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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FLATHEAD-LOLO-BITTERROOT)	CV 23-101-M-DWM
CITIZEN TASK FORCE and WILDEARTH)	
GUARDIANS,)	
)	
Plaintiffs,)	PLAINTIFFS' BRIEF IN
)	SUPPORT OF MOTION
vs.)	FOR PRELIMINARY
)	INJUNCTION
)	
STATE OF MONTANA, LESLEY)	
ROBINSON, and GREG GIANFORTE,)	
)	
Defendants.)	

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INTRODUCTION

Plaintiffs Flathead-Lolo-Bitterroot Task Force and WildEarth Guardians (Task Force) move the Court for a preliminary injunction to enjoin the trapping and snaring of coyotes and wolves in occupied grizzly bear habitat in Montana under regulations approved by the State of Montana Fish and Wildlife Commission on August 17, 2023. The regulations as adopted are reasonably certain to cause trapping and snaring of grizzly bears in violation of the Endangered Species Act (ESA). 16 U.S.C. §1538(a)(1)(B).

Task Force’s request for an injunction should be granted. Task Force is likely to prevail on the merits of its ESA claim that the challenged activity is reasonably certain to cause the unlawful “take” of threatened grizzly bears. Past trapping bycatch in Montana and in neighboring states of Idaho and Wyoming and neighboring provinces of Alberta and British Columbia show that—where wolf and coyote trapping occurs—grizzly bears are incidentally captured and harmed. Moreover, preliminary injunctive relief is essential to avoid irreparable harm to Montana’s grizzly bears and Task Force’s members’ interests. The equities and public interest support protection of threatened species such as grizzly bears. Thus this Court should issue a preliminary injunction prohibiting the State of Montana and its agents from authorizing wolf and coyote trapping and snaring in occupied grizzly bear habitat in Montana.

FACTUAL BACKGROUND

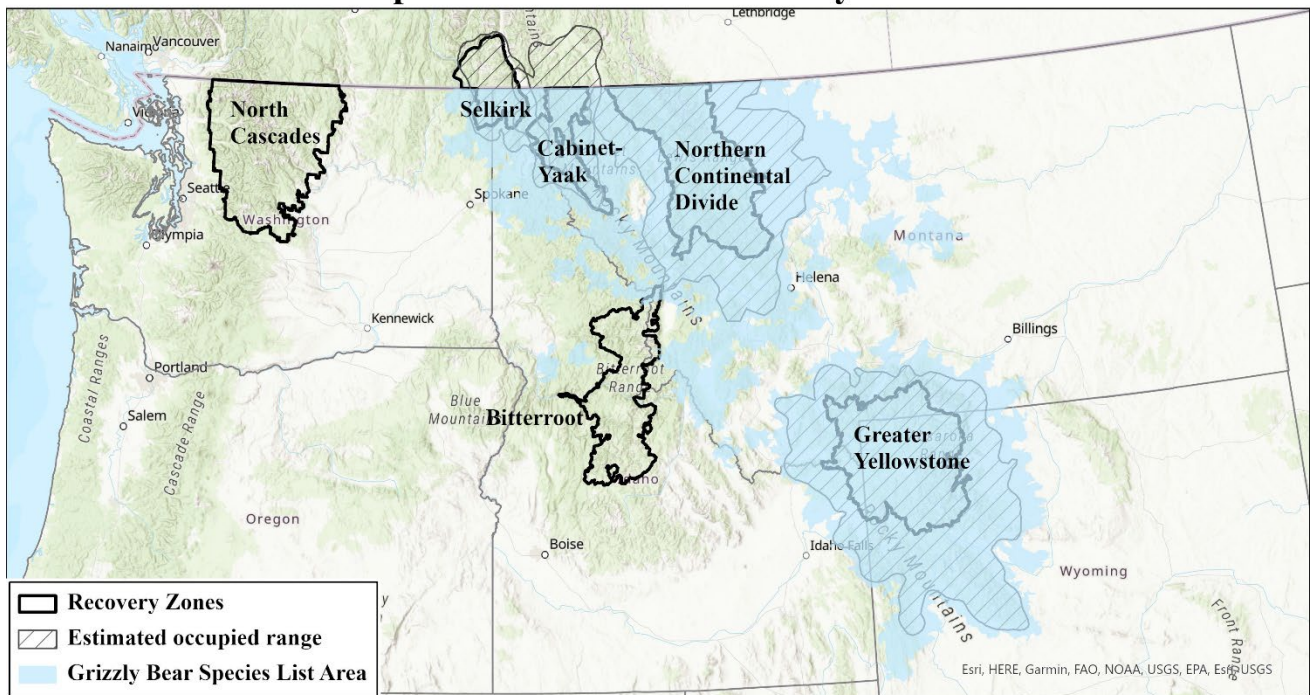
After generations of federal and state eradication efforts and precipitous population declines, grizzly bears now remain in only a few states in the Mountain West, including Montana. Montana's grizzly bears and wolves inhabit similar geographic ranges and habitat. Montana's authorization of widespread wolf trapping and snaring means that wolf trapping and snaring frequently occurs in areas inhabited by ESA-protected grizzly bears. In recent years, wolf trapping and snaring in Montana has captured at least 21 grizzly bears. Despite these incidents, the Montana Fish and Wildlife Commission ("Commission") issued new rules on August 17, 2023, further incentivizing and expanding wolf trapping and snaring statewide, thus increasing the likelihood that grizzly bears will be caught in traps and snares.

I. GRIZZLY BEARS

An estimated 50,000 grizzly bears once ranged throughout the western Lower 48 states, but with European settlement, the government implemented bounty programs aimed at eradication, and grizzly bears were shot, poisoned, and trapped wherever they were found. *Crow Indian Tribe v. United States*, 343 F.Supp.3d 999, 1004 (D. Mont. 2018)(quotations omitted). Grizzly bears were eventually listed in the Lower 48 as threatened under the ESA in 1975. *Alliance for the Wild Rockies v. Cooley*, __F.Supp.3d__, 2023 WL 2522945 (D. Mont. Mar. 14,

2023) at *1. Currently, grizzly bears are confined to a few remnant populations in Montana, Wyoming, Washington, and Idaho. Montana is home, in part, to four recovery areas designated by the U.S. Fish and Wildlife Service (FWS): (1) the Northern Continental Divide Ecosystem; (2) the Cabinet-Yaak Ecosystem; (3) the Greater Yellowstone Ecosystem; and (4) the Bitterroot Ecosystem. *Crow Tribe*, 343 F.Supp.3d at 1005.

Species List Area for Grizzly Bears



Species List Areas (or "may be present" map) help federal agencies determine where effects to listed species should be considered for consultation from actions they carry out, fund, or permit to meet requirements under Section 7(a) of the Endangered Species Act (ESA). As grizzly bears expand their range, the SLA is intended to be spatially inclusive of all areas that meet the "may be present" methodology for grizzly bears. The "may be present" methodology is derived from current estimated occupied range and verified location data outside of current distributions; not all areas that are designated as "may be present" meet the criteria to be included in estimated occupied range. Local evaluation is needed by federal Level 1 ESA Streamlining Teams to determine potential effects of agency actions where grizzly bears "may be present." Identifying locations where grizzly bears "may be present" will facilitate project planning activities that promote grizzly bear conservation and recovery. The grizzly bear SLA is updated with any new verified sightings every 90 days. Although we receive sighting information throughout the year, there can be a lag between receipt of the information, verification of grizzly bear, and updating the map. To provide the most up-to-date information for Section 7 consultation pending those updates, we will notify the relevant federal agency personnel when any new HUCs are added. We will continue to supply an updated verified map to all partners through PAC. Last updated July 19, 2023 with data from 2013 to July 19, 2023.

Figure 1. Species List Area for Grizzly Bears
(<https://www.fws.gov/media/grizzly-bear-species-list-area-map-0>)(July 19, 2023).

According to FWS, grizzly bears' current known distribution includes and extends beyond the occupied, designated recovery zones. See Figure 1. Moreover, multiple bears have been confirmed in the Bitterroot Ecosystem in the past 15 years. *Cooley* at *10-11. Verified grizzly bear observations outside of the Recovery Zones have significantly increased in recent years in Montana. Montana Fish, Wildlife & Parks published a bulletin on August 30, 2023, 8:41 AM, titled *Hunters Must Expect to See Bears* which begins with: "Grizzly bears have the potential to be found anywhere in the western two-thirds of Montana (west of Billings), and their distribution is denser and more widespread than in previous years. Some areas with dense concentrations of grizzly bears are very accessible to hunters, especially during the archery season."

<https://fwp.mt.gov/homepage/news/2023/aug/0830---hunters-must-expect-to-see-bears>.

In recent years, likely due to climate change, grizzly bears have been denning later in the fall and emerging from their dens earlier in the spring. Brian Horejsi Dec. ¶¶8-10; David Mattson Dec. ¶¶12-15; Katherine Kendall Dec. ¶10. Thus bears are increasingly spending more days each year out of the den. Some bears delay denning to take advantage of gut piles and unrecovered animals from

Montana’s hunting season, and some bears do not den at all. Horejsi Dec. ¶¶8-10. This decrease in denning activity, paired with the increase in grizzly bear distribution in Montana in recent years, increases the risk that grizzly bears will be subject to accidental capture in in wolf and coyote traps. Horejsi Dec. ¶¶12-13. Mattson Dec. ¶¶16-17; Kendall Dec. ¶¶9-10.

II. WOLF TRAPPING AND SNARING HARMS GRIZZLY BEARS

“Traps and snares of any kind are designed to capture, hold, and sometimes kill animals. By their design, placement, and function, traps and snares can be immensely effective at capturing animals. But the design, placement, or function of traps or snares controls whether they are discriminate, or indiscriminate, in terms of the animals that are trapped or snared.” Carter Niemeyer Dec. ¶43. Wolves and grizzly bears have overlapping ranges in Montana, and where wolf trapping occurs, grizzly bears are captured and harmed. Mattson Dec. ¶¶9-17. Data gathered from grizzly bear and wolf biologists shows that there have been 21 verified grizzly bears caught in leghold traps set for coyotes and wolves in Montana. Michael Bader Dec. ¶¶5-6. Biologists have recorded additional multiple grizzly bear captures and mortalities in wolf traps and snares in neighboring Idaho, Wyoming, British Columbia, and Alberta. Niemeyer Dec. ¶¶16-18, ¶¶32-34.

Regulations approved on August 17, 2023, by the Montana Fish & Wildlife Commission allow recreational trappers to use foothold traps where wolf

trapping is allowed in Montana beginning as early as November 27 and extending through March 15. Niemeyer Dec. ¶9. When a foothold trap is set with the two jaws open, the trap is triggered by the weight of an animal's foot stepping on the trap. These traps usually hold an animal by the paw or toes, not the legs. Niemeyer Dec. ¶10. Montana permits recreational wolf trappers to use foothold traps with an inside jaw spread of up to nine inches when targeting wolves. Foothold traps with a nine-inch jaw spread are large enough to capture grizzly bears and all furbearers. Due to the massive size and weight of these traps, they can cause toe fractures and toe amputations in grizzly bears. Additionally, traps with a jaw spread of 9 inches or less may clamp bears just by their toes, a situation that may result in toe amputations when grizzly bears fight to free themselves." Niemeyer Dec. ¶11.

Moreover, "Montana has taken virtually no precautions to protect grizzly bears from the dangers of recreational wolf snaring." Niemeyer Dec. ¶33. Neck snares are usually placed on trails or in narrow, constricted corridors or pathways where animals are forced to pass through the elevated loop created by the snare. Neck snares can quickly kill a snared animal because, as a snared animal struggles to get free, the snare becomes tighter and can either asphyxiate the animal or break its neck. Neck snares are non-selective and indiscriminate by design and will capture, hold, or kill non-target or unintended species. Certain devices may be used to reduce the danger of harm to non-target animals once caught in a snare, but such

devices do not prevent or minimize the danger that non-target animals will be caught in the first place. Niemeyer Dec. ¶¶27-29.

Trappers almost always use bait or scented lures (such as urine, anal glands, or ground up meat) to attract prey to their traps or snares. Any bait or lure that will attract a wolf will also attract grizzly bears, which are omnivores with an acute sense of smell. Niemeyer Dec. ¶39. Montana permits wolf trappers to place traps 30 feet from visible bait. No such limitation is placed on the use of scented lures, which may be placed directly next to wolf traps and snares.¹ The prohibition on trapping within 30 feet of bait visible from above is intended to prevent capture of raptors. It will not prevent capture of grizzly bears. Niemeyer Dec. ¶38.

Grizzly bears are fully capable of tearing wolf foothold traps and snares from their anchors and walking away with the trap or snare still attached. Niemeyer Dec. ¶40. While this can cause severe injury, it also leads to significant underestimates of grizzlies captured in traps and snares, and “many incidental captures go unreported.” Niemeyer Dec. ¶42. As shown by Montana records, wolf traps and snares frequently injure and kill grizzly bears once caught.

¹ See Bader Dec. ¶11. FWP’s Megan James informed Mr. Bader that scents are not allowed in Lynx Protection Zones, but the actual regulations are silent on the use of scents in Lynx Protection Zones. See Bechtold Dec. Ex. 1.

III. THE STATE’S ROLE IN TRAPPING AND SNARING

The Commission has authority to carry out Montana’s wildlife policies and supervises the Montana Department of Fish Wildlife and Parks. MCA §87-1-301. The Commission sets season trapping and snaring rules and issues permits, tags, and licenses, which are required to trap, snare, and hunt wolves. MCA §87-1-304. On August 17, 2023, the Commission adopted the current wolf trapping regulations that allow trapping in occupied grizzly bear habitat when grizzly bears are likely to be out of their dens. Pursuant to the rules adopted on August 17, 2023, wolves can be trapped in occupied grizzly bear habitat as soon as the Monday after Thanksgiving until March 15. *See* Bechtold Dec. Exhibit 1 at 15.

LEGAL BACKGROUND

I. ENDANGERED SPECIES ACT

The ESA is considered “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” and embodies Congress’s “commitment to halt and reverse the trend toward species extinction, whatever the cost.” *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1059 (9th Cir. 2018) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978)) (quotation and citation omitted).

Section 9 of the ESA prohibits the “take” of an endangered species unless specifically authorized by the relevant federal agency in an incidental take

statement. 16 U.S.C. §§1538(a)(1)(B), 1539. The ESA defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” §16 U.S.C. §1532(19). Thus, activities such as trapping or capturing an endangered species constitute unlawful “take” even if they do not cause injury or mortality. §1532(19). The ESA further prohibits anyone from “caus[ing] to be committed any offense” defined in the Act. 16 U.S.C. §1538(g); *Strahan v. Sec’y, Mass. Exec. Off. of Energy & Env’t Affs.*, 458 F.Supp.3d 76, 79 (D. Mass. 2020). “Take” includes direct as well as indirect harm and need not be purposeful. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 (1995).

The ESA’s take prohibition applies equally to threatened species, unless otherwise indicated by a species-specific rule promulgated by the relevant federal agency. *See* 50 C.F.R. §17.31(a). FWS oversees ESA compliance with respect to grizzly bears and allows for no exception from the take prohibition for trapping or snaring activities targeting other species. *See* 50 C.F.R. § 17.40(b)(1)(i).

The ESA prohibits states from authorizing activities that are reasonably likely to take members of a listed species. *See* 16 U.S.C. § 1538(a)(1)(B), (g) (prohibiting unpermitted take); *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (applying take prohibition to state-regulated fishing program); *Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (“[T]he Plaintiff must

make a showing that a violation of the ESA is at least likely in the future.”); *Ctr. for Biological Diversity v. C.L. Otter*, 2016 WL 233193 *11 (D. Idaho Jan. 8, 2016) (same), *rev'd on other grounds on reconsideration*, 2018 WL 539329 (D. Idaho Jan. 24, 2018). State-authorized recreational trapping violates the ESA when “a risk of taking exists [even] if trappers comply with all applicable laws and regulations in place.” *Animal Prot. Inst. v. Holsten*, 541 F.Supp.2d 1073, 1079 (D. Minn. 2008).

“A reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction” in the context of ESA Section 9. *Marbled Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060, 1066 (9th Cir. 1996).

II. PRELIMINARY INJUNCTION

A party seeking a preliminary injunction must demonstrate: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) injunctive relief is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The ESA alters this standard such that courts “presume ... that the balance of interests weighs in favor of protecting endangered species, and that the public interest would not be disserved by an injunction.” *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018). Accordingly, a preliminary injunction is appropriate where plaintiffs show they are likely to

succeed on the merits of their ESA claims and are likely to suffer irreparable harm in the absence of preliminary injunctive relief. *NWF*, 886 F.3d at 818; *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002); 16 U.S.C. § 1531(b).

A. Recent Incidental Trapping and Snaring of Grizzly Bears in Montana Demonstrates that Future Take is Reasonably Certain to Occur.

“[T]he mere trapping of the [ESA-listed species], even if released alive, constitutes a taking under § 9 of the ESA.” *Center for Biological Diversity*, 2016 WL 233193 at *4; 16 U.S.C. §1532(19). The list of unique confirmed cases of grizzly bears caught in wolf and coyote traps in Montana establish the reasonably certain future unlawful take of grizzly bears in wolf traps and snares. Bader Dec. ¶¶5-6. Moreover, experienced grizzly bear and wolf biologists with extensive careers in grizzly bear and wolf management in Montana agree that the regulations propounded by the State will only increase the likelihood of grizzly bears being caught in wolf and coyote traps in the future. *See* Timothy Manley Dec. ¶14; Diane Boyd Dec. ¶25; Mattson Dec. ¶37; Horejsi Dec. ¶13; Niemeyer Dec. ¶53; Kendall Dec. ¶13. Even if there is a year with no verified reports of grizzly bears caught in traps, it does not lessen the likelihood of future captures or related harm to affected bears. Mattson Dec ¶31.

Past takings of ESA-protected species are “instructive, especially if there is evidence that future similar takings are likely.” *Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc.*, 23 F.3d at 1512. Federal district courts have repeatedly recognized past takings as evidence of future take. *See Center for Biological Diversity*, 2016 WL 233193, at *1 (four lynx captures in three-and-a-half years sufficient to establish reasonable certainty of future take); *Animal Prot. Inst.*, 541 F. Supp. 2d at 1080 (future take reasonably certain because data from earlier years showed take and trapping regulations remained substantially the same). Indeed, while prior take is indicative of likely future take, evidence of prior take is not always necessary to demonstrate future take. *Animal Welfare Inst. v. Beech Ridge Energy*, 675 F. Supp. 2d 540, 576, 579 (D. Maryland 2009) (finding—despite no record evidence of prior take—“a virtual certainty that [endangered bats] will be harmed, wounded, or killed imminently” by wind turbines where plaintiffs established bat presence in the area). Moreover, “the future threat of [even a] single taking is sufficient to invoke the authority of the [ESA].” *Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, 896 F.Supp. 1170, 1180 (M.D. Fla. 1995). Here, the evidence of 21 unique instances of grizzly bears caught in traps and snares, paired with the anecdotal reports of grizzly bears in traps and snares and the unreported instances of grizzly bears caught in traps and snares, sufficiently demonstrates the likelihood of future take to invoke the ESA’s enforcement mechanisms.

Task Force is not asking the Court to find Montana liable for past ESA violations, rather Task Force is asking the Court to recognize that the regulatory scheme devised by the State of Montana is almost certain to result in take of grizzly bears. The past incidents of grizzly bears getting caught in traps in Montana demonstrate that wolf snares and traps take grizzly bears (regardless of who is responsible for that take), and future take is reasonably certain. Montana not only authorizes trapping and snaring that will take bears in the future, it has also authorized the expansion of those activities into timeframes and areas known to be occupied by grizzly bears out of dens. See Bechtold Dec. Ex. 1. at 14-15.

Montana's regulations adopted on August 17, 2023, authorize a trapping season across large swaths of occupied grizzly bear habitat in Montana, and future take of grizzly bears would thus be directly attributable to the State of Montana. Further, coyotes are allowed to be trapped year-round in occupied grizzly bear habitat. In the early winter when grizzly bears are in hyperphagia, the bears are attracted to trappers' baits and lures. In late winter and spring, grizzly bears emerge from their dens with high protein needs after months of hibernation. Montana's regulations permit baited trapping and snaring during these months of peak consumption of meat by grizzly bears —because other food sources are scarce—and grizzly bears are particularly likely to be drawn to the baits and scented lures intended to attract wolves to traps and snares. Horejsi Dec. ¶10; Mattson Dec.

¶¶16-26; Kendall Dec. ¶¶8-10. Grizzly bears often appropriate wolf kills, and are likely to be active in areas frequented by wolves, and thus active in the same areas targeted by wolf trappers. Mattson Dec. ¶¶17-20.

Thus, future take of grizzly bears is more likely to occur during the spring, fall, and winter months when Montana permits trapping and snaring on both public and private lands and these takes will therefore be directly attributable to the State of Montana's permitting of wolf trapping and snaring in occupied grizzly bear habitat.

B. Task Force is Likely to Succeed on the Merits of its Claims that Montana Wolf-Trapping Rules Violate the ESA

Task Force is likely to prevail on the merits of its claim that the State of Montana's authorization of wolf-trapping is reasonably certain to cause the unlawful take of grizzly bears. 16 U.S.C. §§1538(a)(1)(B), 1539. The list of grizzly bears caught in traps and snare in recent years is solid evidence that take is likely to occur. *See* Bader Dec. ¶¶5-6. Worse, Montana recently introduced new wolf-trapping rules that further expand and incentivize wolf trapping in the State, including in occupied grizzly bear habitat. Declarations by Carter Niemeyer (former FWS trapper and wildlife biologist), Timothy Manley (former grizzly bear biologist for the State of Montana), Diane Boyd (former wolf biologist for FWS and the State of Montana), David Mattson (former grizzly bear biologist for the

National Park Service); Brian Horejsi (grizzly bear biologist in Alberta); Katherine Kendall (former National Park Service and US Geological Survey grizzly bear biologist, current IUCN bear biologist) each confirm that future grizzly bear take in Montana wolf traps is reasonably certain to occur. Manley Dec. ¶¶14; Niemeyer Dec. ¶¶53, 33; Boyd Dec. ¶25; Horejsi Dec. ¶13; Mattson Dec. ¶37; Kendall Dec. ¶13.

C. Montana’s Recent Actions Increase the Likelihood of Future Grizzly Bear Take.

Despite wolf trapping and snaring already causing the unlawful capture and killing of grizzly bears, the State of Montana’s wolf trapping and snaring rules adopted recently seek to further expand and incentivize trapping and snaring in occupied grizzly bear habitat in Montana.

On August 17, 2023, the State of Montana altered the wolf-trapping rules for the upcoming winter, with the goal of substantially reducing Montana’s wolf population. Among other things, the new rules authorize: (1) wolf trapping and snaring in occupied grizzly bear habitat when the bears are likely to be out of their dens; (2) allows up to 20 wolves per person, 10 by hunting and 10 by trapping, increased from 5 in 2020; and (3) allows baiting in occupied grizzly bear habitat. Trapping and snaring in grizzly bear habitat is reasonably certain to take grizzly bears because these devices “are indiscriminate by design.” Niemeyer Dec. ¶28.

Neck snares are “capable of ensnaring almost any animal that steps into or through them.” Niemeyer Dec. ¶28. Wolf foothold traps can clamp a grizzly bear by its feet or toes, trapping the animal, and causing injuries such as foot damage and toe amputations. Niemeyer Dec. ¶44; Horejsi Dec. ¶7. In fact, when paired with baits, scents, and lures—as permitted in Montana—traps and snares pose particular dangers to grizzly bears, who can smell dead animals from long distances and will be easily drawn to these scents. Manley Dec. ¶13; Niemeyer Dec. ¶¶38-39; Horejsi Dec. ¶6; Kendall Dec. ¶¶6-9. Thus, the State of Montana’s efforts to increase wolf trapping and snaring further heightens the reasonable certainty that state-permitted wolf trapping will cause the unlawful take of grizzly bears. Manley Dec. ¶¶14; Niemeyer Dec. ¶¶53, 33; Boyd Dec. ¶25; Horejsi Dec. ¶13; Mattson Dec. ¶37; Kendall Dec. ¶14.

In short, Task Force is likely to succeed on the merits of its claim that the State of Montana’s continued and expanded authorization of wolf trapping and snaring in occupied grizzly bear habitat is reasonably certain to cause the future “take” of grizzly bears in violation of ESA Section 9. *See Loggerhead Turtle*, 896 F.Supp. at 1180; *Center for Biological Diversity*, 2016 WL 233193, at *1; *Animal Prot. Inst.*, 541 F. Supp. 2d at 1073; *Animal Welfare Inst.*, 675 F.Supp.2d at 576, 579. These future ESA violations are reasonably certain “even if trappers comply with all applicable laws and regulations in place,” and are thus directly attributable

to Defendants' permitting actions and wolf-trapping and snaring rules and regulations. *Animal Prot. Inst.*, 541 F.Supp.2d at 1079.

Prior takings often demonstrate the likelihood of similar takings in the future. *Burlington N. R.R.*, 23 F.3d at 1512. In *Burlington N.R.R.*, grizzly bears were attracted to grain spills caused by derailments near Glacier National Park, and at least five bears were killed by trains near the spills. The train company cleaned up the spills and upgraded the tracks to prevent future derailments, and no bears got killed by trains there for the next three years. Thus both Judge Hatfield and the Ninth Circuit found no clear evidence that future take was likely. *Burlington N.R.R.*, 23 F.3d at 1512. Unlike *Burlington N.R.R.*, here Montana's trapping regulations actually increase the likelihood of grizzly bears getting caught in traps in the future. Mattson Dec. ¶¶34-37.

ESA caselaw in other jurisdictions emphasizes the significance of past take as evidence that future take is likely. In *Strahan*, the plaintiff sued Massachusetts regulators for causing the illegal take of endangered Northern Right whales in state-licensed gillnetting and lobster pots. 127 F.3d at 158. The First Circuit found sufficient evidence to support injunctive relief to prevent future take based on "eleven occasions on which Northern Right whales had been found entangled in fishing gear in Massachusetts between 1978 and 1995." *Strahan*, 127 F.3d at 164-65. Similarly, in another *Strahan* case, the U.S. District Court of Massachusetts

held that state-licensed fishing gear was likely to unlawfully take Northern Right whales based on evidence of one prior entanglement in lines permitted by Massachusetts authorities, together with abundant evidence of the prevalence of entanglements in other jurisdictions. *Strahan*, 458 F.Supp.3d at 89-92 (noting that “known entanglements vastly underestimate actual entanglements”). Here, expert biologists agree that even with the 21 verified incidences of grizzly bears caught in traps in Montana, the actual number is likely much higher, and there is a strong likelihood that grizzly bears will be caught in traps in the future. Manley Dec. ¶¶14; Niemeyer Dec. ¶¶53, 33; Boyd Dec. ¶25; Horejsi Dec. ¶13; Mattson Dec. ¶37; Kendall Dec. ¶14.

D. Task Force is Likely to Suffer Irreparable Harm if Injunctive Relief is Not Granted

The State of Montana’s continued and expanded authorization of wolf trapping in grizzly bear habitat threatens irreparable harm to Flathead-Lolo-Bitterroot Task Force and WildEarth Guardians and their members’ interests in observing, enjoying, and conserving grizzly bears in the wild. Montana’s wolf-trapping rules also threaten irreparable harm to Montana’s vulnerable grizzly populations. These harms warrant the issuance of a preliminary injunction.

E. The Wolf-Trapping Rules Irreparably Harm Plaintiffs' and Their Members' Religious, Recreational, and Aesthetic Interests.

Without a preliminary injunction, Task Force and its members will suffer irreparable harm to their religious, recreational, and aesthetic interests under the wolf-trapping rules. Harm to religious, aesthetic, and recreational interests is a cognizable injury. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020). Actions that impair a plaintiff's ability to enjoy wildlife in its natural environment is cognizable harm. *Nat'l Wildlife Fed'n*, 886 F.3d at 821. Harm to a person's aesthetic and recreational interests in enjoying wildlife is irreparable harm because it cannot be undone. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)("[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.").

Here, Flathead-Lolo-Bitterroot Task Force and WildEarth Guardians and their members will suffer irreparable harm to their fundamental interests if this Court does not grant injunctive relief. Montana's wolf-trapping rules harm both plaintiff organizations and their members by undermining the survival and recovery of grizzly bears in Montana. Both plaintiff organizations and their members use Montana's grizzly bear habitat for traditional, recreational, and

deeply personal activities and pursuits, including hiking, camping, backpacking, wildlife viewing, tracking, hunting, photography, aesthetic enjoyment, and spiritual contemplation. In doing so, Plaintiffs' members and staff seek to observe, photograph, track, study, read sign of, and simply be in the presence of grizzly bears in their native habitat. Plaintiffs derive significant religious, aesthetic, recreational, scientific, inspirational, spiritual, and other benefits from these activities. Patricia Ames Dec. ¶¶8-11; Adam Rissien Dec. ¶¶11-14.

All Plaintiffs also have long-standing interests in the preservation and recovery of grizzly bears in Montana, both because they and their members place a deep value on these species, and because the presence of grizzly bears is essential to healthy functioning of the ecosystem. Plaintiffs have been active in seeking to protect and recover grizzly bears through an array of actions, including public outreach and education, scientific analysis, and advocacy intended to promote achievement of healthy ecosystem functioning in the region. Consequently, the reasonably certain trapping and snaring of grizzly bears caused by Defendants' authorization of wolf trapping and snaring in occupied grizzly bear habitat will irreparably harm Plaintiffs' and their members' interests in grizzly bear conservation.

F. The Wolf-Trapping Rules Irreparably Harm Grizzly Bears, which Establishes Irreparable Harm.

“Irreparable harm should be determined by reference to the purposes of the statute being enforced.” *Nat’l Wildlife Fed’n*, 886 F.3d at 818. Given the ESA’s purpose of “conserving endangered and threatened species and the ecosystems that support them, establishing irreparable harm” in an ESA case “should not be an onerous task.” *Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). Section 9 of the ESA prohibits the “take” of “any animal from a listed species.” 16 U.S.C. §1538(a)(1)(B); *Nat’l Wildlife Fed’n*, 886 F.3d at 818. Thus, “the threat of death to individual grizzly bears ... is sufficient” to establish irreparable harm. *Crow Indian Tribe v. United States*, 2018 WL 4145908, at *1 (D. Mont. Aug. 30, 2018); accord *Fund for Animals, Inc. v. Turner*, 1991 WL 206232, at *8 (D.D.C. Sept. 27, 1991). Proof of an “extinction-level threat” to a species is not required. *Nat’l Wildlife Fed’n*, 886 F.3d at 818-19.

Expert biologists have identified 21 verified occurrences of grizzly bears caught in traps in Montana, and have opined that it is reasonably certain that more grizzly bears will be trapped in the future under Montana’s regulations approved on August 17, 2023. Thus, like the sport hunt enjoined in *Fund for Animals v. Turner*, “the loss even of ... relatively few grizzly bears that are likely to be taken ... during the time it will take to reach a final decision in this case is a significant,

and undoubtedly irreparable, harm.” 1991 WL 206232, at *8; *accord Crow Indian Tribe*, 2018 WL 4145908, at *1; *Nat’l Wildlife Fed’n*, 886 F.3d at 820-22 (harm from dams to salmon irreparable in light of “precarious state” of species). Unlike the Idaho court that found that only two incidences of harm to grizzly bears in that state was not sufficient to establish the likelihood of future harm, *see Ctr for Biological Diversity v. Little*, 622 F.Supp.3d 997, 1006 (D. Id. 2022), here the widespread presence of grizzly bears on the landscape paired with their proclivity to shadow wolves during time of food scarcity and demonstrated history of verified trapping merits injunctive relief.

Based on existing case law and the facts before this Court, Task Force is suffering actual, concrete, and irreparable injuries resulting from the State of Montana’s authorization of wolf trapping and snaring in occupied grizzly bear habitat. This Court should issue a preliminary injunction enjoining wolf trapping and snaring in Montana’s overlapping wolf and grizzly bear habitat to prevent irreparable harm to Plaintiffs, their members, and Montana’s ESA-listed grizzly bear populations before the Court has an opportunity to issue a decision on the merits.

G. The Balance of Harms and Public Interest Weigh in Favor of Granting Preliminary Relief.

Finally, by congressional design the “balance of hardships and the public interest tips heavily in favor of protected species.” *See, e.g., Burlington N. R.R.*, 23 F.3d at 1511 (citing *Tenn. Valley Auth.*, 437 U.S. at 174); *Nat. Res. Def. Council, Inc. v. Evans*, 279 F.Supp.2d 1129, 1190 (N.D. Cal. 2003) (the public has an “extremely strong” interest in protecting “the survival and flourishing of ... endangered species”).

CONCLUSION

The State of Montana’s authorization of wolf trapping and snaring in occupied grizzly bear habitat violates the ESA’s prohibition against the take of threatened grizzly bears. Absent intervention from this Court, Montana’s ongoing and increased efforts to kill wolves is reasonably certain to cause the unlawful take of grizzly bears in wolf traps and snares, thereby irreparably harming grizzly bears and Task Force. Baits and lures used by recreational wolf trappers attract grizzly bears to wolf traps and snares, which are indiscriminate, and Montana’s recreational wolf-trapping and snaring rules are insufficient to limit take; thus take is likely to occur in the future. Task Force respectfully urges this Court to enjoin the State of Montana from authorizing wolf trapping and snaring in occupied

grizzly bear habitat in Montana to avoid irreparable harm until a ruling on the merits in this matter.

Respectfully submitted this 22nd day of September, 2023.

/s/Timothy M. Bechtold

Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE

I certify the foregoing brief has 5104 words, excluding tables and certificates.

Pursuant to LR 7.1, Tables of Authorities and Contents are included in this brief.

/s/Timothy M. Bechtold

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