

Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Phone: (303) 292-2021
Fax: (303) 292-1980
cody@mslegal.org

Attorney for Intervenor-Defendants

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

CENTER FOR BIOLOGICAL)
DIVERSITY,)

Plaintiff,)

v.)

DAVID BERNHARDT, Secretary of)
the Interior; and MARGARET)
EVERSON, Principal Deputy Director)
of U.S. Fish and Wildlife Service,)

Defendants,)

and)

STATE OF WYOMING and STATE)
OF IDAHO,)

Intervenor-Defendants)

WYOMING STOCK GROWERS)
ASSOCIATION, WYOMING FARM)
BUREAU FEDERATION, and UTAH)
FARM BUREAU FEDERATION,)

Intervenor-Defendants.)

Case No. 9:19-cv-00109-DLC

**WYOMING STOCK GROWERS
ASSOCIATION, WYOMING
FARM BUREAU FEDERATION,
AND UTAH FARM BUREAU
FEDERATION'S RESPONSE TO
PLAINTIFF'S STATEMENT OF
UNDISPUTED FACTS**

Pursuant to Federal Rule of Civil Procedure 56(c) and D. Mont. L.R. 56.1(b), Intervenor-Defendants Wyoming Stock Growers Association, Wyoming Farm Bureau Federation, and Utah Farm Bureau Federation (collectively, “Agricultural Associations”) hereby file this response to *Plaintiff’s Statement of Undisputed Facts*, ECF No. 56, and assert as follows:

Prefatory Note: Each of Plaintiff Center for Biological Diversity’s (“CBD”) claims seek judicial review of agency actions pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 706 *et seq.* Judicial review of federal agency actions under the APA does not call for this Court to make factual findings on the merits. Rather, this Court’s task is to review the Administrative Record that was before the federal agency, at the time the agency made the challenged decisions, to determine whether, as a matter of law, that record supports the agency’s decisions or whether the agency’s decisions are arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *See* 5 U.S.C. § 706 (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) (“The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court.”) (citation omitted).

Because this Court need not “find” underlying facts there are no material facts in dispute that are essential to the Court’s resolution of this action. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that a party seeking summary judgment need not make an affirmative evidentiary showing if the existing record is sufficient to demonstrate that there is no genuine issue of material fact); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 884 (1990) (reasoning the Rule 56(c) standards are fully applicable when a suit is brought pursuant to section 702 of the APA). Thus, the “facts” necessary for resolution of this case on the pending cross-motions for summary judgment are set forth in the Administrative Record before this Court, and the statements of undisputed facts submitted by the Parties in support of their respective motions for summary judgment should be viewed as the Parties’ summary and characterization of materials in the Administrative Record that support their legal arguments under the APA standard of review.

Verbatim Response to CBD’s Statement of Undisputed Facts:

1. The grizzly bear (*Ursus arctos horribilis*) once ranged throughout most of western North America, from the high Arctic to Mexico, and from the coast of California across most of the Great Plains. Over 50,000 grizzlies likely once lived in the western United States.

Response: CBD’s Undisputed Fact No. 1 fails to comply with D. Mont. L.R. 56.1(a)(2) as it does not contain a pinpoint citation to the Administrative Record or

other admissible document. Thus, Agricultural Associations are unable to verify this “fact” and it is therefore disputed.

2. European settlement of the American West led to bounty programs aimed at the eradication of grizzly bears and other large carnivores, and they were shot, trapped, and poisoned for decades. People eliminated the grizzly bear from Texas by 1890 and from California by 1922. Grizzly bears were last reported in Utah in 1923, Oregon in 1931, New Mexico in 1933, and Arizona in 1935. By the 1930s, people had reduced the bear’s range and numbers to less than two percent of historic levels.

Response: CBD’s Undisputed Fact No. 2 fails to comply with D. Mont. L.R. 56.1(a)(2) as it does not contain a pinpoint citation to the Administrative Record or other admissible document. Thus, Agricultural Associations are unable to verify this “fact” and it is therefore disputed.

3. In 1975, the Service listed the grizzly bear as “threatened” in the lower 48 states under the Endangered Species Act (“ESA”). 40 Fed. Reg. 31,734 (July 28, 1975). Likely fewer than 1,000 grizzly bears remained in the lower 48 states at that time. At the time of listing, grizzly bears were known to still live in portions of Colorado, Idaho, Montana, Washington, and Wyoming. A poacher shot Colorado’s last known grizzly bear in 1979.

Response: The first sentence is undisputed. The remainder of CBD's Undisputed Fact No. 3 fails to comply with D. Mont. L.R. 56.1(a)(2) as it does not contain a pinpoint citation to the Administrative Record or other admissible document. Thus, Agricultural Associations are unable to verify this "fact" and it is therefore disputed.

4. The Service approved a grizzly bear recovery plan in 1982 and revised this plan in 1993 ("1993 Recovery Plan"). In the plan, the Service identified four recovery zones: Yellowstone, Northern Continental Divide, Cabinet-Yaak, and Selkirks. The Service also identified three evaluation areas for potential recovery: Bitterroot, North Cascades, and San Juan Mountains.

Response: Undisputed.

5. Fewer than 1,900 grizzly bears likely survive in the lower 48 states today. Most grizzly bears live in the northern Rocky Mountains, in four of six recovery zones: Greater Yellowstone (approximately 709 bears), North Continental Divide (approximately 1,029 bears), Cabinet-Yaak (55-60 bears), and Selkirk, including portions in Canada (approximately 75-80 bears). The North Cascades have had only sporadic sightings of lone bears and the Bitterroot zone has no known population. Grizzly bears can be found nowhere else throughout their historic range in the lower 48 states.

Response: CBD's Undisputed Fact No. 5 fails to comply with D. Mont. L.R. 56.1(a)(2) as it does not contain a pinpoint citation to the Administrative Record or other admissible document. Thus, Agricultural Associations are unable to verify this "fact" and it is therefore disputed.

6. The Service's 1993 Recovery Plan includes "objective, measurable criteria" for grizzly bear recovery as required by the ESA. The Service uses the Plan's criteria to monitor the status of recovering bear populations and determine when they have recovered. The Plan prescribes prospective policy by describing actions for federal and state agencies to implement that would promote grizzly bear recovery. *See* 82 Fed. Reg. 30,502, 30,508 (June 30, 2017). These actions include restrictions on motorized access in key habitats. The U.S. Forest Service has incorporated the Plan's restrictions on motorized access, and its other habitat protections, into its forest plans for areas within the grizzly bear's range. 82 Fed. Reg. at 30,516.

Response: Undisputed insofar as the 1993 Recovery Plan sets forth prospective policy and contains recovery criteria useful for determining when grizzly bear populations are deemed recovered and eligible for delisting. CHRISTOPHER SERVHEEN, U.S. FISH & WILDLIFE SERVICE, GRIZZLY BEAR RECOVERY PLAN (1993) ("1993 Recovery Plan"); AR000309-483. The remainder of this "fact" is disputed. Recovery plans, however, do not "prescribe" any action, they

merely recommend actions. Recovery plans, by design, do not institute requirements and are non-binding on future agency actions. See Nat'l Marine Fisheries Serv. & U.S. Fish & Wildlife Serv., Interim Endangered and Threatened Species Recovery Planning Guidance § 1.1 (v.1.3) ("Recovery plans are guidance documents, not regulatory documents. No agency or entity is required by the ESA to implement the recovery strategy or specific actions in a recovery plan."). Recovery plans are dynamic documents subject to frequent change.

7. The Service prepared geographically specific supplements to the 1993 Recovery Plan in 1996 (Bitterroot), 1997 (North Cascades), 2007 and 2017 (Greater Yellowstone), and 2018 (North Continental Divide). With these supplements in place, the Service designated six recovery zones: Yellowstone, Northern Continental Divide, Cabinet-Yaak, Selkirks, Bitterroot, and North Cascades.

Response: Undisputed.

8. In the 1993 Recovery Plan, the Service committed to evaluate "the San Juan Mountains of Colorado and other potential recovery areas throughout the historical range of the grizzly bear" The Service anticipated that the analysis would take five years to complete.

Response: Disputed. Recovery plans, by design, do not institute requirements and are non-binding on future agency actions. See Nat'l Marine Fisheries Serv. & U.S. Fish & Wildlife Serv., Interim Endangered and Threatened Species Recovery

Planning Guidance § 1.1 (v.1.3) (“Recovery plans are guidance documents, not regulatory documents. No agency or entity is required by the ESA to implement the recovery strategy or specific actions in a recovery plan.”). Recovery plans are dynamic documents subject to frequent change. Nonetheless, the Record demonstrates that this area is being evaluated. See AR000872 (analysis of the San Juan and Sierra Nevada Mountains historic range).

9. In August 2011, the Service published a five-year status review for the grizzly bear (“5-Year Review”). In the 5-Year Review, the Service again noted that “other areas throughout the historic range of the grizzly bear in the lower 48 States should be evaluated to determine their habitat suitability for grizzly bear recovery,” including in “Colorado, New Mexico, Arizona, Utah, California, Nevada, Oregon, and southern Washington (mountain ranges in the western U.S.).”

Response: Disputed. CBD has selectively omitted relevant portions of this paragraph. Specifically, the 5-Year Review went on to provide: “As budgets allow, conduct evaluations of habitat suitability for currently unoccupied, historic habitat in Colorado, New Mexico, Arizona, Utah, California, Nevada, Oregon, and southern Washington (mountain ranges in the western U.S.). While this is ongoing, continue to focus management efforts on extant populations and the BE before pursuing recovery in currently unoccupied habitat.” AR005370.

10. The Service explained in the 5-Year Review that, except for the geographically-focused supplements, “the recovery plan and the associated recovery criteria have not been updated since the plan was released in 1993” and “no longer reflect[] the best available and most up-to-date information on the biology of the species and its habitat.” The Service listed revision of the recovery plan “so that it reflects the best scientific and commercial information available” as its first recommendation for future actions in 5-Year Review.

Response: Disputed. CBD takes this quotation out of context, which clearly indicated that the base recovery plan covering the entire listed species (i.e., the continental United States, except for the six designated subpopulations) was in need of updating. The specific recovery plans for each designated recovery area were not questioned. See AR005277–78.

11. In subsequent agency planning documents, the Service reiterated its intentions to “[r]evise demographic standards and protocols to monitor demographic standards” in the Cabinet/Yaak and Selkirk chapters of the recovery plan and to “revise the recovery plan for grizzly bears in the [North Cascades Ecosystem] so that it reflects the best scientific and commercial information available.” In a 2019 overview of the 5-Year Plan, the Service stated that “Goal #1” is to “update the grizzly bear recovery plan . . . for listed ecosystems.”

Response: CBD's Undisputed Fact No. 11 fails to comply with D. Mont. L.R. 56.1(a)(2) as it does not contain a pinpoint citation to the Administrative Record or other admissible document. Thus, Agricultural Associations are unable to verify this "fact" and it is therefore disputed.

12. The Service published revised demographic recovery criteria for the Yellowstone Ecosystem in 2017 and habitat-based recovery criteria for the Northern Continental Divide Ecosystem in 2018. The Service has not updated the recovery criteria, nor any other outdated information, for the other four recovery areas. More than eight years have passed since the Service completed its last review.

Response: Disputed. The Fish & Wildlife Service has initiated a 5-year review of the grizzly bear populations in the conterminous United States. Initiation of 5-Year Status Review of Grizzly Bear (Ursus arctos horribilis) in the Conterminous United States, 85 Fed. Reg. 2,143 (Jan. 14, 2020).

13. On June 18, 2014, the Center submitted a formal petition to the Service pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(e), for the development of an updated recovery plan for the grizzly bear. The Petition specifically requests that the Service revise the 1993 Recovery Plan to address "significant remaining areas of suitable habitat across the grizzly bear's native range in the western U.S."

Response: Undisputed insofar as CBD submitted what it deemed a petition pursuant to 5 U.S.C. § 553(e). The remainder of this “fact” is disputed. Recovery plans are not “rules,” and therefore are not subject to petitions for rule-making pursuant to the APA.

14. The Center’s Petition “compiled information from all available studies of grizzly bear habitat” and summarizes numerous scientific publications describing suitable additional habitat for grizzly bears. A draft study produced in 2019 by Service scientists concluded that abundant habitat remains for the grizzly bear in its historical range in the San Juans (5,747 square miles). The science summarized in the Center’s Petition also demonstrates that approximately 110,000 square miles of additional habitat remain available to support grizzly bear recovery. These habitat areas include the Mogollon Rim and Gila Wilderness complex in Arizona and New Mexico (14,488 square miles), the Sierra Nevada mountains in California (7,747 square miles), the Grand Canyon in Arizona (6,180 square miles), and the Uinta Mountains in Utah (6,067 square miles).

Response: CBD’s Undisputed Fact No. 14 fails to comply with D. Mont. L.R. 56.1(a)(2) as it does not contain a pinpoint citation to the Administrative Record or other admissible document. Thus, Agricultural Associations are unable to verify this “fact” and it is therefore disputed.

15. The Center's Petition also requests revised recovery criteria and updates with other current scientific information relevant to bear recovery, such as findings of new research on road density limits and new techniques to reconnect grizzly bear recovery areas.

Response: CBD's Undisputed Fact No. 15 fails to comply with D. Mont. L.R. 56.1(a)(2) as it does not contain a pinpoint citation to the Administrative Record or other admissible document. Thus, Agricultural Associations are unable to verify this "fact" and it is therefore disputed.

16. On September 22, 2014, the Service denied the Center's Petition. In its denial letter, the Service asserted that "[r]ecover plans are not rules under the APA" because they are "discretionary guidance documents that are non-binding and non-enforceable" and "Section 553(e) does not provide the right to petition for the issuance of a recovery plan."

Response: Undisputed insofar as CBD submitted what it deemed a petition pursuant to 5 U.S.C. § 553(e) and that "petition" was denied pursuant to the reasons provided by the Fish & Wildlife Service.

17. The Service's denial letter also stated that the agency had "prioritized" recovery in "the locations where grizzly bear populations were present or thought to be present in 1975 (when they were listed) and where habitat and environmental conditions existed for grizzly recovery." These grizzly bear recovery efforts have

“centered on and around the remaining populations in portions of Wyoming, Montana, Idaho, and Washington.” The Service stated that additional recovery efforts would that “would require redirecting limited grizzly bear recovery dollars away from these ongoing recovery efforts with subsequent erosion of recovery success.”

Response: Undisputed.

18. The Service further asserted in its denial letter that “any additional recovery planning is subject to Service prioritization and is discretionary,” and that it had “satisfied [its] statutory responsibilities for recovery planning and implementation.”

Response: Undisputed.

19. The Service’s recovery planning guidelines call for application of the conservation biology principles of representation, resilience, and redundancy. 82 Fed. Reg. at 30,621. Redundancy, for example, could be furthered by reintroducing bears into the Southwest, where they would forage on foods different than in the Northern Rockies.

Response: Disputed. CBD mischaracterizes the Fish & Wildlife Service’s response to comments made regarding its 2017 Final Rule to delist the Greater Yellowstone Ecosystem grizzly bear distinct population segment. The Fish & Wildlife Service’s response provided: “Overall, the GYE grizzly bear population’s

current and expected abundance and geographic distribution (occurring both inside and outside the DMA and occurring across multiple management jurisdictions) provides the GYE grizzly bear population with substantial representation, resiliency, and redundancy (see Significant Portion of its Range discussion for further details).” Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife (“2017 Final Rule”), 82 Fed. Reg. 50,502, 30,621 (June 30, 2017); AR002127.

20. The Service’s denial letter does not address the suitability of the San Juan Mountains as additional habitat for grizzly bear recovery. The 1993 Recovery Plan demonstrates that grizzly bears lived in the San Juan Mountains at the time of listing in 1975 and recognizes the San Juans as one of the areas that “either have or recently had the potential to provide adequate space and habitat to maintain the grizzly bear as a viable and self-sustaining species.”

Response: Disputed. The Fish & Wildlife Service’s June 5, 2019 letter provided: “We are also considering regulatory actions for other grizzly bear populations and expect to complete our review in the coming months.” AR000002. The Administrative Record confirms this, with a draft analysis of the suitability of the San Juan Mountains. AR000872.

21. In a June 19, 2014 email chain between Service recovery program staff – who had just learned of the Center’s Petition through media coverage – the

Service's then-Grizzly Bear Recovery Coordinator stated that the Center's Petition was "just an effort to get these people newspaper coverage." The Recovery Coordinator further explained that he intended to deny the Petition even though the agency had "not yet received [it] officially."

Response: Undisputed as to the contents of the June 19, 2014 email chain. CBD, however, fails to provide context for the quotation. The Fish & Wildlife Service's then-Grizzly Bear Recovery Coordinator was responding to the then-Assistant Regional ESA Chief's following statement: "Fear not, this is not a petitionable action." AR010931.

22. In a September 17, 2014 email chain between Service staff regarding a press release on their denial of the Center's Petition, the Service also stated that additional recovery areas requested in the Petition are "no longer capable of supporting" grizzly bears.

Response: Disputed. The quoted material cited by CBD was actually proposed as a question: "Can we also add statements that most of the areas CBD requested are no longer capable of supporting griz? I've inserted this when I thought it would make sense but if it doesn't work for you, we can take it out." AR010913.

23. In April 2018, the Service announced plans to remove protections for grizzly bears in the Northern Continental Divide Ecosystem. 83 Fed. Reg. 18,737,

18,739 (April 30, 2018). The Service stated that the population of grizzly bears in the Northern Continental Divide Ecosystem “may be eligible for delisting in the near future.” *Id.*

Response: Disputed. CBD cites the Fish & Wildlife Service’s review of the 2017 Final Rule that designated the Greater Yellowstone Ecosystem grizzly bear population as a distinct population segment eligible for delisting. AR001634–40. In this review, the Fish & Wildlife Service noted “that the population in the Northern Continental Divide Ecosystem may be eligible for delisting in the near future.” AR001636. This single statement, however, is far from a commitment to delist that population or an announcement of any such plans.

24. The Center filed this case on June 27, 2019. The Center challenges the Service’s failure to “develop and implement” a recovery plan that provides for the “conservation” of the species, in violation of sections 4(f) and 7(a)(1) of the ESA. *See Compl.* ¶¶ 42-50. The Center also challenges the Service’s denial of the Petition as arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A). *See Compl.* ¶¶ 59-68.

Response: CBD’s Undisputed Fact No. 24 is merely a restatement of claims made in its Complaint. Accordingly, it is not a “fact” related to CBD’s motion for summary judgment, and no response is necessary.

DATED this 6th day of July 2020.

Respectfully Submitted,

/s/ Cody J. Wisniewski

Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Phone: (303) 292-2021
Fax: (303) 292-1980
cody@mslegal.org

Attorney for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on July 6, 2020, I filed the forgoing document with the Clerk of the Court using this Court's CM/ECF system, which will send notification to all counsel of record pursuant to Fed. R. Civ. P. 5 and D. Mont. L.R. 1.4(c)(2).

/s/ Cody J. Wisniewski

Cody J. Wisniewski

MOUNTAIN STATES LEGAL FOUNDATION