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

ALLIANCE FOR THE WILD ROCKIES, Plaintiff, vs. UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants, and BILL MYERS, individually, Defendant-Intervenor.	CV-11-76-M-CCL **BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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I. INTRODUCTION

This is a civil action for judicial review under the Endangered Species Act and Administrative Procedure Act. Alliance attests that Defendants' decisions to fund, authorize, participate in, and conduct low-altitude helicopter wildlife-hazing operations in the Yellowstone Grizzly Bear Recovery Zone during the spring and summer bear season – without addressing the environmental impacts of that activity on grizzly bears and demonstrating compliance with the Endangered Species Act – are arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law. The activities violate the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq*., National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq*., the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq*.,and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq*.

Although Alliance had requested prior notice of plans to commence helicopter hazing operations this spring, in order to avoid the filing of a request for a temporary restraining order, Alliance learned only today through eyewitness accounts that helicopter hazing operations commenced today. Declaration of Michael Garrity ¶ 9 (May 9, 2012)(hereinafter "Garrity Declaration"). These operations pose an imminent threat and irreparable harm to Alliance's interests, Garrity Declaration ¶¶ 3-9, thus a preliminary injunction and temporary restraining

order are appropriate and necessary for this case. Alliance respectfully requests that the Court temporarily restrain and preliminarily enjoin Defendants from allowing, authorizing, funding, participating in, and executing low-altitude, helicopter hazing operations in occupied habitat for the threatened Yellowstone grizzly bear until this Court has the opportunity to issue a final decision on the merits of the case.

Additionally, because (1) the ESA 60 day notice has now expired, (2) the Montana Department of Livestock's Executive Director has been added as a Defendant, and (3) the Montana Department of Livestock's Executive Director stated that, as of June 29, 2011, all funding for the helicopter hazing was provided by Federal Defendants U.S. Department of Agriculture and USDA Animal and Plant Health Inspection Service (APHIS), and APHIS sometimes provide pilots for the operations, *see* Exhibit A[1] and Exhibit B,[2] Alliance has remedied any issues

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[1]Exhibit A is an email dated June 29, 2011 from Montana Department of Livestock Executive Director Christian Mackay that states "For hazing operations, we use a private helicopter service. All bison management activities are funded through a cooperative agreement between MDOL and USDA-APHIS. When a private service is not available, we have used the department helicopter. In that event, WS bills us for the time and we pay that with APHIS funds."

[2]Exhibit B is the most recent annual cooperative agreement between USDA-APHIS and the Montana Department of Livestock obtained by Alliance, which includes the Decision Memorandum approving the agreement. It indicates that the federal government provides 100% of the funding for the bison management

related to procedure and appropriate parties that were raised in the Court's denial of Alliance's previous request for a preliminary injunction and temporary restraining order. *See* Docket Document 13.

II. FACTUAL BACKGROUND

The Yellowstone grizzly bear is a sub-population of grizzly bear that is currently listed under the ESA. Docket Document 5-2. Grizzly bears historically ranged in the United States from the mid-plains west to the California coast and south into Texas and Mexico, and numbered over 50,000 in population. Docket Document 5-3 at 9. With European settlement, grizzlies were "shot, poisoned, and trapped wherever they were found." Docket Document 5-4 at 14868. In a historical blink of an eye – from 1800-1975 – humans reduced bear numbers and habitat by 98% and restricted their range to a few remnant islands of wild country, including the Greater Yellowstone Ecosystem. Docket Document 5-3 at ix, 10-11. When the grizzly bear was originally listed under the ESA in 1975, perhaps 1,000 individuals remained. Docket Document 5-3 at 9; *see also* Docket

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activities: for example, last year, fiscal year 2010, under the cooperative agreement,USDA provided $525,000.00 to the MDOL to conduct bison management activities. The total cost of the activities was $525,000.00 and the MDOL's contribution or "share" was $0.00.

Document 5-5.

The number of breeding Yellowstone grizzly bears has been estimated at near or slightly over 100 individuals. *See e.g.* Docket Document 5-6 at 4338. The best available science indicates that hundreds of breeding individuals are necessary to prevent extinction from inbreeding in the long term. *See e.g.* Docket Document 5-7 at 1859. The U.S. Fish and Wildlife Service recognizes that the effective population size (i.e. breeding individuals) of the Yellowstone grizzly bear is "lower than recommended for evolutionary success . . . ." Docket Document 5-4 at 14895.

On March 29, 2007, the Yellowstone grizzly bear was delisted by the Fish and Wildlife Service as a "distinct population segment" of grizzly bear. Docket Document 5-4. On September 21, 2009, this Court overturned the Yellowstone grizzly bear delisting rule for failing to comply with the provisions of the ESA. *Greater Yellowstone Coalition v. Servheen*, 672 F. Supp.2d 1105 (D. Mont. 2009). The decision to relist was affirmed by the Ninth Circuit in *Greater Yellowstone Coalition, Inc. v. Servheen,* 665 F.3d 1015 (9th Cir. 2011). The Yellowstone grizzly bear is thus still listed as threatened under the ESA. Docket Document 5-2.

The grizzly bear's unique biology has exacerbated the speed and depth of its

decline and continues to slow recovery efforts. Grizzly bears have one of the slowest reproductive rates of all terrestrial mammals, due to the late age of first reproduction, small average litter size, and long interval between litters. Docket Document 5-3 at 4. At best, a breeding female grizzly bear can replace herself with one breeding age female in the first 10 years of her life. Docket Document 5-3 at 4.

When bears emerge from their dens in the spring, they are malnourished from the five to six month-long fasting period. *See* Docket Document 5-3 at 8. The Yellowstone grizzly bears heavily depend on their opportunity to consume winter-killed ungulates to nourish themselves and their cubs after den emergence. Docket Document 5-8 at 13, 24. Accordingly, disruption of grizzly bears during spring feeding activities can have significant detrimental effects on grizzly bears. As the 1993 Grizzly Bear Recovery Plan states, "[g]rizzly bears must avail themselves of foods rich in protein or carbohydrates in excess of maintenance requirements in order to survive . . . post-denning periods." Docket Document 5-3 at 7. Although the majority of grizzly bear mortalities are human-caused and occur in the autumn, most natural deaths occur in the spring period. Docket Document 5-8 at 40.

Motorized vehicle use, usually associated with roads in grizzly habitat,

displaces bears and stresses them biologically. The Fish and Wildlife Service states that "[f]emales with cubs displaced into marginal habitat may experience physiological stresses related to decreased nutrient and energy intake, resulting in lower cub survivorship." Docket Document 5-3 at 146. One type of motorized use that negatively affects grizzly bears is low-altitude helicopter use. The Forest Service acknowledges that "[g]rizzly bears have been noted to panic and flee areas from over-flights in nearly all cases where they have been observed." Docket Document 5-9 at 10 (citing a National Park Service literature review of five studies). In a review of one study, the Park Service noted that "grizzly bears . . . never became tolerant of aircraft, despite very frequent exposure." Docket Document 5-10 at 21. The Park Service has indicated that there is concern among wildlife biologists that "disturbance from overflights could cause sensitive animals to abandon their habitats." Docket Document 5-10 at 17. The Park Service warns that "the consequences of habitat abandonment can be serious, particularly for species whose high-quality habitat is already scarce." Docket Document 5-10 at 17.

The Forest Service acknowledges that "[t]he available scientific literature suggests that high frequency helicopter use, particularly at low altitudes, in habitat occupied by grizzly bears can negatively affect the bears . . . ." Docket Document

5-11 at 4. It also acknowledges that the negative effects "may include disturbance resulting in behavioral changes, such as fleeing from the disturbance; physiological changes, such as increased heart rate; displacement to lower quality habitat; and increased energetic demands." Docket Document 5-11 at 4. Accordingly, the Forest Service's own guidance document on determining how helicopters affect grizzly bears orders that "the appropriate effects determination for low altitude and high frequency or extended duration helicopter use is 'may affect, likely to adversely affect.'" Docket Document 5-11 at 4.

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

Grizzly bears share habitat on the Gallatin National Forest with Yellowstone

bison. Yellowstone bison are managed, in part, according to a 2000 interagency document called the Interagency Bison Management Plan, hereinafter referred to as the "2000 management plan." Docket Document 5-12. The 2000 management plan ROD disclosed that the agencies would execute hazing operations that would haze bison off of the Gallatin National Forest and into Yellowstone National Park. Docket Document 5-12 at 11. The final Environmental Impact Statement (EIS) for the 2000 management plan concluded that threatened Yellowstone grizzly bears would not be adversely affected by this hazing activity because the bears would most likely be in their dens during the hazing periods: "Bison management activities such as hazing . . . would not have more than a negligible impact on grizzly bears. Although there is the possibility of overlap in the fall and spring when bears are not in dens, during the majority of bison management activities, bears would be in their dens." Docket Document 5-13, Volume I at 585. The 2000 management plan EIS further elaborated by stating that there was no evidence of Yellowstone grizzly bears being present on National Forest lands on the west side of Yellowstone National Park (near West Yellowstone, Montana) at the times then planned for bison hazing operations: "At this time, no grizzly bears or their sign have been observed prior to hazing operations at West Yellowstone (USFS, Inman, pers. comm.)." Docket Document 5-13, Volume I at 565.

In the analysis of the existing situation, the 2000 management plan EIS represented that there was an interagency policy that if grizzly bears were present, the agencies would not engage in bison hazing operations: “Currently, hazing operations would cease if there was evidence of grizzlies being active in the area.” Docket Document 5-13, Volume I at 565. The agencies implied that this policy would continue by stating that the impact of the chosen alternative on grizzly bears would be the same as the existing situation. Docket Document 5-13, Executive Summary at 55 (under row entitled “Grizzly bear – bison management activities”).

In response to a public comment that “helicopters would adversely affect denning bears and pregnant females and bears emerging from hibernation,” the agencies stated that bears would likely be in their dens and/or at higher elevations during hazing operations:

> The *actual practice of hazing bison is unlikely to affect bears emerging from their dens*....Grizzly bears locate their dens at high elevations . . . .Winter range for bison, which encompasses the capture facilities and areas where hazing would occur, is present at lower elevations. Thus, the bears’ dens and the areas where hazing would occur do not overlap. . . . personnel conducting hazing activities move bison only within their winter range and not out in the more remote areas of the park where bears hibernate. Thus, hazing would not affect bears within their dens.

Docket Document 5-13, Volume II at 427 (emphasis added). In response to a

similar public comment that "[a]ll alternatives could displace grizzly bears . . . from areas near bison management activities," the agencies asserted:

> grizzly bear activity in the vicinity of the capture facilities is limited or nonexistent. Most human activities associated with the capture facilities would occur when grizzly bears are hibernating, although some operations may occur in November and April, when bears are active. However, because *little or no grizzly activity occurs in these areas,* impacts would be negligible.

Docket Document 5-13, Volume II at 431(emphases added).

In contrast to these statements, over the past several years there have been numerous observations of significant amounts of grizzly bear activity prior to and during hazing operations around West Yellowstone. For example, last year the Forest Service issued a joint press release with partner agencies on May 13, 2011 that states:

> Bears are out and active this time of year in the Greater Yellowstone area, including the Gallatin National Forest . . . . Numerous sightings of bears feeding on carcasses have already occurred in the Cooke City area, *on the Horse Butte Peninsula just north of West Yellowstone, Montana*, and throughout Yellowstone National Park.

Docket Document 5-14 (emphasis added).

Additionally, on May 12, 2011, the Forest Service posted a warning sign on the Madison Arm road near West Yellowstone, Montana that stated that there is a grizzly bear sow with an injured cub in the vicinity. Docket Document 5-15;

Docket Document 5-27, Declaration of Rebecca K. Smith ¶ 2 (May 23, 2011)(hereinafter "Smith Declaration"). On May 19, 2011, the Forest Service issued an official closure of the area to "ALL HUMAN ENTRY" due to the significant presence of grizzly bears in the area. Docket Document 5-16; Smith Declaration ¶ 3.

Helicopter hazing operations have resulted in documented harassment of at least one threatened Yellowstone grizzly bear. For example, on May 12, 2010, during helicopter hazing operations near West Yellowstone, a videographer filmed an incident in which a helicopter that was hazing bison flew over a grizzly bear on the Horse Butte Peninsula on the Gallatin National Forest and caused the bear to flee. Exhibit 17 to Docket Document 5 (filed conventionally); Docket Document 41-1; Docket Document 41-2; Smith Declaration ¶ 4. Nowhere in the EIS for the 2000 management plan did the agencies address this possibility – that has now materialized – wherein "persistent hazing operations" would routinely be carried out in late May, June, and even into late July, *see* Docket Document 5-18 at 19, at a time period that undisputedly overlaps with spring and summer grizzly bear activity in lower elevations.

On January 13, 2009, the Forest Service signed a Decision Memorandum renewing a 10 year permit (initially authorized in 1998), hereinafter referred to as

the "Horse Butte permit," for the Montana Department of Livestock to operate a bison capture facility on Gallatin National Forest lands on the Horse Butte peninsula near West Yellowstone, Montana. Docket Document 5-20. The scope of the NEPA analysis for the Horse Butte permit covers bison hazing related to the capture facility from November 1 to April 30 annually. Docket Document 5-20 at 4. The NEPA analysis for the Horse Butte permit does not address any environmental effects of bison hazing into Yellowstone National Park after April 30 because such hazing is not associated with the capture facility. Docket Document 5-20 at 24.

In the NEPA analysis for the Horse Butte permit, the Forest Service ordered a "no-fly zone" for helicopter hazing around several bald eagle nests between November 1 to April 30. Docket Document 5-20 at 5. The Forest Service speculated that this "no-fly zone" from November 1 to April 30 annually around several bald eagle nests would adequately protect the Yellowstone grizzly bear during the operation of the capture facility. Docket Document 5-20 at 5.

III. PRELIMINARY INJUNCTION & TRO STANDARD

In general, "[a] plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and

that an injunction is in the public interest." *Winter v. Nat. Res. Defense Council*, 129 S.Ct. 365, 374 (2008). "The standard for issuing a preliminary injunction is the same as the standard for issuing a temporary restraining order." *California Independent System Operator Corp. v. Reliant Energy Services*, 181 F.Supp.2d 1111, 1126 (E.D. Cal. 2001). The Ninth Circuit applies a sliding scale test to these factors, which does not require absolute surety as to the "likelihood of success on the merits" prong. Instead, if the plaintiff can at least raise "serious questions going to the merits," and demonstrate "a balance of hardships that tips sharply towards the plaintiff," the plaintiff is entitled to preliminary injunctive relief "so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011).

In ESA cases, a plaintiff's request for a preliminary injunction is reviewed with a strong presumption in favor of granting the injunction:

> Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.' . . . the *balance of hardships and the public interest tip heavily in favor of endangered species*. [citation omitted]. *We may not use equity's scales to strike a different balance.*

Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987)(emphasis added).

IV. ARGUMENT

Alliance is entitled to a preliminary injunction and temporary restraining order because the public interest and balance of equities tip sharply in its favor, there is a likelihood of irreparable harm, and there are serious questions on the merits.

A. The public interest and balance of the equities tip sharply in favor of Plaintiff.

The Supreme Court holds that Congress foreclosed a reviewing court's equitable discretion regarding the public interest and the balancing of the equities when addressing claims under the ESA. If a violation of law is likely, "only an injunction [can] vindicate the objectives of the Act." *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313-14 (1982). This is because "the balance of hardships and the public interest tip heavily in favor of endangered species . . . [and a reviewing court] may not use equity's scales to strike a different balance." *Marsh*, 816 F.2d at 1383 (citations omitted).

This case involves imminent harm to a species that is protected under the ESA. For this reason, the balance of hardships and public interest "tip heavily in favor of [the] endangered species." *Marsh*, 816 F.2d at 1383. Moreover, "[t]he preservation of our environment, as required by NEPA and the NFMA, is clearly

in the public interest." *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147, 1177 (9th Cir. 2006), *overruled on other grounds by Winter*, 129 S.Ct. at 375; *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002) (public has an interest in "preserving our national forests in their natural state"). Additionally, the need to "ensur[e] that government agencies comply with the law is a public interest of the highest order." *National Wildlife Federation v. National Marine Fisheries Service*, 235 F.Supp.2d 1143, 1162 (W.D. Wash. 2002)(citation and internal punctuation omitted).

B. There is a likelihood of irreparable harm in the absence of preliminary relief.

As the Ninth Circuit has stated, "[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." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (internal quotations and citations omitted). In this case, Alliance's members use the Yellowstone Grizzly Bear Recovery Zone for vocational and recreational purposes. Garrity Declaration ¶¶ 2-9. Alliance asserts that the challenged activities will irreparably harm its members' interests in the naturally functioning ecosystems of the Greater Yellowstone Area, in particular their interests in viewing, studying, and enjoying Yellowstone grizzly bears

undisturbed in their natural surroundings. Garrity Declaration ¶¶ 2-9. The challenged activities will prevent Alliance's members' use and enjoyment of the Yellowstone Grizzly Bear Recovery Zone in its undisturbed state for this purpose. Garrity Declaration ¶¶ 2-9.

The Ninth Circuit holds that this type of harm to Alliance's members' interests satisfies the irreparable harm prong of the preliminary injunction test:

> AWR's members use the Beaverhead–Deerlodge National Forest, including the areas subject to logging under the Project, for work and recreational purposes . . . . AWR asserts that its members' interests will be irreparably harmed by the Rat Creek Project. In particular, AWR asserts that the Project will harm its members' ability to "view, experience, and utilize" the areas in their undisturbed state. . . . The Project will prevent the use and enjoyment by AWR members of 1,652 acres of the forest. This is hardly a de minimus injury. . . . actual and irreparable injury, such as AWR articulates here, satisfies the "likelihood of irreparable injury" requirement articulated in *Winter*.

Cottrell, 632 F. 3d at 1135.

Furthermore, the helicopter operations will cause irreparable harm to grizzly bears. The small population of breeding Yellowstone grizzly bears is already lower than recommended for evolutionary success, Docket Document 5-4 at 14895, and grizzlies have one of the slowest reproductive rates of all terrestrial mammals, Docket Document 5-3 at 4. Grizzly bears need to be able to feed heavily in this post-denning feeding period in order to survive. Docket Document

5-3 at 7. This time of year is the easiest time for grizzly bears to die of natural causes. Docket Document 5-8 at 40. The U.S. Fish and Wildlife Service recognizes that displacement of Yellowstone grizzly bears during spring feeding activities may cause "take" and "harm" under the ESA. Garrity Declaration ¶ 6.

There is undisputed evidence that grizzly bears occupy the same area planned for helicopter hazing activities during the same time as those activities. *See e.g.* Garrity Declaration ¶ 9 and Attachment 1; *see also* Docket Document 5-14; Docket Document 5-15; Docket Document 5-16. There is no dispute that recurrent, low-altitude helicopter flights will harm and displace grizzly bears. *See* Docket Document 5-10 at 17, 21; Docket Document 5-11 at 4; *Alliance*, CV-07-150-M-DWM, Order at 19-26; *Alliance*, CV-08-168-M-JCL-DWM, Findings and Recommendations at 16-23, *adopted in full by Alliance*, CV-08-168-M-JCL-DWM, Order at 2; *Alliance*, 720 F.Supp.2d at 1213-1215. Thus, the science, agency guidance, and legal precedent from this Court all establish that low-altitude helicopter use displaces, harms, and adversely affects grizzly bears. Accordingly, there is a likelihood of irreparable harm to grizzly bears, in addition to the irreparable harm to Alliance's members' interests.

C. Alliance raises serious questions on the merits.

For the sake of brevity, Alliance will only present a summary of its NEPA

and ESA claims, but Alliance does not waive other claims or arguments raised in its amended complaint and will address those arguments and claims in upcoming summary judgment briefing.

1. Alliance raises serious questions on the merits of its ESA claims.

The long-standing federal court interpretation of the ESA, as established by our highest court, holds that Congress "clearly [] viewed the value of endangered species as 'incalculable.'" *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 (1978). The "plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Hill*, 437 U.S. at 187. Thus, the statute reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id*. at 185.

Addressing this precedent, the Ninth Circuit holds:

> "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" [] The [Supreme] Court noted that the 'language, history, and structure' of the act 'indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.' [] Congress considered and rejected language that would have permitted an agency to weigh the preservation of species against the agency's primary mission.

Marsh, 816 F.2d at 1383 (*quoting Hill*, 437 U.S. 153).

In order to ensure that ESA-listed species receive the highest priority, and ensure that the required policy of institutionalized caution is implemented, the Ninth Circuit requires that reviewing courts "give the benefit of the doubt to the species." *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988)(citation omitted). As one district court has noted, this standard should be applied "[t]o the extent that there is any uncertainty as to what constitutes the best available scientific information . . . ." *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp.2d 1115, 1127 (N.D. Cal. 2006). As the Ninth Circuit recently noted in a case affirming protections for Yellowstone grizzly bears, an agency "cannot take a full-speed ahead, damn-the-torpedoes approach . . . especially given the ESA's 'policy of institutionalized caution.'" *Greater Yellowstone Coalition,* 665 F.3d at 1030.

ESA Section 7 requires that federal agencies insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species. 16 U.S.C. § 1536(a)(2). The Ninth Circuit holds that this regulatory language "admit[s] of no limitations" and that "there is little doubt that Congress intended to enact a broad definition of agency action in the ESA . . . ." *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). Thus, ESA Section 7 consultation is required for

individual projects as well as for the promulgation of land management plans and standards. *Id.* "Only after the [agency] complies with [ESA] § 7(a)(2) can any activity that may affect the protected [species] go forward." *Id.* at 1056-57.

To carry out the duty to avoid jeopardy, ESA Section 7 sets forth a procedural requirement that directs an agency proposing an action (action agency) to consult with an expert agency, in this case, the U.S. Fish & Wildlife Service, to evaluate the consequences of a proposed action on a listed species. 16 U.S.C. § 1536(a)(2). The Ninth Circuit holds that "the minimum threshold for an agency action to trigger consultation with FWS is low . . . ." *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011). As discussed below, the threshold is whether an activity "may affect" a listed species that "may be present."

"Once an agency is aware that an endangered species *may be present* in the area of its proposed action, the ESA requires it to prepare a biological assessment . . . ." *Thomas v Peterson,* 753 F. 2d 754, 763 (9th Cir. 1985)(emphasis added); 16 U.S.C. § 1536(c)(1). "A failure to prepare a biological assessment for a project in an area in which it has been determined that an endangered species may be present cannot be considered a de minimis violation of the ESA . . . . under the ESA, agencies are required to assess the effect on endangered species of projects in

areas where such species may be present." *Id.* at 763-764.

Additionally, "[a] federal agency must initiate formal consultation if its proposed action *may affect* listed species . . . and any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement." *Kraayenbrink*, 632 F.3d at 496 (emphasis added) (citing 51 Fed. Reg. 19,949 and *Cal. ex rel. Lockyer v. U.S. Dep't of Agric*., 575 F.3d 999, 1018–19 (9th Cir.2009))(internal quotation marks and brackets omitted).

If an ESA Section 7 consultation is completed, but later becomes inadequate, the agencies must reinitiate consultation. 50 C.F.R. § 402.16. For example, the agencies must reinitiate consultation if subsequent circumstances could be construed as "modifications to [a] land management plan that affected listed species in a manner and to an extent not previously considered." *Forest Guardians v. Johanns*, 450 F.3d 455, 465 (9th Cir. 2006).

Section 9 of the ESA prohibits any person from "taking" an endangered species. 16 U.S.C. § 1538(a)(1)(B). This prohibition applies equally to threatened species, unless otherwise indicated by a species-specific rule promulgated pursuant to Section 4(d) of the ESA. 50 C.F.R. § 17.31(a); *Loggerhead Turtle v. Volusia County*, 148 F.3d 1231, 1237 (11th Cir. 1998); *U.S. v. Plymouth*, 6 F. Supp. 2d 81, 90 (D. Mass 1998). "Take" is defined to include "harass." 16 U.S.C.

§1532(19). "Harass" is defined as an "intentional or negligent act . . . which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. §17.3.

The U.S. Fish and Wildlife Service may allow, under certain terms and conditions, the taking of a threatened or endangered species that is "incidental" to the purpose of an otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B); *see Defenders of Wildlife v. Administrator, E.P.A*, 882 F.2d 1294 (8th Cir. 1989). To escape liability, however, the person must have received an "Incidental Take Permit." *Defenders of Wildlife*, 882 F.2d at 1300; *see also Loggerhead Turtle v. Volusia County*, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995), *other aspect of case rev'd*, 148 F.3d 1231 (11th Cir. 1998).

The ESA broadly defines "person" to explicitly include states, state officers, and state agencies and departments. 16 U.S.C. § 1532(13); *see also Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (finding State liability for regulatory licensing scheme for fishing nets likely to result in takes of right whales); *Pacific Rivers Council v. Brown*, 2002 WL 32356431 (D. Or. 2002) (finding State liability for authorizing logging operations that were likely to take listed salmon); *Seattle Audubon Soc'y v. Sutherland*, 2007 WL 1577756 (W.D. Wash. May 30, 2007)

(finding State liability for regulating logging on private lands likely to result in take of listed species); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008) (finding State liability for regulatory trapping scheme that was likely to take threatened lynx).

The ESA "not only prohibits a party from directly causing take, but also prohibits a party, including state officials, from bringing about the acts of another party that exact a taking." *Seattle Audubon v. Sutherland ,* 2007 WL 1300964 at *8 (W.D.Wash. 2007), *citing Strahan*, 127 F.3d at 163. As the court noted in *Sutherland*:

> Courts have repeatedly held government officers liable for violating the take prohibition when the officers *authorized activities undertaken by others that caused take*. For example, the Eighth Circuit held that the Environmental Protection Agency caused illegal take by its decision to register pesticides containing strychnine used by farmers and ranchers. *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir.1989). Likewise, the Fifth Circuit held that the Forest Service caused illegal take of endangered red-cockaded woodpeckers by implementing a timber management plan allowing timber companies to clear-cut. *Sierra Club v. Yeutter*, 926 F.2d 429, 438–39 (5th Cir.1991). Moreover, in *Strahan v. Coxe*, 127 F.3d 155 (1st Cir.1997), the First Circuit held Massachusetts officials liable under the ESA for licensing commercial fishermen to use gillnets and lobster pots in a manner that was likely to take endangered whales.

Sutherland, 2007 WL 1300964 at *9 (emphasis added).

In light of all of the facts discussed above, there can be no dispute that grizzly

bears "may be present" in the area during helicopter hazing operations and that helicopter hazing "may affect" them. Thus, the low threshold for ESA consultation is met. *Thomas,* 753 F. 2d at 763; *Kraayenbrink*, 632 F.3d at 496. Defendants have failed to comply with this legal obligation to conduct ESA Section 7 consultation because, as discussed above, there has been no consultation that recognizes and assesses the effect of helicopter bison-hazing operations on ESA-listed grizzly bears in the Yellowstone Grizzly Bear Recovery Zone in May, June, and July.

As discussed above, the analysis accompanying the 2000 management plan assumed that grizzly bears would not likely be present in the area during hazing operations. *See e.g.* Docket Document 5-13, Volume I at 565, 585, Volume II at 427, 431. There has been no subsequent ESA analysis that has corrected that false assumption in light of evidence of grizzly bear presence during hazing operations. *See e.g.* Docket Document 5-14, Exhibit 17 to Docket Document 5 (filed conventionally); Docket Document 41-1; Docket Document 41-2. The only other potentially relevant analysis, which accompanied the Horse Butte permit, only addressed the impacts of helicopters through April, and is therefore irrelevant.[3] *See*

[3]Accordingly, the analysis in *Cold Mountain v. Garber*, 375 F.3d 884 (9th Cir. 2004), which addressed only the Horse Butte permit, is not applicable to this case.

Docket Document 5-20 at 4. As discussed above, there are "persistent hazing operations" in grizzly bear habitat now in May, June, and July. *See e.g.* Docket Document 5-18 at 19. Despite these new circumstances, the agencies have not reinitiated consultation on the 2000 management plan or conducted any other supplemental or individual ESA analysis that addresses these activities. Accordingly, Alliance raises serious questions on the merits of its ESA Section 7 claims.

Additionally, none of Defendants have received an incidental take permit for the helicopter hazing operations that they allow, authorize, fund, conduct, or participate in during the months of May, June, and July. Helicopter hazing operations cause take due to harm from harassment and displacement from spring feeding activities. *See e.g.* Docket Document 5-3 at 146; Docket Document 5-9 at 10; Document 5-10 at 17, 21; Docket Document 5-11 at 4; Garrity Declaration ¶ 6. One incident of take via harassment has even been documented on film. Exhibit 17 to Docket Document 5 (filed conventionally); Docket Document 41-1; Docket Document 41-2; Smith Declaration ¶ 4. Defendants' participation, funding, and authorization of helicopter hazing operations that are causing past and ongoing unpermitted take of threatened Yellowstone grizzly bears violates Section 9 of the ESA. 16 U.S.C. § 1538(a)(l)(B); *Sutherland* , 2007 WL 1300964 at *8. Accordingly,

Alliance raises serious questions on the merits of its ESA Section 9 claims.

2. Alliance raises serious questions on the merits of its NEPA claims.

NEPA directs federal agencies to prepare a detailed environmental impact statement (EIS) for federal actions that may significantly affect the environment. 42 U.S.C. § 4332(2)(C). In order to determine whether an action is significant, the agency may first prepare a shorter "environmental assessment" (EA). 40 C.F.R. § 1508.9. If an agency decides not to prepare a full EIS, it must prepare an EA unless the proposed action qualifies as a "categorical exclusion" (CE) to NEPA analysis. 40 C.F.R. § 1508.4. An action may qualify as a CE, and be approved via a "Decision Memorandum," only if it falls within a "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." *Id.* One factor that may render an action "significant" is an adverse effect on a species listed under the Endangered Species Act. 40 C.F.R. § 1508.27 (9).

An agency must prepare supplements to either draft or final environmental impact statements if it either "makes substantial changes in the proposed action that are relevant to environmental concerns" or if there are "significant new circumstances or information relevant to environmental concerns and bearing on the

proposed action or its impacts." 40 C.F.R. §1502.9 (c).

Defendants have never engaged in a NEPA analysis to assess the direct, indirect, and cumulative environmental effects on threatened Yellowstone grizzly bears from authorizing, funding, conducting, and participating in low-altitude helicopter flights in May, June, and July over occupied grizzly habitat in the Yellowstone Grizzly Bear Recovery Zone. Neither the 2000 long range resource management plan nor the annual Decision Memorandums approving federal funding for hazing activities, were accompanied by a NEPA analysis that addresses this issue. Moreover, there is no other related NEPA document that provides this analysis. In particular, as noted above, the NEPA analyses for the Horse Butte permits did not address helicopter hazing in May, June, and July.[4]

Defendants' failure to conduct a NEPA analysis that squarely acknowledges and addresses the issue of effects on threatened grizzly bears from low-altitude, helicopter hazing operations over the Yellowstone Grizzly Bear Recovery Zone in May, June, and July violates NEPA. Additionally, the Forest Service's failure to conduct a NEPA analysis on this issue makes it impossible to determine whether it is

[4]Accordingly, the analysis in *Cold Mountain*, 375 F.3d 884, which addressed only the Horse Butte permit, is not applicable to this case.

complying with the multiple grizzly bear provisions found in the Gallatin Forest Plan. *See Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 952, 962 (9th Cir. 2005) (finding a violation of NFMA where the court is "unable to determine from the record that the agency is complying with the forest plan standard"). Accordingly, Alliance has raised serious questions on the merits of its NEPA claims, and its NEPA-related NFMA claims.

V. CONCLUSION

For all of the above stated reasons, Alliance requests that this Court declare that Alliance raises serious questions on the merits of its claims that the challenged helicopter hazing activities violate NEPA and the ESA. Alliance requests that this Court therefore temporarily restrain and preliminarily enjoin Defendants from authorizing, allowing, funding, participating in, and executing low-altitude helicopter hazing operations in occupied habitat for the threatened Yellowstone grizzly bear until this Court has the opportunity to issue a final decision on the merits of the case.

Respectfully submitted this 9th Day of May, 2012.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief is 6,270 words, excluding the caption, table of authorities, table of contents, signature blocks, and certificate of compliance. Under Local Rule 7.1(d), a table of contents and table of authorities is provided for this brief.

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