

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of NEW) NOTICE OF ADOPTION
RULES I through XIII and the)
amendment of ARM 12.9.1401)
pertaining to grizzly bears)

TO: All Concerned Persons

1. On October 20, 2023, the Fish and Wildlife Commission (commission) published MAR Notice No. 12-614 pertaining to the public hearing on the proposed adoption of new rules and amendment of the above-stated rule on page 1204 of the 2023 Montana Administrative Register, Issue Number 20.

2. On November 17, 2023, a public hearing was held on the adoption of new rules and amendment of the above-stated rule, via Zoom. The commission received both written and oral testimony comments by November 20, 2023.

3. The commission has adopted and amended the following rule from the proposal notice with the following changes based on comments received and after further review. New matter underlined, deleted matter interlined:

NEW RULE I (ARM 12.9.1404) DEFINITIONS (1) through (4) remain the same and are adopted as proposed.

(5) "Department director" means Montana, Fish, Wildlife and Parks' director ~~or the director's designee.~~

(6) remains the same and is adopted as proposed.

(7) "Non-lethal and preventative measures" means actions to prevent or reduce conflict that are not intended to injure or kill a grizzly bear.

~~(8) "Preventative measures" means actions that are intended to prevent or reduce conflict.~~

(9) "Probable grizzly bear mortality" means a situation where there is sufficient evidence of grizzly bear blood, hair, and other grizzly bear tissues, to support a finding of death.

~~(10)~~ "Take" or "taken" means the confirmed and probable killing of a grizzly bear by firearm.

(11) "Wildlife services" means the United States Department of Agriculture – Animal and Plant Health Inspection Service.

AUTH: 87-1-201, 87-1-301, MCA

IMP: 87-5-301, 87-6-106, MCA

NEW RULE II (ARM 12.9.1405) GRIZZLY BEAR MANAGEMENT
OBJECTIVE (1) remains the same and is adopted as proposed.

AUTH: 87-1-201, 87-1-301, MCA

MAR Notice No. 12-614

IMP: 87-1-201, 87-1-301, 87-5-301, MCA

NEW RULE III (ARM 12.9.1406) THE QUOTA AND ESTABLISHING AND ADJUSTING THE QUOTA (1) For each delisted ecosystem, the commission will establish an annual quota for the number of delisted grizzly bears that may be taken by a livestock owner or other authorized person, whether permitted or not, pursuant to 87-5-301, MCA. The commission shall consider relevant factors, including information provided to the commission by the department in the grizzly bear annual report, the most recent grizzly bear population estimate, the mortality threshold for the delisted ecosystem, and previous quotas. The quota pertains to both within and outside of the DMA.

(2) through (6) remain the same and are adopted as proposed.

AUTH: 87-1-201, 87-1-301, MCA

IMP: 87-5-301, 87-6-106, MCA

NEW RULE IV (ARM 12.9.1407) THE MORTALITY THRESHOLD (1) The mortality threshold(s) is/are the maximum annual number of grizzly bear mortalities, within the DMA, that the population(s) can withstand while maintaining recovery without falling below recovery levels. These are described in the ecosystem conservation strategies.

(2) and (3) remain the same and are adopted as proposed.

AUTH: 87-1-201, 87-1-301, MCA

IMP: 87-5-301, 87-6-106, MCA

NEW RULE V (ARM 12.9.1408) GRIZZLY BEAR MORTALITIES THAT APPLY TO THE QUOTA AND THE MORTALITY THRESHOLD (1) A delisted grizzly bear taken within the DMA, pursuant to 87-5-301(3) and (4), MCA, counts towards the relevant quota and the relevant mortality threshold.

(2) The quota and the total mortalities counted towards the mortality threshold include confirmed ~~or~~ and probable grizzly bear mortalities.

(3) remains the same and is adopted as proposed.

AUTH: 87-1-201, 87-1-301, MCA

IMP: 87-5-301, 87-6-106, MCA

NEW RULE VI (ARM 12.9.1409) IF A DELISTED GRIZZLY BEAR POPULATION OVERLAPS TWO OR MORE STATES (1) remains the same and is adopted as proposed.

AUTH: 87-1-201, 87-1-301, MCA

IMP: 87-5-301, 87-6-106, MCA

NEW RULE VII (ARM 12.9.1410) ALLOWABLE LETHAL MANAGEMENT OF THE GRIZZLY BEAR (1) remains the same and is adopted as proposed.

(2) Pursuant to 87-5-301(3), MCA, a livestock owner or other authorized person may take, without a permit or license, a delisted grizzly bear that is attacking or killing livestock. Take by a livestock owner or other authorized person is limited to those areas that a livestock owner's livestock are legally authorized to be.

(3) Pursuant to 87-5-301(4) and 87-6-106(4), MCA, the department director or designee may issue a permit to a person, livestock owner, or other authorized person to take a delisted grizzly bear, under the following circumstances and conditions:

(a) and (b) remain the same and are adopted as proposed.

(c) if on public land, when the bear is threatening livestock on public land, and when the livestock owner has demonstrated an effort to utilize one or more non-lethal and preventative measures as determined by the department director or designee.

(4) through 4(e) remains the same and are adopted as proposed.

(5) If a person, livestock owner, or other authorized person, whether permitted or not, takes or injures a delisted grizzly bear, pursuant to 87-5-301(3) and (4) or 87-6-106(4), MCA, they shall:

(a) through (e) remain the same and are adopted as proposed.

(6) A person, livestock owner, or other authorized person, who purposefully injures or kills a delisted grizzly bear by any other means, besides a firearm, is subject to criminal penalties, pursuant to 87-6-201, MCA.

(7) Pursuant to 87-5-301(4)(b) and 87-6-106(4), MCA, the department has the discretion to lethally remove a delisted grizzly bear. If a delisted grizzly bear is lethally removed by department or wildlife services' staff, after conducting an on-site investigation, the grizzly bear does not count towards the quota. However, if the lethal removal occurred inside of the DMA, the delisted grizzly bear will count towards the mortality threshold.

AUTH: 87-1-201, 87-1-301, MCA

IMP: 87-5-301, 87-6-106, MCA

NEW RULE VIII (ARM 12.9.1411) ALLOWABLE NON-LETHAL MEASURES OR AND PREVENTATIVE MEASURES OF THE GRIZZLY BEAR

(1) As allowed by 87-5-301 and 87-6-106(4), MCA, control of the grizzly bear includes a variety of non-lethal ~~measures or~~ and preventative measures intended to decrease risk of, prevent, or resolve a conflict without killing the grizzly bear in question. Allowable non-lethal ~~measures or~~ and preventative measures include, but are not limited to:

(a) through (g) remain the same and are adopted as proposed.

AUTH: 87-1-201, 87-1-301, MCA

IMP: 87-5-301, 87-6-106, MCA

NEW RULE IX (ARM 12.9.1412) BAITING GRIZZLY BEARS AND NORMAL LIVESTOCK AND AGRICULTURAL OPERATIONS

(1) A person may not intentionally bait a grizzly bear. Normal livestock and agricultural operations are not considered baiting.

AUTH: 87-1-201, 87-1-301, MCA
IMP: 87-5-301, MCA

NEW RULE X (ARM 12.9.1413) REQUIREMENT TO MANAGE ANY DELISTED GRIZZLY BEAR POPULATION FOR FIVE YEARS PRIOR TO A HUNTING OR HARVEST SEASON (1) The department shall manage any delisted grizzly bear population for at least five years from the time of delisting prior to proposing any hunting season ~~or harvest~~ for grizzly bears.

AUTH: 87-1-201, 87-1-301, MCA
IMP: 87-1-201, 87-1-301, 87-5-301, MCA

NEW RULE XI (ARM 12.9.1414) GRIZZLY BEAR ANNUAL REPORT

(1) through 2(d) remain the same and are adopted as proposed.
(e) the number, types and general locations of human bear conflicts; and
(f) remains the same and is adopted as proposed.

AUTH: 87-1-201, 87-1-301, MCA
IMP: 87-1-201, 87-1-301, 87-5-301, MCA

NEW RULE XII (ARM 12.9.1415) GENETIC AND POPULATION AUGMENTATION (1) remains the same and is adopted as proposed.

AUTH: 87-1-201, 87-1-301, MCA
IMP: 87-1-201, 87-1-301, 87-5-301, MCA

NEW RULE XIII (ARM 12.9.1416) DATE OF EFFECT AND APPLICABILITY
(1) remains the same and is adopted as proposed.

AUTH: 87-1-201, 87-1-301, MCA
IMP: 87-5-301, MCA

12.9.1401 GRIZZLY BEAR POLICY (1) through (1)(f) remain the same and are adopted as proposed.

AUTH: 87-1-301, MCA
IMP: 87-1-201, 87-1-301, 87-5-301, MCA

4. The commission has thoroughly considered the comments and testimony received. A summary of the comments received, and the commission's responses are as follows:

COMMENT 1: Some reviewers provided comment on ARM 12.9.1401 outside of the amendments proposed therewithin, as it relates to sport hunting and relocation of grizzly bears.

RESPONSE 1: Public comments pertaining to ARM 12.9.1401 that do not relate or reference the proposed amendments are outside of the scope of adoption of New Rules I through XIII (ARMs 12.9.1404-1416) and the amendment of ARM 12.9.1401 pertaining to grizzly bears. While the Department welcomes public comments, those focused on verbiage or passages that remain unchanged in ARM 12.9.1401 are not applicable for this public process.

COMMENT 2: Some reviewers want improved clarity on where these rules apply and whether the United States Fish and Wildlife Service (USFWS) maintains authority for grizzly bears in ecosystems still listed under the Endangered Species Act (ESA). Some reviewers want grizzly bears to remain listed and protected by the ESA due to associated concerns regarding suitable habitat, migration corridors, and land use practices. Some reviewers support the delisting of grizzly bears.

RESPONSE 2: New Rule XIII (ARM 12.9.1416) explains that New Rules I through XII only apply to grizzly bears that have been delisted by the USFWS. The USFWS asked that the New Rules state that these ARMs pertain to “delisted” grizzly bears. The commission agrees with the USFWS and “delisted” has been added throughout the New Rules. Grizzly bears are organized by the USFWS into recovery zones and ecosystems. Delisting individual ecosystems is expected to occur through designation of distinct population segments (DPS) that contain the specific ecosystem. Delisted ecosystems encompass the DMA(s) and Recovery Zone(s). Protections of grizzly bears are maintained, evaluated, and determined by the USFWS, and thus parameters and criteria surrounding the delisting/relisting process are outside of the scope of these ARMs. Where grizzly bears remain listed, the USFWS and 50 C.F.R. § 17.40 (the “4d rule”) authorize lethal control.

COMMENT 3: Some reviewers don’t understand why these New Rules and ARMs are preceding delisting of a distinct population segment.

RESPONSE 3: These ARMs provide a regulatory framework for Montana’s management of grizzly bears, which is part of the criteria evaluated by the USFWS for delisting. Additionally, Senate Bill 295 (2023 Montana Legislature), required the commission to complete rule making prior to delisting.

COMMENT 4: Some reviewers support or oppose Senate Bill 295.

RESPONSE 4: Legislative processes are the mechanism for the adoption, amendment, or repeal of statutes, and administrative rules result from public rule-making processes intended to more precisely implement statutes. Public comment on legislative bills and/or statutes are outside of the scope of these ARMs. If a member of the public would like to comment on the adoption, amendment, or repeal of a statute, they would do so during the legislative session. As a result, these comments are outside of the scope pertaining to these ARMs.

COMMENT 5: Some reviewers want to see a commitment by the Department to abide by grizzly bear Conservation Strategies.

RESPONSE 5: The Department recognizes the value and importance of conservation strategies in grizzly bear recovery and management post-delisting. However, multiple partners are involved in conservation strategies. Given this, the Department will make efforts to update and apply the most recent conservation strategy model, or its functional replacement, to help guide successful state management of recovered grizzly bears.

COMMENT 6: Some reviewers believe the definition of “take” in New Rule I (ARM 12.9.1404(8)) will be confused with the definition used under ESA.

RESPONSE 6: Because New Rule XIII (ARM 12.9.1416) explains that New Rules I through XII only apply to grizzly bears that have been delisted by the United States Fish and Wildlife Service, the definition of “take” or “taken” in New Rule I (ARM 12.9.1404(8)) does not include the other forms of take (e.g., disturb, harass) as defined under the Endangered Species Act.

COMMENT 7: Some reviewers suggested New Rule II (ARM 12.9.1405) further define connectivity to be both genetic and demographic.

RESPONSE 7: As stated in New Rule II (ARM 12.9.1405), the department's grizzly bear management objective is to maintain and enhance Montana's contribution to the grizzly bear population in the lower-48 states and the connectivity between grizzly bears in and outside Montana. This includes both natural genetic and demographic connectivity, as well as augmentation as described in New Rule XII (ARM 12.9.1415).

COMMENT 8: Some reviewers want to see improved clarity differentiating quotas and mortality thresholds, identifying ambiguity regarding where, geographically, quotas and mortality thresholds will apply.

RESPONSE 8: Quotas refer to the number of delisted grizzly bears that are attacking or killing livestock that may be taken by a livestock owner or other authorized person, whether permitted or not, pursuant to § 87-5-301, MCA, both within and outside of the DMA. The mortality threshold(s) is/are the maximum annual number of grizzly bear mortalities, within the DMA, that the population(s) can withstand to maintain recovery. This includes all causes of mortality, such as grizzly bears taken from quotas, by the Department, Wildlife Services, or individual persons in self-defense, vehicle collisions or incidental take, and an estimation of those unreported/undocumented. To ensure clarity, the commission added “[t]he quota pertains to both within and outside of the DMA,” to New Rule III (ARM 12.9.1406(1)).

COMMENT 9: Some reviewers want to see improved clarity on the timeframe for which quotas will function.

RESPONSE 9: The commission does not agree that a timeframe, indicating when the quota will apply, is necessary. New Rule III (ARM 12.9.1406(1)) states that an

“annual” quota will be established. Simply stated, the quota is intended to encompass the active bear season and would not run past one year in length. This approach ensures adequate time to summarize relevant data across jurisdictions.

COMMENT 10: Some reviewers suggested specific and objective biological criteria as it relates to quotas be explicitly outlined in New Rule III (ARM 12.9.1406).

RESPONSE 10: In New Rule III (ARM 12.9.1406), there are no listed specific biological criteria as it relates to the mentioned quota. The Department will present a formal quota recommendation, based on data and trends, and solicits public comment on such quota proposals. Following public comment, a final recommendation is forwarded to the commission for consideration. Through annual commission oversight and public input, and at its discretion, the commission may use the Department’s proposed quota recommendations. Quotas may depend on regional densities, distributions, trends, and sociopolitical environment. A similar process would occur if/when a hunting season of grizzly bears is established in a delisted ecosystem. As a result, specific and objective quotas are unnecessary in New Rules and ARMs and may be overly rigid for a process designed to be flexible. Nevertheless, the Department is committed to ensuring mortality thresholds for each DMA are not exceeded.

COMMENT 11: Some reviewers believe it is unclear what criteria the commission may use to establish or adjust a quota.

RESPONSE 11: The commission shall consider relevant factors, including information provided to the commission by the Department in the grizzly bear annual report, the most recent grizzly bear population estimate, the mortality threshold for the delisted ecosystem, and previous quotas when determining an established quota, as per New Rule III (ARM 12.9.1406(1)). The commission shall also consider the aforementioned factors when adjusting the quota (New Rule III ARM 12.9.1406(6)) to ensure that recovery is maintained.

COMMENT 12: Some reviewers believe a longer grace period should be established between the Department’s notice of a quota being reached and when someone becomes subjected to potential criminal penalties, as per New Rule III (ARM 12.9.1406(5)). Some reviewers want the Department to directly contact any person(s) to whom a permit has been issued to inform them personally when a quota is met, and that a permit-holder who has not been notified is exempt from criminal liability.

RESPONSE 12: When a quota is reached, the department will make a public announcement, via its webpage and social media page as per New Rule III (ARM 12.9.1406(4)). Public notice of a quota being reached will be done during business hours. It is reasonable for an individual to see that notice prior to the end of that day. It is the responsibility of the permit-holder to stay informed as to the status of quotas.

COMMENT 13: Some reviewers want removal of New Rule III (ARM 12.9.1406(2)) and believe all mortalities should count toward the quota regardless of where they occur.

RESPONSE 13: Quotas refer to the number of delisted grizzly bears attacking or killing livestock that may be taken by a livestock owner or other authorized person, whether permitted or not, pursuant to § 87-5-301, MCA, both within and outside of the DMA. These grizzly bears also apply to the mortality threshold if the take occurs within the DMA. Grizzly bears taken by the Department, Wildlife Services, or an individual person in self-defense do not count towards the quota but do count towards the mortality threshold if within the DMA. Senate Bill 295 speaks entirely to persons, livestock owners, and other authorized persons' ability to take a delisted grizzly bear. The ability for a person to take a grizzly bear in self-defense, or for Wildlife Services and/or the Department to take a grizzly bear has been in place and will continue to remain in place, exclusive of the quota. Thus, these subtle differences differentiate the cause of take of grizzly bears and where they apply.

COMMENT 14: Some reviewers believe it is unclear what criteria will be used to determine the mortality threshold and seek clarification on how population estimates relate to the DMA and associated mortality threshold. Some reviewers believe mortality rates are too high and the gene pool too small.

RESPONSE 14: Conservation strategies containing demographic criteria and mortality thresholds have been developed using the best available science for recovered ecosystems as a condition of delisting. Annual mortality limits consider the most recent grizzly bear population estimate, population trends, previous reported and unknown mortalities for the delisted ecosystem, among other environmental factors, when determining the mortality threshold. Mortality rates, causes and related data (i.e., genetic connectivity) are intensively monitored.

COMMENT 15: Some reviewers seek clarification that the calculated estimate of unknown/unreported mortalities count towards mortality thresholds.

RESPONSE 15: The established mortality threshold is the maximum annual number of grizzly bear mortalities, within the DMA, that the population can withstand to maintain recovery. This includes all types and causes of mortalities as described in New Rule IV (ARM 12.9.1407(2)), including a calculation of unknown/unreported grizzly bear mortalities.

COMMENT 16: Some reviewers believe quotas should be less than mortality thresholds and/or there should be a "cushion" between the two values.

RESPONSE 16: Because quotas pertain to areas both within and outside of the DMA, they could be greater than the mortality threshold(s). If the number of grizzly bear mortalities is approaching the mortality threshold for a DMA, a quota may be restricted to areas outside of the DMA. As per New Rule III (ARM 12.9.1406(6)), if the commission determines that circumstances require an adjustment to the total

number of delisted grizzly bears taken, pursuant to § 87-5-301(3), MCA, then it may adjust the quota at any time prior to the quota being met. Quotas and mortality thresholds ensure that mortality rates (from any cause) do not threaten the recovery of grizzly bears.

COMMENT 17: Some reviewers are confused on what qualifies as “recovery levels” and seek clarification on the maximum number of annual mortalities a population can withstand without falling below recovery levels in a DMA.

RESPONSE 17: Federal recovery levels are determined by the USFWS and are outlined in the federal recovery plan and ecosystem Conservation Strategies. Recovery criteria were initially contained in the federal recovery plan and have been modified based on new, available science that are described in the ecosystem Conservation Strategies. The maximum number of annual mortalities the population can withstand to maintain recovery in a DMA is not defined to ensure population sustainability. These values are dependent on several factors, will fluctuate based on those factors, and correspond to the respective delisted ecosystem. New Rule IV (ARM 12.9.1407(1)) has been modified to emphasize FWP’s commitment to maintaining grizzly bear populations above recovery levels as determined by the USFWS.

COMMENT 18: Some reviewers support the inclusion of “probable” mortalities in the definition of “take.”

RESPONSE 18: The commission agrees that this change is needed. Adding “probable” to the definition of “take” or “taken” will safeguard against overtake of grizzly bears and assist in maintaining recovery levels of delisted grizzly bears. Given that “probable” was included, the commission agrees that “confirmed” is also necessary.

COMMENT 19: Some reviewers support lethal control of grizzly bears in the act of attacking or killing livestock. Some reviewers oppose lethal control of grizzly bears without a permit. Some reviewers oppose the lethal take of grizzly bears by any private person(s). Some reviewers oppose the lethal control of grizzly bears on public lands. Some reviewers oppose the lethal control of threatening grizzly bears. Some reviewers want documentation related to livestock depredation by a grizzly bear prior to lethal control. Some reviewers want documentation and record-keeping of threatening grizzly bear incidences. Some reviewers believe that because private and public land are interspersed, having consistent rules across landownership types is important. Some reviewers expressed concern that take of grizzly bears on public land by private person(s) may create public safety issues and, therefore shouldn’t be allowed and/or should only be conducted by bear management specialists.

RESPONSE 19: New Rules VII (ARM 12.9.1410) reflect state mandates. If a grizzly bear is attacking or killing livestock, a livestock producer or other authorized person may take a grizzly bear without a permit as a means of protection of property, as per

§ 87-5-301(3), MCA. Take by a livestock owner or other authorized person is limited to those areas that a livestock owner's livestock are legally authorized to be. This includes private and public lands. Additionally, there is no requirement that the livestock owner or other authorized person provide documentation related to the depredation incident, nor that the Department draft or retain documentation related to that depredation incident. Livestock depredations by grizzly bears are typically documented and confirmed by Wildlife Services. State law requires this confirmation before a livestock owner may be compensated for the loss. Take of threatening grizzly bears on private and public lands, with a permit, may also occur in the future, as per § 87-5-301(4) and 87-6-106(4), MCA. Conditions of such action are described in New Rule VII (ARM 12.9.1410(3)). The Department understands that there are scenarios in which lethal grizzly bear-livestock conflict mitigation must take place, even if on public lands. Bear management specialists or other Department personnel may assist if requested and may be involved in any aftermath if the attempted take was not successful. Especially if human safety is a concern.

COMMENT 20: Some reviewers identified a lack of clarity in New Rule VII (ARM 12.9.1410(3)(a)-(c)), and whether all of the criteria had to be met or any of the three prior to the Department's issuance of a permit. Some reviewers want improved clarity regarding where take permits apply (i.e., private and/or public lands).

RESPONSE 20: FWP has edited New Rule VII (ARM 12.9.1410(3)(a)-(c)) to increase clarity concerning the criteria needed and where the permits apply.

COMMENT 21: Some reviewers raised concerns regarding the potential for lag time between incidents and the response, specifically noting New Rule VII (ARM 12.9.1410(3)(c)). Some reviewers believe bear management specialists should be involved in any decision-making at the Director or designee level.

RESPONSE 21: Bear management specialists play a vital role in grizzly bear management. While they may make recommendations based on their regional and local expertise, some decisions may be exclusively made at the Director's Office level. The Director's designee may include, bear management specialists and technicians, area biologists, wildlife managers, and game wardens, among other designated personnel. The commission is aware of the Department's history with grizzly bear conflicts and its prompt response time regarding those incidents. Given the Department's success and current advances in technology, the commission does not anticipate lag time to be an issue. Moreover, in reviewing comments concerning "lag time," the commission recognized a clerical oversight concerning the definition of "Department director." Senate Bill 295 identifies that the complaint must be made to the "department director." Accordingly, New Rule I (ARM 12.9.1404(5)) now excludes any reference to "or the director's designee."

COMMENT 22: Some reviewers stated that "attacking," and "threat" or "threatening," weren't clearly defined, and are thus ambiguous. Some reviewers stated that "non-

livestock related property losses,” “consistent presence,” and “proximity” weren’t clearly defined, and are thus ambiguous.

RESPONSE 22: The terms “attacking,” “threat,” “threatening,” “non-livestock related property losses,” “consistent presence,” and “proximity” are to be given their plain and normal meaning, and require no regulatory definition. By excluding a definition for the aforementioned terms, the Department is afforded maximum flexibility to respond/address the scenario.

COMMENT 23: Some reviewers believe grizzly bears that are “taken” should be reported immediately or in a shorter timeframe versus within a 24-hour period, as per New Rule VII (ARM 12.9.1410(5)).

RESPONSE 23: A 24-hour period to report a “taken” grizzly bear is reasonable, practical, and timely. The Department understands that some of these occurrences may happen in remote, rural, and/or backcountry areas, and immediate reporting may not be possible.

COMMENT 24: Some reviewers expressed concern that there was a lack of clarification as to what qualifies as a “non-lethal and preventative measure,” no emphasis on adequacy and appropriateness of that strategy, and that the determination is up to the sole discretion of the Department to determine if efforts made were sufficient to justify a take. Some reviewers want “demonstrating an effort” to be defined as, for example, employing at least one non-lethal and preventative measure and requiring implementation of that strategy or strategies for some set period of time prior to allocating a permit in New Rule VII (ARM 12.9.1410(3)(c)). Some reviewers want record-keeping and documentation by professionals of non-lethal and preventative measures demonstrated by the livestock owner and/or producer prior to permit allocation. Some reviewers believe the requirement of utilization of non-lethal and preventative measures should extend to private lands. Some reviewers want recognition that sometimes there are no non-lethal and preventative measures that are adequate or appropriate, and anticipation of grizzly bear presence and associated implementation of non-lethal and preventative measures may not be possible due to their rapid expansion. Some reviewers do not want to see a list of non-lethal and preventative measures in New Rule VIII (ARM 12.9.1411). Some reviewers want to see a process for livestock owners to object to the Department’s determinations regarding the demonstration of an effort to utilize non-lethal and preventative measures and if the public should interfere with such efforts (i.e., a safeguard for liability).

RESPONSE 24: Some non-lethal and preventative measures to mitigate grizzly bear-livestock conflict are listed in New Rule VIII (ARM 12.9.1411). This list is not exclusive and allows for flexibility, technological advances, or consideration of new or other tools. Sometimes non-lethal and preventative measures have already been implemented, or non-lethal and preventative measures are not adequate or appropriate. Due to the expansion and growth of the grizzly bear population, grizzly bears can unknowingly exist in an area, and non-lethal and preventative measures

are not a consideration at that time. Further, the Department cannot enforce what a private landowner decides to implement on their own property, and some non-lethal and preventative measures cannot be implemented on public land without proper permitting or compliance with the Montana Environmental Policy Act. As a result, more stringent guidelines or requirements are inappropriate. As noted previously, non-lethal and preventative measures may be documented and verified by the Director's designee prior to the allocation of a permit. Lastly, the commission recognized a clerical error concerning the definitions of "non-lethal measures" and "preventative measures." Senate Bill 295 couples the two together. Accordingly, any reference to "non-lethal measures" has now been edited to read "non-lethal and preventative measures," and includes the definition of "preventative measures." Lastly, the commission does not agree that an objection or appeals process is necessary. The livestock owner or their authorized person can take a delisted grizzly bear if the grizzly bear is attacking or killing livestock.

COMMENT 25: Some reviewers want to see scare devices and other nearby attractants added to New Rule VIII (ARM 12.9.1411), and that (1)(f) should be moved to (1)(a).

RESPONSE 25: Examples of New Rule VIII (ARM 12.9.1411(1)(a)) "carcass removal" assumes attractant removal. Adding a reference to removing "other nearby attractants" is vague and may be impracticable. Moreover, paragraph 1(c) states "hazing in a non-injurious manner," which may involve scare devices such as flashing lights and/or alarms. Lastly, the organization of paragraph (1)(a)-(f) is not in a hierarchical order, and the structure of components in paragraph (1) does not reflect their relative importance or support as perceived by the Department.

COMMENT 26: Some reviewers believe the term "baiting" is unclear. Some reviewers want to see agricultural operations included in New Rule IX (ARM 12.9.1412).

RESPONSE 26: Baiting is described in New Rule IX (ARM 12.9.1412). Baiting is different than the presence of attractants and is considered intentional. The commission agrees that New Rule IX (ARM 12.9.1412) should include reference to agricultural operations, and it is now included in this ARM.

COMMENT 27: Some reviewers support a delay in proposing a hunting season of grizzly bears, and/or, upon delisting, establishment of a hunting season in general. Some reviewers oppose a 5-year delay in proposing a hunting season of grizzly bears. Some reviewers oppose the establishment of a hunting season of grizzly bears.

RESPONSE 27: Grizzly bears are statutorily classified as a game animal (§ 87-2-101, MCA). As a result, upon delisting, FWP could recommend a hunting season for grizzly bears. However, per New Rule X (ARM 12.9.1413), the Department is committed to prohibiting any hunting season for grizzly bears for at least five years from the time of delisting. If after five years post-delisting, the Department

determines a grizzly bear hunting season is warranted, the Department must submit its recommendation to the commission for its consideration. Following public comment, the commission may approve a hunting season for grizzly bears.

COMMENT 28: Some reviewers want first-year cubs to be included in the population estimate in New Rule XI (ARM 12.9.1414(2)(a)).

RESPONSE 28: The population estimate included in the Grizzly Bear Annual Report, New Rule XI (ARM 12.9.1414(2)(a)), does not include cubs under one year of age due to their low survivability rates. That said, cubs over one year of age are included in the population estimate, and, by virtue, included in the Grizzly Bear Annual Report. Population estimates will be calculated using the best available science as appropriate, and consistent with Conservation Strategies.

COMMENT 29: Some reviewers want information regarding climate change and habitat loss included in New Rule XI (ARM 12.9.1414(2)(d)).

RESPONSE 29: As per New Rule XI (ARM 12.9.1414(2)(d)), “potential for future population level impacts” may include critical descriptions and details (from analysis, literature review, etc.) on population level impacts. This may include information about climate and habitat variability among other factors, like genetic and demographic connectivity as described in New Rule XI (ARM 12.9.1414(2)(c)).

COMMENT 30: Some reviewers believe the outcome of conflicts, non-lethal and preventative measures used, and attractants in the area should also be listed in New Rule XI (ARM 12.9.1414(2)(e)).

RESPONSE 30: As per New Rule XI (ARM 12.9.1414(2)(e)), information on the outcome of conflicts (i.e., management actions), non-lethal and preventative measures used (if any), and attractants in the area (if any) may be included and described in Grizzly Bear Annual Report. If included, location information will be general, as edited in New Rule XI (ARM 12.9.1414(2)(e)), for the protection of the livestock or agricultural producer. This information may be recorded in forms/files and tabulated in a database for internal FWP use.

COMMENT 31: Some reviewers believe we should trap and transplant problem grizzly bears to new areas to restore populations, or that translocated grizzly bears be radio-collared, and that spatiotemporal data be relayed to Wildlife Services and livestock and agricultural producers if it results in conflict. Some reviewers oppose New Rule XII (ARM 12.9.1415) and believe it should be removed, or if retained, should be outlined as a tool and not a duty.

RESPONSE 31: The Department will continue to translocate grizzly bears to augment genetic and demographic connectivity after delisting. The Department encourages and will continue to promote, the natural movement of individuals between populations, as genetic and demographic connectivity continues to be an outlined objective. The Department may radio-collar grizzly bears that are

translocated/relocated. Spatiotemporal data may be shared with Wildlife Services and/or agricultural/livestock producers when appropriate. Translocation/relocation sites are approved by the commission.

COMMENT 32: Some reviewers recognize that lethal management of grizzly bears is a tool that is required to ensure human safety and address harmful conflicts. Some reviewers want clarification on how grizzly bears taken in self-defense (§ 87-6-106, MCA) will be counted.

RESPONSE 32: Pursuant to § 87-6-106, MCA, a grizzly bear can be taken without a permit only if attacking or killing a person. In that instance, the grizzly bear will not count towards the quota; however, if the take occurs inside of the DMA, the delisted grizzly bear will count towards the mortality threshold. If delisted, a grizzly bear that is threatening livestock or poses a threat to humans may only be taken with a permit, as per New Rule VII (ARM 12.9.1410). If a grizzly bear that is threatening livestock or poses a threat to humans is “taken,” that grizzly bear counts towards the quota, and towards the mortality threshold if taken within the DMA.

COMMENT 33: Some reviewers want the state to continue to play a significant role as a partner in conflict prevention efforts, want to see an enhancement in educational information and outreach, or want the Department to continue to allocate resources and support grant programs to make these prevention tools more accessible to private landowners, farmers, and ranchers.

RESPONSE 33: The Department plays, and will continue to play, a prominent role as a partner in conflict prevention efforts. Similarly, the Department works to provide and enhance educational information and outreach opportunities geared toward the public. Such examples include bear-aware-focused materials and events. Bear management specialists regularly work with livestock producers and non-governmental organizations (NGOs) to implement preventative measures. Other organizations, such as the Montana Livestock Loss Board, provide pamphlets that describe non-lethal and preventative measures and have grants available to assist in funding such efforts (<https://liv.mt.gov/Attached-Agency-Boards/Livestock-Loss-Board/index>). Ongoing and future efforts (e.g., Delivering Carnivore Conflict Prevention Workshop) with NGOs regarding partnerships or projects will continue into the future.

COMMENT 34: Some reviewers believe a legal requirement to carry and utilize bear spray prior to firearms should be established in these ARMs.

RESPONSE 34: Bear spray is generally considered highly effective in deterring a grizzly bear attack (Herrero and Higgins 1998, Smith et al. 2008). Although windy or extremely cold conditions can compromise the effectiveness of bear spray, Smith et al. (2021) concluded that it would still have utility under most adverse conditions. The Department encourages those recreating to carry bear spray. However, some situations (e.g., proximity, grizzly bear behavior, timeframe of interaction) may not allow for the use of bear spray. In an effort to prioritize human safety, the

commission declines to establish rules on tools available for use when there is an interaction involving a grizzly bear. As per § 87-6-106, MCA, a person can lawfully take a grizzly bear that is attacking or killing a person, with or without a permit. If the outcome of such interaction results in a grizzly bear mortality, it will be investigated by the Department. Grizzly bears taken under these circumstances do not count toward the quota but will count towards the mortality threshold if within the DMA.

COMMENT 35: Some reviewers expressed concern and/or confusion on how these ARMs impact or influence the responsibilities and authority of Wildlife Services.

RESPONSE 35: These ARMs do not discredit or supersede the Memorandum of Understanding with Wildlife Services and their role in the investigations and responses of depredation events. As such, depredations of livestock on private and public lands found by the livestock producer will continue to be investigated and addressed through Wildlife Services. Grizzly bears taken under these circumstances do not count toward the quota but will count towards the mortality threshold if within the DMA (New Rule VII ARM 12.9.1410(7)). These ARMs are meant as additional tools to mitigate the complexity surrounding livestock and human conflict involving grizzly bears.

COMMENT 36: The USFWS suggested that New Rule IV (ARM 12.9.1407(1)) be revised to state that the “population(s) can withstand below recovered levels as outlined in the most recent version of the Conservation Strategy.”

RESPONSE 36: The commission modified the language of New Rule IV (ARM 12.9.1407(1)) so that it now states “...that the population can withstand while maintaining recovery levels. These are described in the ecosystem conservation strategies.”

COMMENT 37: The USFWS suggested that New Rule V (ARM 12.9.1408(2)) state “and” rather than “or” when referring to confirmed/probably grizzly bear mortalities.

RESPONSE 37: The commission agrees that this change is necessary. This was a clerical oversight, and New Rule V now correctly states “and.”

5. The commission has determined the following edits were required for clarification purposes:

New Rule V (ARM 12.9.1408(1)) excluded the term “relevant” before “quota,” but included the term “relevant” before “mortality threshold.” To remain synonymous throughout the ARM, the commission inserted “relevant” and the sentence now reads “the relevant quota and the relevant mortality threshold.”

New Rule VII (ARM 12.9.1410(3)) excluded “or designee.” Senate Bill 295 states that the “director or director’s designee may...issue a permit.” To remain consistent with Senate Bill 295, the commission amended the sentence to read, “the department director or designee may issue a permit to a person.”

New Rule X (ARM 12.9.1413) included reference to a “harvest” season. The commission does not intend to implement a “harvest” season, and, as a result any reference to a “harvest season” is now excluded. Moreover, New Rule X excluded terms that helped identify the Department’s commitment to manage any delisted grizzly bear population for five years prior to a hunting season. The commission added “at least” and “from the time of delisting” to ARM 12.9.1413(1) to clarify a commitment and to indicate the hiatus begins upon delisting.

/s/ Alexander Scolavino
Alexander Scolavino
Rule Reviewer

/s/ Lesley Robinson
Lesley Robinson
Chair
Fish and Wildlife Commission

Certified to the Secretary of State January 2, 2024.