consultation should be
3 reinitiated” if there are new impacts to grizzly bears that were not
4 considered in the initial Biological Opinion and Incidental Take Statement.
5
6

7
8 SECOND CLAIM FOR RELIEF

9 The annual low-altitude helicopter hazing operations in occupied Yellowstone
10 grizzly bear habitat in May, June, and July violate ESA Section 9.

11 111. All previous paragraphs are incorporated by reference.

12 112. In violation of the ESA, Defendants are allowing and causing past and
13 ongoing unpermitted take of threatened Yellowstone grizzly bears from
14 harassment and harm related to helicopter hazing operations that cause
15 grizzly bears to flee from normal biological activities.
16
17

18 113. In violation of the ESA, Defendants do not have an Incidental Take
19 Statement for this take.
20

21 114. At least one incident of this take, which occurred on National Forest lands
22 on May 12, 2010, has been documented on film.

23 115. The Park Service has also documented specific incidences of harassment of
24 Yellowstone grizzly bears from helicopter hazing operations on National
25 Park lands.
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1 116. Additionally, in violation of the ESA, the Forest Service is not complying
2 with the terms of the Incidental Take Statement for the Gallatin Forest Plan,
3 which prohibits adverse effects on threatened Yellowstone grizzly bears.
4

5
6 THIRD CLAIM FOR RELIEF

7 The annual low-altitude helicopter hazing operations in occupied Yellowstone
8 grizzly bear habitat in May, June, and July violate NEPA.
9

10 117. All previous paragraphs are incorporated by reference.

11 118. NEPA directs federal agencies to prepare a detailed environmental impact
12 statement (EIS) for federal actions that may significantly affect the
13 environment.
14

15 119. One factor that renders an action “significant” is the presence of a species
16 listed under the Endangered Species Act.
17

18 120. The twin purposes of NEPA analysis are to make sure that the *public* is fully
19 informed of the environmental effects of agency actions, and to make sure
20 that the *agency* is fully apprised of the effects of its planned activity before
21 it decides on a course of action.
22

23 121. In the EIS, the agency must take a “hard look” at the effects of the activity
24 on the environment, including the direct, indirect, and cumulative effects.
25
26
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- 1 122. The Council on Environmental Quality (CEQ) regulations require that an
2 agency “prepare supplements to either draft or final environmental impact
3 statements if (i) The agency makes substantial changes in the proposed
4 action that are relevant to environmental concerns; or (ii) There are
5 significant new circumstances or information relevant to environmental
6 concerns and bearing on the proposed action or its impacts.”
7
8
9 123. Defendants have failed to conduct a NEPA analysis to assess the direct,
10 indirect, and cumulative environmental effects on threatened Yellowstone
11 grizzly bears of annual recurring low-altitude helicopter flights over
12 occupied grizzly bear habitat.
13
14
15 124. Neither the 2008 Adaptive Management Plan, nor the 2009 operating
16 procedures, nor the annual site-specific decisions to allow recurring low-
17 altitude helicopter flights in occupied grizzly bear habitat during spring and
18 summer grizzly bear season are accompanied by a NEPA analysis.
19
20
21 125. Defendants cannot abdicate their responsibility to conduct a NEPA analysis
22 for this activity by “tiering” to any other former NEPA analysis because no
23 other NEPA analysis addressed this activity either.
24
25 126. As discussed above, the only three potentially relevant former NEPA
26 analyses all failed to squarely address the issue of effects on threatened
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28

1 grizzly bears from low-altitude, recurring helicopter hazing operations in
2 May, June, and July annually: (1) the NEPA analysis for the 1987 Gallatin
3 Forest Plan does not address this issue; (2) the NEPA analysis for the 2000
4 Interagency Bison Management Plan does not address this issue; and (3) the
5 NEPA analyses for the Horse Butte Capture Facility permits does not
6 address this issue.
7

8
9 127. To the contrary, as noted above, the NEPA analyses for the 2000
10 management plan and 2009 permit both expressly represented that the
11 Forest Service would not allow hazing operations if there were grizzly bears
12 present in the area. The 2000 management plan analysis promised:
13
14 “Currently, hazing operations would cease if there was evidence of grizzlies
15 being active in the area.” The 2009 permit analysis promised: “[i]f grizzly
16 bear(s) are active in the area, the permittee may be required to cease
17 operations.”
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21 128. Defendants have not conducted any supplemental NEPA analysis for any of
22 those prior NEPA analyses to assess the impacts of their new decision to
23 allow low-altitude helicopter hazing in occupied grizzly bear habitat during
24 the spring and summer bear season (i.e. May, June, and July) annually.
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1 129. Defendants' failure to conduct a NEPA analysis that squarely acknowledges
2 and addresses the issue of effects on threatened grizzly bears from low-
3 altitude, recurring helicopter hazing operations in occupied grizzly bear
4 habitat during the spring and summer bear season (i.e. May, June, and July)
5 annually violates NEPA.
6

7
8 130. In addition, the Forest Service's failure to address this issue makes it
9 impossible to determine whether it is complying with the Gallatin Forest
10 Plan standards that apply to this issue, as discussed below, which also
11 violates NEPA.
12

13 FOURTH CLAIM FOR RELIEF 14

15 The annual low-altitude helicopter hazing operations in occupied Yellowstone
16 grizzly bear habitat in May, June, and July violate NFMA.

17 131. All previous paragraphs are incorporated by reference.

18
19 132. NFMA requires that the Forest Service promulgate Land and Resource
20 Management Plans, i.e. Forest Plans, that will manage National Forest lands
21 in a manner that conserves biodiversity.
22

23 133. The provisions of a Forest Plan are legally enforceable under NFMA.

24 134. The Forest Plan prohibits activities that will adversely affect grizzly bears.
25
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1 135. The Forest Plan requires that “sufficient area is left undisturbed from
2 detrimental human activities to meet the biological requirements of grizzly
3 bears.”
4

5 136. The Forest Plan requires formal ESA consultation if an activity “may affect”
6 grizzly bears.
7

8 137. The Forest Plan forbids uses on MS-1 and MS-2 lands unless they are
9 compatible with grizzly bear needs.
10

11 138. The Forest Plan requires that anyone who is authorized “to conduct
12 activities in occupied grizzly bear habitat” must receive a letter from the
13 Forest Service that orders the permittee to conduct their activities “in a
14 manner which will prevent or minimize the opportunity for conflicts with
15 the grizzly bear.” The letter must inform the permittee that “violations of
16 the Endangered Species Act can result in the termination” of their
17 authorization to conduct activities on National Forest lands.
18
19
20

21 139. The Forest Plan requires that the Forest Service protect habitat in a manner
22 that will maintain viable and recovered populations of grizzly bears.
23

24 140. The Forest Plan requires that the Forest Service strive to avoid human-
25 caused grizzly bear losses.
26
27
28

1 141. The Forest Plan requires that management activities favor grizzly bear
2 recovery and states that it “may be necessary to restrict human activity
3 within occupied grizzly bear habitat to reduce human/grizzly bear
4 confrontations.”
5

6
7 142. As discussed above, the Forest Service has failed to assess the
8 environmental effects on threatened Yellowstone grizzly bears of recurring
9 low-altitude helicopter flights in spring and summer bear season (May,
10 June, July) annually over occupied habitat for the threatened Yellowstone
11 grizzly bear. Without such an analysis it is impossible to determine whether
12 the Forest Service is meeting all of these grizzly bear-related Forest Plan
13 obligations.
14
15

16 143. The Forest Service’s failure to demonstrate compliance with these Forest
17 Plan provisions violates the Forest Plan and therefore violates NFMA.
18

19 144. Even if the Forest Service had conducted an analysis that addressed all of
20 these Forest Plan provisions, the challenged activity would not comply with
21 these provisions because recurring, low-altitude helicopter flights harass
22 grizzly bears and cause them to flee while in the midst of critical spring
23 feeding activities. Thus, the challenged activity has adverse effects on
24 bears, disturbs habitat necessary to meet the biological requirements of
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bears, is not compatible with grizzly bear needs, does not prevent or minimize conflict with grizzly bears, violates the ESA, threatens the viability and recovery of this population, does not strive to avoid human-caused grizzly bear losses, and does not favor grizzly bear recovery, which all violate the Forest Plan, in violation of NFMA.

VII. RELIEF REQUESTED

For all of the above stated reasons, Plaintiff requests that this Court award the following relief:

- A. Declare that low-altitude helicopter hazing operations over occupied Yellowstone grizzly bear habitat in May, June, and July violate the law;
- B. Enjoin implementation of low-altitude helicopter hazing operations over occupied Yellowstone grizzly bear habitat in May, June, and July;
- C. Award Plaintiff its costs, expenses, expert witness fees, and reasonable attorney fees under the ESA and EAJA; and
- D. Grant Plaintiff any such further relief as may be just, proper, and equitable.

Respectfully submitted this 14th Day of July, 2011.

/s/ Rebecca K. Smith

Rebecca K. Smith

PUBLIC INTEREST DEFENSE CENTER, PC

P.O. Box 7584

Missoula, MT 59807

(406) 531-8133
publicdefense@gmail.com

Timothy M. Bechtold
BECHTOLD LAW FIRM, PLLC
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Attorneys for Plaintiffs